

AUTHORS AND INVENTORS: THE RITUAL ECONOMY OF EARLY AMERICAN
COPYRIGHT LAW

by

JASON LEE GUTHRIE

(Under the Direction of Janice Hume)

ABSTRACT

Authors, musicians, photographers, and other content creators currently have unprecedented levels of access to production and distribution networks. The disruptive rise of digitization and the internet have undermined monopolies previously enjoyed by creative industries. Yet, the intricacies of copyright law remain an enigma to the typical content creator. Throughout the three-hundred-year history of statutory copyright contentious debates over its justification and scope have yet to be resolved. A focus on suggestions for policy reform in previous literature has further obscured copyright's most intractable philosophical problems. Rather than suggesting a set of reforms, this dissertation argues that a fundamental problem in copyright law is an incomplete theorization of creativity and creative labor.

Previous frameworks used to theorize copyright have encountered difficulties in legitimating individual creativity while contextualizing its relationship with the socio-cultural and political economic aspects of creative labor. Adapted from economic anthropology, the theory of ritual economy provides an alternative framework capable of legitimating individual contribution through a twin emphasis on worldview and process.

Ritual economy opens new vistas of historical exploration that suggest a return to the primary evidence left by content creators of how they interpreted and used copyright in practice.

This dissertation will focus on three early American content creators: Benjamin Franklin, Stephen Foster, and Mathew Brady. It conceptualizes ritual economy as a framework that can both challenge theoretical inconsistencies in the dominant historical discourse and utilize historical scholarship to inform further theoretical understanding. Fundamentally, this research seeks to address a problem of access and a problem of understanding. Access to a history of copyright from the content creator's perspective may help to challenge a discourse that inherently marginalizes creative labor.

Understanding how creativity materializes in a capitalist, market-driven system may help content creators better manage ownership of their work. Theoretical understanding of the creative process and the creative worldview is still incomplete, and historical work has the potential to inform a more complete understanding. As the intersection of the law, political economy, and creativity, the history of copyright is an ideal place for that work to begin.

INDEX WORDS: Copyright Law, Creativity, Journalism, Mass Communication,
Photography, Popular Music, Ritual Economy

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DEDICATION

This dissertation is dedicated to my wife, my mom, and my son. Kate, we did this together. We have earned the right to forever laugh about how crazy we were to get PhDs at the same time, and there is no one I'd rather laugh with forever than you. Also, we've earned a very, very long vacation. Sheila, I would not be here without a lifetime of your belief, support, and guidance (not to mention homework help!). Society and circumstance never allowed you this kind of opportunity, but you persevered to make sure it was available for me. Consider this as much the product of your labor as mine. Gabriel, you are too young right now to understand all the sacrifices that this document represents, but some day you will. I hope that understanding will inspire you to love your own family with everything you have. That is most certainly how I love you...

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CHAPTER 1

INTRODUCTION

Authors, musicians, photographers, and other content creators currently have unprecedented levels of access to production and distribution networks. The disruptive rise of digitization and the internet have undermined monopolies previously enjoyed by creative industries. More than ever before, content creators can produce and distribute their work independently if they choose. Yet, the intricacies of copyright law remain an enigma to the typical content creator, and no wonder. In the three-hundred-year history of statutory copyright contentious debates over its justification and scope have yet to be resolved. Striking a balance between the disparate interests of content creators, publishers, and the public domain has proved persistently difficult. A focus on suggestions for policy reform in previous literature has further obscured copyright's most intractable philosophical problems. Rather than suggesting a set of reforms, this dissertation argues that a fundamental problem in copyright law is an incomplete theorization of creativity and creative labor.

The purpose of this chapter is to stake out a theoretical framework for a history of copyright from the content creators' perspective. To do that, it is necessary to articulate the relationship between copyright and creativity. It is also necessary to review some historical perspectives on the individual's relationship with culture and society. This chapter will propose the theory of ritual economy as an alternative perspective able to build upon the strengths of previous work while addressing some important critiques. The

research questions that guide this dissertation will be presented and its methodology will be discussed. This chapter will conclude with an outline of subsequent chapters.

Copyright and Creativity

The history of copyright is necessarily a legal history. In the Anglo-American tradition, copyright's philosophical justification resides solely in the statutory construct.¹ Thus, there can be no legal protection apart from the legislation that creates it and the case law that reifies it. The practice of law requires a history structured by the dates of legislation and court rulings, and attentive to the minutia of their language and application. Histories of copyright structured in this way abound, and some have transcended mere utility by fusing legal chronology with a well-designed, contextual narrative.²

Yet, the history of copyright is necessarily a history of creativity. Though copyright technically protects any original work that is fixed in a tangible medium, copyright protection is most needed for expressions of individual or collective creativity that are vulnerable to infringement and have significant economic value.³ In the case of creative works, perhaps more than in any other economic sector, the assignment of value is a symbolic process that is socially negotiated and constructed. This aspect of copyright history has not been sufficiently explored, especially in light of recent disruptions by mass communication technologies. These disruptions undermine the very printing and distribution monopolies that first gave rise to statutory copyright in the early eighteenth century.

The Statute of Anne, ratified into English law in 1710, is considered a seminal early copyright statute.⁴ It began with a statement of the central issue that it was enacted to address:

Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing... without the consent of the authors or proprietors... to their very great detriment, and too often to the ruin of them and their families...⁵

In the context of the time, this “taking of liberties” represented a cultural shift away from the practice of honoring author’s rights as a moral obligation. The innovation of the printing press, the rise of a literate public, and the economic opportunities in providing that public with written content turned a matter of morality into a matter of money.⁶ The primary beneficiaries of this turn were not necessarily authors themselves, but those with sufficient wealth and infrastructure to capitalize upon the production and dissemination of creative works. For authors and their designated rights holders, infringement had become detrimental enough that the British Parliament enacted legislation ostensibly on their behalf.

Parliament’s eventual American counterparts followed suit at the Constitutional Convention in 1789, authoring The Copyright and Patent Clause that authorized Congress “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷ The first American Copyright Act went into effect the following year, and since that time copyright legislation has habitually struggled to keep up with changes in technology.⁸ Congress added protection for printed images and engravings in 1802, sheet music in 1831, and photography in 1865, but these amendments were all conceived in reaction to,

rather than in anticipation of, technological innovation.⁹ The inherently reactionary nature of copyright's legal history suggests that there is more to the story than just Congressional legislation and case law.

Historical Perspectives

To understand copyright history from the content creators' perspective requires a theoretical framework that conceptualizes worldview as both individually and socially constructed, and that considers how worldview enters into a reflexive relationship with political economy. Michael Bentley detailed the progression that historical study underwent through The Enlightenment, The Counter Enlightenment, Romanticism, and into Social Scientific influences.¹⁰ James Startt and Wm. David Sloan's focus on histories of mass communication characterized a similar epochal progression through Nationalism, Romanticism, the Developmental school, the Progressive school, and into modern perspectives such as critical cultural, gender, and race studies.¹¹ These schools of thought have all held sway at various times to varying degrees over interpretation and methodology. Brief comment on how the schools of classical liberalism, functionalism, and Marxism have conceived of the individual is helpful here because it contextualizes why theorization of individual worldview has often been fraught with difficulties.

Classical liberalism, a theoretical framework closely associated with the work of John Locke, was intentionally constructed as a defense of the individual against feudal society. John Durham Peters noted, "Locke arguably invents the concept of communication as the sharing of thoughts by individuals," an influential contribution to both the study of communication and the perception of individual effort.¹² However, by delineating society and the individual as dichotomous and antagonistic, classical

liberalism choose to legitimate the individual at the expense of society. This explains, for example, the logic of Adam Smith's "invisible hand" in which each individual's self-interested pursuit culminated in an economy of maximum efficiency.¹³ Still, there are empirically observable phenomena that the logic of classical liberalism cannot explain, as Peters further noted "a key part of Locke's legacy is the sacrifice of theoretical coherence about the creation of public worlds on the altar of individual freedom."¹⁴

The overemphasis on the individual in classical liberalism led to oversimplified historical narratives "where heroes and heroines flourish and have meaning which historians must identify and exhibit."¹⁵ The "accentuation of the role of great men in history" through laudatory biographies did little to spotlight supporting casts or to contextualize the backdrops against which history was set.¹⁶ The great irony of this view of history was that an emphasis on the importance of the individual ultimately led to only a select few individuals achieving importance, while the rest of humanity was marginalized.

Throughout the long nineteenth century, the pendulum swung from an emphasis on individual contribution toward identifying patterns and generalizations across the spectrum of human behavior. Thus, by the mid-twentieth century Harold Lasswell's model of communication as "Who, Says What, In What Channel, To Whom, With What Effect?" was "less interested in dividing up the act of communication than in viewing the act in relation to the entire social process."¹⁷ Lasswell's biological description of the communicator as a "single-celled organism" was indicative of ways that social science theorized a reduced role for the individual, and his assertion that "any process can be examined in two frames of reference, namely, structure and function" was a direct nod to

the influence of structuralism and functionalism as theoretical concepts across a variety of academic inquiry.¹⁸

James Carey located a break from humanist-informed sociological approaches in mass communication research when Elihu Katz took over the graduate program at The University of Chicago in the early 1960s.¹⁹ Katz was the lead author of an influential 1973 article entitled “Uses and Gratifications Research” that emphasized “a revival of direct empirical investigations.”²⁰ In same era, agenda setting theory “rapidly expanded beyond its original theoretical domain, the interface of the mass media agenda and the public agenda,” and inspired a substantial amount of quantitative work in the field.²¹ This literature informed understandings of the socially constructed dimensions of worldview by exploring the relationships between media, culture, and society, but it left little room for individual contribution.

Karl Marx’s writings have been influential across the social sciences and humanities, so it is unsurprising that they have influenced readings of copyright history as well.²² The relationship between Marxism and the creative industries has been subject to a wide variety of interpretations. Marx’s own writings were more concerned with the critique of political economy than with culture, which may help to explain the diversity in interpretations of his base/superstructure model. An orthodox interpretation of this model theorized an economic base, constituted by the division of labor and the relations of production in a society, as determinant of superstructural phenomena such as literature, music, and art.²³ Janice Peck charged that, at its worst, this kind of reflection theory in interpretations of the base/superstructure model “conserved economism—the very thing it sought to abolish once and for all.”²⁴

Peck's charge echoed Raymond Williams's call for a new line of theoretical work that reimagined the base/superstructure model, the nature of determinacy, and the division between culture and "not-culture." Williams argued that as long as cultural theory was based upon a model in which preexisting economic conditions were considered to any degree determinant of culture the resulting theoretical formulations would possess little value.²⁵ Determinacy did exist for Williams, for without it no useful analysis would be possible, but he argued that cultural studies must move beyond the base/superstructure model into the more useful concepts of hegemony and totality to find it.²⁶ The "legitimacy of the individual" in Marxist thought has long been the topic of conceptual debate.²⁷ Legitimizing individual worldview while retaining the role that political economy plays in the choices that individuals can make and the ways they interpret meaning is vital to understanding how copyright law has materialized in practice.

Ritual Economy

Previous frameworks used to theorize copyright have encountered difficulties in legitimating individual creativity while contextualizing its relationship with the socio-cultural and political economic aspects of creative labor. Adapted from economic anthropology, the theory of ritual economy provides an alternative framework capable of legitimating individual contribution through a twin emphasis on worldview and process. Ritual economy opens new vistas of historical exploration that suggest a return to the primary evidence left by content creators of how they interpreted and used copyright in practice.

Ritual economy can find compatibility with what Carey called the “most useful view of communication and the mass media in the American tradition.”²⁸ It was handed down to mass communication researchers around the turn of the twentieth century from a group of sociologists who were interested in journalism and the mass media, and who took a humanist, rather than an organizational, approach to their discipline. Beginning with the work of John Dewey, George Herbert Mead, Robert Park, and Charles Cooley, this framework was eventually dubbed “symbolic interaction” by Herbert Blumer who defined it as a theory of the “peculiar and distinctive character of interaction as it takes place between human beings.”²⁹ Critically, by beginning from an assumption of human interaction as both individually expressive and communally interpretive, symbolic interactionism offered an approach that could avoid reductionism and account for a wide variety of empirically observable phenomena.³⁰

Carey found symbolic interactionism to be a philosophical and methodological reaction against the utilitarian legacy classical liberalism left upon the study of media. He established a link between the sender/receiver model of communication that descended from Locke and the so-called limited effects view of the media, a link that led American mass communication research to become “largely a mopping-up operation” in the mid-twentieth century.³¹ Carey also found that symbolic interactionism shared a common intellectual history with Marxism as both turned from the central question of classical liberalism – “What are the conditions of freedom?” – toward its inverse: “How it is that the social order is integrated through communication?”³²

Symbolic interactionism further informed Carey’s view of the peculiarities in the American case:

...in the United States communication is substituted for tradition... there was not a shared traditional culture available to people who were forming new communities and institutions... the only means by which these communities could be organized and held together was through discussion, debate, negotiation, and communication.³³

The logic of symbolic interactionism was evident in Carey's theorizing of the ritual view of communication, which he posed as an alternative to the transmission view that dominates the Western, industrialized world. He described the ritual view as "directed not toward the extension of messages in space but toward the maintenance of society in time; not the act of imparting information but the representation of shared beliefs."³⁴

Ritual economy parallels symbolic interactionism and the ritual view of communication in many ways. It incorporates an anthropological view of ritual, the Marxist critique of political economy, and a socio-cultural understanding that is compatible with this branch of communication theory.³⁵ Ritual economy has also proven particularly useful in studying cultures that either pre-date or have demonstrated resistance to capitalism because it acknowledges both economic relations and ritual symbolism as motivating factors in human interaction.³⁶ These dimensions of ritual economy should prove fruitful for this research because they can allow for the history of copyright to be seen from the content creators' perspective while also acknowledging the context in which cultural production is embedded.

E. Christian Wells and Karla L. Davis-Salazar wrote "ritual and economy are not often integrated by those who wish to understand the ways in which nonmaterial motives are embedded in material transfers."³⁷ To escape this tendency, Wells, along with Patricia A. McAnany, codified a theoretical definition of ritual economy as the "process of provisioning and consuming that materializes and substantiates worldview for managing

meaning and shaping interpretation.”³⁸ Informing McAnany and Wells’s conceptualization of worldview was Roy Rappaport’s distinction between an “operational model” of the physical world built on empirical data and a “cognized model” of the “environment conceived by the people who act in it.”³⁹ Rappaport explained:

The cognized model is not merely a less adequate representation of reality than the operational model. The operational model... has a purpose only for the anthropologist. The cognized model... has a function for the actors; it guides their actions.... *it elicits behavior that is appropriate to the material situation...*⁴⁰

Also influential was Pierre Bourdieu’s concept of an “economic habitus” comprised of the various economic, social, and historical conditions in which worldview materializes, a concept that Bourdieu intentionally opposed to “the so-called ‘rational’ economic agent” idealized in the logic of classical liberalism.⁴¹ Conceiving of ritual and economy as “linked” but “not reducible to one another,” and making worldview of central importance, allows for a history of copyright from a content creators’ perspective that considers the complex interactions between individual worldview, symbolic social rituals, and the constraining forces of political economy.⁴²

The emphasis on individual autonomy in romanticism, the artistic articulation of classical liberalism, is the origin of the “genius author” archetype. While this mythic figure persists to the present day in the discourse of the creative industries, the complexity of cultural production in an advanced capitalist society challenges the legitimacy of any artistic success resulting from individual genius alone. Terry Eagleton voiced a Marxist-influenced criticism when he traced the emergence of the genius author construct as a defense against commodification “just when the artist is becoming debased to a petty commodity producer.”⁴³ Michel Foucault alleged that the author’s name “has

no legal status,” and instead emphasized the role of the “author function” in legitimizing discourse.⁴⁴ Foucault’s intention may not have been to minimize the author’s role in shaping culture, but this has been one effect of the poststructuralist critique of authorship.⁴⁵

Ritual economy’s emphasis on process allows for a theorization of copyright and creativity that can retain the valid critiques expressed in both these views without minimizing the individual contribution of content creators. As copyright law evolved, authors developed complex relationships with publishers that began to obscure claims to individual authorship. In the present day, these relationships are exceedingly complex for authors, musicians, photographers, and other content creators to navigate. Even those content creators with the most legitimate claims to “genius” have some level of dependence upon legal representatives, publishers, marketing professionals, and other members of the creative industries. Yet, it is in deconstructing these complex processes of relationship, rather than in viewing content creators as either a vaunted genius or a petty capitalist, that an opportunity for a more meaningful understanding of culture and cultural production exists. By doing so, the central problem of value in the creative industries, at least from the content creators’ perspective, is revealed to be not one of the monetary value of specific works. Instead, it is in determining the value of living a life devoted to creativity.

Foucault suggested elsewhere that history may be remembered differently if it begins from a point of view in which “universals do not exist.”⁴⁶ By beginning in this way he was able to pose an answer to the question, “How can you write history if you do not accept a priori the existence of things like the state, society, the sovereign and

subjects?”⁴⁷ The political economy of the creative industries does exist and is an important topic of study, but for many content creators an alternative reality more meaningfully exists. When their decisions are driven by a worldview in which personal sacrifice for artistic excellence supersedes economic capitalization, one primary result may be their exploitation. Ritual economy as articulated here suggests the image of an economy within an economy, two radically divergent logics among content creators and the creative industries for assigning value that nonetheless exist simultaneously. Critically though, the ritual economy framework can address this divergence as a clash of worldviews rather than as an inevitable outcome determined by economic modes of production.

Creative individuals remain generally vulnerable to exploitation because of forces beyond their control in the political economy of the creative industries. It is therefore unlikely that a specific set of statutory copyright reforms for a capitalist system, socialist system, or any political economic system will end their exploitation. The specialized nature of their labor requires that they prioritize a lifestyle of creativity above economic concerns. If their work possesses economic potential, the preconditions of exploitation will persist. Still, developing an inquiry into the factors that sustain exploitation may allow the past to suggest steps toward a more equitable future.

Research Questions

Bernard Miège observed, “Most of the analyses of the cultural industries devote little attention to artistic creation and are even less concerned with artists.”⁴⁸ To answer his call to re-center discourse, theoretically-based historical work in copyright law must move beyond the critique of previous frameworks and begin to establish a discourse that

is artist-centric. To begin a content creator's history of copyright, the central question must turn from "How has copyright law evolved over time?" to instead ask "How have content creators interpreted and used copyright in practice?"

This change shifts the focus from suggesting directions for policy reform towards empowering content creators to better navigate and influence existing copyright systems. The structuring principles of this history are not the chronology of legislation or the language of judicial rulings. Instead, they must emerge from the surviving works of content creators themselves and the legacies their works have created. If many creative individuals are more concerned with constructing an opportunity in life to create than with the maximization of economic potential, their history must not proceed from an understanding of economics as determinant. Economics may play a highly influential role, and a better understanding of economic processes may well be in their best interest, but financial concerns are neither a beginning nor an end unto themselves.

Similarly, if the value of contributing to a creative community is more highly esteemed than the monetary valuation of their works, a content creators' history must proceed from an understanding of both individual agency and community interaction as central to the creative process. To understand how content creators have interpreted and used copyright requires a return to the primary sources they have left behind. It also requires a theory that can contextualize the historical evidence within an understanding of the creative worldview. Worldview is complex, changing, and at times contradictory. Ritual economy can help to reconcile these contradictions by questioning "the simplistic notion that making, exchanging, and using things are invariably motivated by purely materialistic concerns."⁴⁹ In this way, a history becomes possible in which the political

economy of the creative industries may significantly influence the outcome of its production, but does not usurp all power of determination and agency from individual actors.

The theoretical critique of individual authorship has proven useful for illuminating the communal nature of cultural production, for challenging industry reform efforts paraded in the name of author protection, and for recovering creativity as an essential part of the collective human experience rather than the purview of a genius elite. Yet, in a postmodern reality where individual authorship is almost universally possible, theoretical work must move beyond the authorship critique and establish a discourse that legitimizes individual contribution. Blumer noted, “The most outstanding consequence of viewing human society as organization is to overlook the part played by acting units in social change.”⁵⁰ Underestimating the part that content creators can play in social change has been a negative consequence of the authorship critique, and this dissertation attempts to recover the importance of individual creativity in a theoretically informed way.

Fundamentally, this research seeks to address a problem of access and a problem of understanding. Access to a history of copyright from the content creators’ perspective may help to challenge a discourse that inherently marginalizes creative labor. Understanding how creativity materializes in a capitalist, market-driven system may help content creators better manage ownership of their work. The intellectual history of copyright reveals an incomplete understanding of the creative process and the creative worldview. The move toward the ritual economic view proposed here is thus a synthesis of history and theory, one that can challenge theoretical inconsistencies in the dominant

historical discourse and utilize historical scholarship to inform further theoretical understanding.

Methodology

To apply ritual economy to the history of copyright suggests a methodology that returns to the primary sources left by individual content creators. Criteria that must be met in selecting an eligible content creator are: 1) a surviving body of work large enough to allow for deep exploration, 2) published work that sold well enough to warrant protection from infringement, and 3) a record of thoughts and actions about copyright and related issues in surviving sources. This dissertation will focus on three early American creators of copyrightable work: Benjamin Franklin, Stephen Foster, and Mathew Brady.

The methodological arc of this dissertation is to prefer evidence in the following order: 1) primary sources left by these individuals that specifically mention copyright, intellectual property, and related issues such as plagiarism, property rights, and publishing contracts; 2) primary sources left by these individuals that evidence personal moral philosophy, creative process, and worldview; and 3) primary and secondary sources that evidence the legacies of their works and how their individual worldview, as voiced in their works, has influenced culture. Biographical literature, topical histories of early America, and work in critical cultural studies and the history of the book will inform this research as well.⁵¹

Franklin, Foster, and Brady exhibited a range of characteristics germane to this research. Each were widely-known in their lifetimes, each had at least some level of financial success, and each produced work that was vulnerable to infringement. In different ways, each left record of their thoughts and actions regarding copyright and

related issues. The twin emphases on worldview and process in ritual economy helps contextualize the available source material they left behind into a cohesive narrative that makes valuable contributions to the literature. Between them collectively, the peculiarities of such copyright industries as literature, journalism, popular music, art, and photography can be considered as well. Finally, it is important to note an implicit problem in the history of early American copyright, namely a lack of access to the kind of formal power that copyright represents on the part of non-Whites and women. Feminist, critical race, and post-colonial scholars have recently identified the history of copyright as a vantage point of critique.⁵² This research acknowledges the important issues they raise and the inherent limitations that confine it to a demographically narrow set of individuals.

Another aspect of this dissertation's methodology that bears mention is that, while I argue the interpretation and use of copyright by these early American content creators may be illustrative, I do not find it to be representative of copyright theorization in general. On the contrary, the fact that these individuals were so atypical for their time, and therefore unrepresentative, is why I argue that their histories have illustrative potential. Past work that has branded Franklin, Foster, and Brady as representative of an idealistic vision of early America reveals an inconsistent theorization of the kind of claims that historical evidence can make.⁵³ Rather than being representative of early American copyright theorization, it is more useful to think about the ways in which these individuals were influential participants in a larger historical process. This allows for a history that can move beyond economic determinism and approach an understanding of creative production in its totality.

Benjamin Franklin's papers have been digitized and made available online by a joint effort of Yale University and The American Philosophical Society. Stephen Foster's papers were first compiled by his brother Morrison, and then more completely by Josiah Kirby Lilly, who donated them to The Center for American Music at The University of Pittsburgh. Sources in Foster's own hand are limited, but related financial records and family correspondence are extensive, and most of this material has been digitized and made available online. Mathew Brady also left relatively little correspondence in his own hand, but extensive photographic records have survived. These include some of the earliest copyright registrations for photography held at The National Copyright Office and The Library of Congress.

Outline of Chapters

This introductory chapter has reviewed some historical perspectives that have informed understandings of copyright and individual creativity. It has proposed ritual economy as an alternative perspective capable of resolving some persistent theoretical problems. To further explore the efficacy of ritual economy in theorizing copyright and creativity this dissertation will conduct inquiries into the interpretation and use of copyright by three early American content creators.

Chapter Two: Benjamin Franklin

Before he played a key political role in the American Revolution, Benjamin Franklin was the most significant author and inventor in colonial America. As a delegate to the U.S. Constitutional Convention, he was present for the debate over the language of The Copyright and Patent Clause.⁵⁴ The literature on the history of American intellectual

property law has increasingly identified Franklin as a central figure, particularly in the philosophical development of copyright.⁵⁵

A particularly salient example is Lewis Hyde's argument that Franklin and his fellow founders were more concerned about the creation of a public domain than with the interests of content creators or publishers.⁵⁶ While it is true that Franklin supported the free-flow of information, at times to his own financial detriment, in private correspondence and personal business decisions he did not always put the public first. This chapter adds to the reconstruction of Franklin's worldview regarding proto-intellectual property issues by exploring how his worldview materialized in practice.

Chapter Three: Stephen Foster

Stephen Foster was among the first composers of American popular song to sell to a truly national audience. At a time when the transportation and communication technologies that could enable a shared popular culture were only just emerging, Foster's winsome lyrics and catchy melodies spread with remarkable speed across America and around the globe.⁵⁷ He was also among the first to encounter some of the copyright dilemmas peculiar to songwriting.

Primary sources that evidence Foster's failed attempts to leverage copyright protection into economic capitalization have been considered in previous literature, but not through the lens of ritual economy.⁵⁸ A problem of hypercanonization has permeated Foster scholarship, especially in apologetic narratives about the derogatory racial content of his most popular songs.⁵⁹ This chapter will address the hypercanonization problem by mining available copyright and business records to examine what these material economic transactions may suggest about Foster's worldview.

Chapter Four: Mathew Brady

Mathew Brady was the most famous photographer in nineteenth-century America. During his long career he would photograph half a century of American presidents.⁶⁰ He made important aesthetic innovations to both landscape work and portraiture, and his sophisticated approach to the business of photography helped to establish it as a medium. He is most remembered today for his expansive documentation of the Civil War.

Brady has been accused of being a mere figurehead for his business, and for taking the artistic credit rightfully due to the many operators he trained and managed.⁶¹ A review of the copyright record refutes this myth, instead revealing a complex interpretation and use of copyright that may have ultimately influenced photographic eligibility for protection. Influence by content creators from the ground up is rare in copyright history, and therefore worthy of detailed study. This chapter will conclude by considering the agency that Brady had in protecting his work, and how copyright was part of asserting that agency.

Chapter Five: Conclusion

The concluding chapter evaluates the efficacy of ritual economy in theorizing the economics of creative works and in legitimating the contributions of individual content creators. Findings will be analyzed along ritual economy's three dimensions: 1) provisioning and consuming, 2) materialization and substantiation of worldview, and 3) managing meaning and shaping interpretation. This chapter also helps to historicize the cumulative findings of this dissertation by a comparative analysis of two landmark Supreme Court cases that bridged nineteenth-century American copyright policy with the coming mass communication revolutions of the twentieth century.

¹ British and American copyright tradition is often contrasted with that of continental Europe, especially France, where the philosophical justification for copyright comes from the moral rights of an author to the ownership of their work. Interestingly, though the underlying justification for copyright as revealed in statutory language is quite divergent, the practical realities of the copyright systems in these countries are remarkably similar. See Jane C. Ginsburg, “A Tale of Two Copyrights: Literary Property in Revolutionary France and America,” in *Publishing and Readership in Revolutionary France and America*, ed. Carol Armbuster (Westport, CT: Greenwood Press, 1993), 95-114 and Jacques Attali, *Noise: The Political Economy of Music*, trans. Brain Massumi (Minneapolis, MN: University of Minnesota Press, 1985), 52-81.

² See, for example, Benjamin Kaplan, *An Unhurried View of Copyright* (New York, NY: Columbia University Press, 1967) and Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, NY: Vanderbilt University Press, 1968).

³ Cayce Myers, “Copyright and Historical Sources,” *American Journalism* 34, no. 4 (November 2017): 472 noted that “the biggest misconception about copyright is that it exists for a work that is valuable.... While it is an accurate statement to say many copyright infringement cases involve valuable copyrights, that fact is a reflection of only the values of society (and lawyers), not the law.” This distinction highlights the disparities between the statutory parameters of copyright and its actual use.

⁴ The Statute of Anne is a common starting point for legal histories of copyright in the Anglo-American tradition. Note that much legal scholarship acknowledges statutory copyright as itself the historical product of British censorship laws, the monopoly of the Stationer’s Company, and the transition from a patronage model to a market model of artistic production.

⁵ Danby Pickering, *The Statutes at Large, from the Eight to the Twelfth Year of Queen Anne, Volume 12* (Cambridge: Printed by Joseph Bentham, Printer to the University, 1764), 82.

⁶ See Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe*, 2nd ed. (Cambridge, U.K.: Cambridge University Press, 2005).

⁷ U.S. Constitution, art. 1, sec. 8, cl. 8.

⁸ See *An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned*, Chapter 15, *U.S. Statutes at Large* 1 (May 31, 1790): 124-126.

⁹ See *An Act supplementary to an act, intituled [sic] “An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the time therein mentioned,” and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints,*

Chapter 36, *U.S. Statutes at Large* 2 (April 29, 1802): 171-172; *An Act to amend the several Acts respecting Copyright*, Chapter 16, *U.S. Statutes at Large* 4 (February 3, 1831): 436-439; and *An Act supplemental to an Act entitled "An Act to amend the several Acts respecting Copyright," approved February third, eighteen hundred and thirty-one, and to the Acts in Addition thereto and Amendment thereof*, Chapter 126, *U.S. Statutes at Large* 13 (March 3, 1865): 540-541.

¹⁰ Michael Bentley, *Modern Historiography: An Introduction* (London, UK: Routledge, 1999).

¹¹ James D. Startt and Wm. David Sloan, *Historical Methods in Mass Communication*, rev. ed. (Northpoint, AL: Vision Press, 2003), 21-45.

¹² John Durham Peters, "John Locke, the Individual, and the Origin of Communication," *Quarterly Journal of Speech* 75, no. 4 (November 1989): 391.

¹³ Adam Smith, *The Wealth of Nations, Volume 1* (London, UK: J. M. Dent & Sons Ltd., 1964), 400.

¹⁴ Peters, "John Locke," 396.

¹⁵ Bentley, *Modern Historiography*, 28.

¹⁶ Startt, *Historical Methods*, 26.

¹⁷ Harold D. Lasswell, "The Structure and Function of Communication in Society," in *The Communication of Ideas: A Series of Addresses*, ed. Lyman Bryson (New York, NY: Institute for Religious and Social Studies, 1948), 37-38.

¹⁸ *Ibid.*, 38.

¹⁹ James W. Carey, "Graduate Education in Mass Communication," *Communication Education* 28, no. 4 (September 1979): 289.

²⁰ Elihu Katz, Jay G. Blumler, and Michael Gurevitch, "Uses and Gratifications Research," *Public Opinion Quarterly* 37, no. 4 (January 1973): 509.

²¹ Maxwell E. McCombs and Donald L. Shaw, "The Evolution of Agenda-Setting Research: Twenty-Five Years in the Marketplace of Ideas," *Journal of Communication* 43, no. 2 (Spring 1993): 59. See also Maxwell E. McCombs and Donald L. Shaw, "The Agenda-Setting Function of Mass Media," *Public Opinion Quarterly* 36, no. 2 (Summer 1972): 176-187.

²² See, for example, Moyra Haslett, *Marxist Literary and Cultural Theories* (New York, NY: St. Martin's Press, 2000), 15-49 for a discussion of Marxist understandings of culture and society that views copyright as a vantage point of critique.

²³ See Karl Marx, *A Contribution to the Critique of Political Economy*, ed. Maurice Dobb, trans. S. W. Ryazanskaya (New York, NY: International Publishers, Inc., 1970). The preface is a commonly cited passage for the origins of the base/superstructure model, though references to it range widely throughout Marx's writings. Note that the *degree* of determinacy between the base and the superstructure is the subject of much conceptual debate.

²⁴ Janice Peck, "Itinerary of a Thought: Stuart Hall, Cultural Studies, and the Unresolved Problem of the Relation of Culture to 'Not Culture'," *Cultural Critique* 48, no. 1 (Spring 2001): 242.

²⁵ Raymond Williams, "Base and Superstructure in Marxist Cultural Theory," in *Problems in Materialism and Culture: Selected Essays* (London, UK: Verso, 1980), 31-35.

²⁶ *Ibid.*, 35-40. See also Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction," in *Illuminations: Essays and Reflections*, ed. Hannah Arendt, trans. Harry Zohn (New York, NY: Schocken, 1968), 217-238; Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci*, ed. and trans. Quintin Hoare and Geoffrey Nowell Smith (London, UK: Lawrence and Wishart, 1971), 229-246; and E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past & Present* no. 50 (February 1971): 76-136.

²⁷ See Martin Jay, *Permanent Exiles: Essays on the Intellectual Migration from Germany to America* (New York, NY: Columbia University Press, 1986), 18.

²⁸ James W. Carey, "The Chicago School and the History of Mass Communication Research," in *James Carey: A Critical Reader*, ed. Eve Stryker Munson and Catherine A. Warren (Minneapolis, M.N.: University of Minnesota Press, 1997), 24.

²⁹ Herbert Blumer, *Symbolic Interactionism: Perspective and Method* (Englewood Cliffs, N.J.: Prentice-Hall, 1969), 78-79.

³⁰ *Ibid.*, 82. Blumer wrote "I know of no instance of human group action to which the three premises [of symbolic interactionism] do not apply. The reader is challenged to find or think of a single instance which they do not fit."

³¹ Carey, "The Chicago School," 17.

³² *Ibid.*, 25.

³³ *Ibid.*, 26. Note that Carey attributed the idea that "in the United States communication is substituted for tradition" to Carl Hovland.

³⁴ James W. Carey, “A Cultural Approach to Communication,” in *Communication as Culture: Essays on Media and Society* (Boston: Unwin Hyman, 1989), 18.

³⁵ While the field of economic anthropology is sometimes posed as a contrasting model to political economy because of its focus on exchange rather than production, the theory of ritual economy helps to reconcile these two paradigms.

³⁶ See, for example, Katherine A. Spielman, “Crafting the Sacred: Ritual Places and Paraphernalia in Small-Scale Societies,” in *Dimensions of Ritual Economy*, eds. E. Christian Wells and Patricia A. McAnany (Bingley, UK: Jai Press, 2012), 37-72; Walter E. Little, “Weaving Ritual and the Production of Commemorative Cloth in Highland Guatemala,” in *Dimensions of Ritual Economy*, eds. E. Christian Wells and Patricia A. McAnany (Bingley, UK: Jai Press, 2012), 121-148; and Patricia A. McAnany, “Shaping Social Difference: Political and Ritual Economy of Classic Maya Royal Courts,” in *Dimensions of Ritual Economy*, eds. E. Christian Wells and Patricia A. McAnany (Bingley, UK: Jai Press, 2012), 219-247.

³⁷ E. Christian Wells and Karla L. Davis-Salazar, “Mesoamerican Ritual Economy: Materialization as Ritual and Economic Process,” in *Mesoamerican Ritual Economy: Archaeological and Ethnological Perspectives*, eds. E. Christian Wells and Karla L. Davis-Salazar (Boulder, CO: The University Press of Colorado, 2007) 2.

³⁸ Patricia A. McAnany and E. Christian Wells, “Toward a Theory of Ritual Economy,” in *Dimensions of Ritual Economy*, eds. E. Christian Wells and Patricia A. McAnany (Bingley, UK: Jai Press, 2012), 3. Note that this passage cites Wells’s previous work for this definition, but that it is codified in this precise wording for the first time in the passage cited here.

³⁹ Roy Rappaport, *Pigs for the Ancestors: Ritual in the Ecology of a New Guinea People*, new, enlrg. ed. (New Haven, CT: Yale University Press, 1984), 238.

⁴⁰ *Ibid.*, 238-239 [emphasis in original].

⁴¹ Pierre Bourdieu, “Making the Economic Habitus: Algerian Workers Revisited,” trans. Richard Nice and Loïc Wacquant, *Ethnography* 1, no. 1 (July 2000): 18

⁴² McAnany, “Ritual Economy,” 3.

⁴³ Terry Eagleton, *The Ideology of the Aesthetic* (Oxford, UK: Basil Blackwell, 1990), 65.

⁴⁴ Michel Foucault, “What is an Author?,” in *The Foucault Reader*, ed. Paul Rabinow (New York, NY: Pantheon, 1984), 107.

⁴⁵ See Peter Jaszi, “Toward a Theory of Copyright: The Metamorphoses of ‘Authorship’.” *Duke Law Journal*, 1991, no. 2 (1991) for an overview of the poststructuralist critique of authorship. While I agree that the poststructuralist critique

reveals some important theoretical inconsistencies in the intellectual history of copyright, I argue that the deconstruction of authorship also has inherent theoretical problems. Thus, a turn towards the ritual economic view may map out a framework that can move beyond both authorship veneration and authorship deconstruction to approach a true totality of authorship in individual, social, and political economic spheres.

⁴⁶ Michel Foucault, “10 January 1979,” in *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, ed. Michel Senellart, trans. Graham Burchell (New York, NY: Palgrave Macmillan, 2008), 3.

⁴⁷ Ibid.

⁴⁸ Bernard Miège, *The Capitalization of Cultural Production* (London, UK: Journeymen Press, 1989), 76.

⁴⁹ Wells, *Mesoamerican Ritual Economy*, 2.

⁵⁰ Blumer, *Symbolic Interactionism*, 88. Note that the term “acting units” does not exclusively refer to individuals but might be an individual or a group.

⁵¹ See Steven Wilf, “Intellectual Property,” in *A Companion to American Legal History*, ed. Sally E. Hadden and Alfred L. Brophy (Hoboken, NJ: Blackwell Publishing Ltd, 2013), 441-459 for an excellent overview of the critical cultural studies and history of the book literature.

⁵² See, for example, Stephen M. Best, *The Fugitive's Property: Law and the Poetics of Possession* (Chicago, IL: The University of Chicago Press, 2004); Melissa J. Homestead, *American Women Authors and Literary Property, 1822-1869* (Cambridge, UK: Cambridge University Press, 2005); Neil Weinstock Netanel, *Copyright's Paradox* (Oxford, UK: Oxford University Press, 2008); Michael D. Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (Oxford, UK: Oxford University Press, 2012); and Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge* (Cambridge, UK: Cambridge University Press, 2014).

⁵³ See Gordon S. Wood, *The Americanization of Benjamin Franklin* (New York, NY: The Penguin Press, 2004), 1-16; Jennie Lightweis-Goff, “‘Long Time I Trabble on de Way’: Stephen Foster’s Conversion Narrative,” *Journal of Popular Music Studies* 20, no. 2 (June 2008): 150-154; and Robert Wilson, *Mathew Brady: Portraits of a Nation* (New York, NY: Bloomsbury, 2013), 1-5 for critiques of the representation paradigm.

⁵⁴ Lewis Hyde, *Common as Air: Revolution, Art and Ownership* (London, UK: Union Books, 2010), 132-134.

⁵⁵ See, for example, David Saunders, *Authorship and Copyright* (London, UK: Routledge, 1992), 154; Grantland S. Rice, *The Transformation of Authorship in America* (Chicago, IL: The University of Chicago Press, 1997), 50-80; and Doron S. Ben-Atar,

Trade Secrets: Intellectual Piracy and the Origins of American Industrial Power (New Haven, CT: Yale University Press, 2004), 77.

⁵⁶ Hyde, *Common as Air*, 112-161.

⁵⁷ Ken Emerson, *Doo-Dah!: Stephen Foster and the Rise of American Popular Culture* (New York, NY: Simon & Schuster, 1997), 9-16.

⁵⁸ See, for example, Emerson, *Doo-Dah!*, 143-147 and JoAnne O'Connell, *The Life and Songs of Stephen Foster: A Revealing Portrait of the Forgotten Man Behind "Swanee River," "Beautiful Dreamer," and "My Old Kentucky Home"* (Lanham, MD: Rowman & Littlefield, 2016), 89-93.

⁵⁹ See Lightweis-Goff, "Stephen Foster's Conversion Narrative," 150-165.

⁶⁰ Robert A Mayer, "Photographing the American Presidency," *Image* 27, no. 3 (September 1984): 3-15.

⁶¹ Wilson, *Portraits of a Nation*, 4-5.

CHAPTER 2

BENJAMIN FRANKLIN: POOR RICHARD REVISED

Poor Richard Saunders began the inaugural edition of his *Almanack* with an account of his three-part motivation for producing the work. There was first his “excessive” poverty that necessitated an alternative stream of revenue. Second, and closely related, was the threat of increased matrimonial discord. Third was a serendipitous contract with a printer that offered him “some considerable share of the Profits” once the work was published.¹ This ultimately proved to be an especially fortuitous opportunity. *Poor Richard’s Almanack* went on to become the best-selling volume in colonial America.² More fortunate still was the true nature of this business arrangement as Poor Richard and his printer were, in fact, the same man: Benjamin Franklin.

Franklin created many such fictional characters during his career as an author and a journalist, but the contractual agreement that he has Poor Richard describe would not have been a fiction during his lifetime. Modern ideas about the protection of intellectual property were in their infancy, and during this period Franklin was the most significant “author and inventor” in America.³ This chapter will return to his extensive papers for evidence of his thoughts and actions regarding copyright and patent, as well as related issues such as the attribution and development of ideas. His interpretation and use of what we now think of as intellectual property are potentially illustrative of its emerging theorization in the eighteenth century.

Proto-Intellectual Property

The Statute of Anne was ratified into British law in 1710 when Franklin was just a child. However, enforcement was uneven in the colonies, a fact that Franklin exploited with some success by reprinting pirated American editions of popular English books.⁴ Business arrangements to produce and distribute work that would today fall under the complexities of modern intellectual property law often fell instead during Franklin's time under a simple contract negotiated by the relevant parties.⁵ In the absence of the sophisticated legal apparatus necessary to enforce statutory laws like copyright, cultural norms helped to mediate human interaction, a phenomenon that Franklin often acknowledged in his writings.⁶ Intellectual property did eventually gain legislative protection as The Copyright and Patent Clause, which took effect along with the rest of the U.S. Constitution in 1789, established the initial authority for a federal statute.⁷ Franklin died just months after the Constitution took effect, so he lived all his life in the transitional period between contractual and statutory protection for intellectual property.

Carl van Doren's enduring description of Franklin as a "harmonious human multitude" seems apt when considering the scope of his life.⁸ Three distinct careers – literary, scientific, and political – are evident, all of which have a meaningful intersection with intellectual property. Any one of these careers would merit significant attention in the literature on colonial America. Within that literature, Franklin's literary work has at times been overshadowed by his subsequent scientific and political achievements. Attention has been paid to Franklin's pioneering efforts in American journalism, his contributions to the American literary aesthetic, and his synergistic vision that integrated content creation with distribution networks early on in American print culture.⁹ The

literature on the history of intellectual property has increasingly identified Franklin as a central figure as well, particularly in the philosophical development of American copyright law. Steven Wilf's 2013 essay provided an excellent overview of the surge in work from critical cultural studies and the history of the book that contribute to the history of intellectual property.¹⁰ The theoretical traditions that inform these schools have recently stimulated a substantial body of literature.¹¹ This work has influenced and fused with traditional legal scholarship to reconstruct the philosophical context within which Anglo-American copyright law came about.¹²

An understanding of the development of British intellectual property thought is essential to any consideration of the same in colonial America. Mark Rose excavated the British tradition with scrupulous clarity, and in doing so has paved the way for an intellectual history of American copyright to begin on sound footing.¹³ Franklin was cited by Davis Saunders as an "exemplar" of the Enlightenment ideals that formed the philosophical context within which the American copyright system was founded.¹⁴ Grantland S. Rice likewise explored how Franklin's Enlightenment-era understanding of authorship helped to transform American literary sensibilities and to shape the American adaptation of British copyright thought.¹⁵ Peter Baldwin emphasized the primacy that the early American system placed upon the public domain, and cited Franklin as a key supporter of this view.¹⁶

Yet, Franklin was also intimately aware of the content creator's need for compensation as an incentive to create and how this would ultimately benefit the public.¹⁷ Adrian Johns noted Franklin's feud with printer William Carey over Carey's disregard for copyright and its destabilizing effect on the market for proto-academic journals.¹⁸

Johns also sketched Franklin's partnership with Isaiah Thomas, himself an early historian of American print culture, to establish trade organizations as a sort of "moral community" for printers and other tradesmen.¹⁹ Doron Ben-Atar's consideration of Franklin's ideas on intellectual property characterized him as offering "principled support for the free exchange of science and technology" and lamented that this example was not followed more closely by Franklin's successors.²⁰ Copyright has always attempted to strike a delicate balance between the competing interests of content creators, content disseminators, and the public interest, and studies such as these have helped to historicize the founders' understanding of the major issues at play.

The most thorough examination thus far of Franklin views on proto-intellectual property has come from Lewis Hyde's 2010 book *Common as Air*. His guiding question – "How did the founders imagine intellectual property?" – led him on an exploration that reached from the property rights of medieval serfs to copyright considerations in YouTube content, but Franklin received special focus.²¹ Citing Ben-Atar, Hyde characterized Franklin as a "standing illustration" of the valorization of the cultural commons, a sphere in which the benefit of society supersedes individual or corporate economic gain.²² This valorization was nuanced in places as "always individual and always social."²³ Still, Hyde's ultimate intent was to move Franklin from a representation of "self-reliance" to "other-reliant."²⁴ Hyde's project to "enlarge the set of stories that might usefully guide our thinking about the ownership of art and ideas" found Franklin's story particularly illustrative of an early American communal ethic among content creators, and potentially illustrative of a model for future copyright reform.²⁵

Hyde's suggestions for legal reform culminated in two proposals: 1) to bring back the registration formalities that once effectively limited the scope of copyright, and 2) to expand the application of the Fair Use doctrine.²⁶ He tempered these suggestions, however, with the admission that they are "politically impossible" because the media conglomerates who benefit from the current system are too powerful and too well organized to resist.²⁷ Moreover, Jessica Litman has shown that research-based suggestions for policy reform have little effect on the decisions of policy makers.²⁸ Whatever lessons may be learned from the history of American intellectual property theorization, the scope of their application must enlarge beyond suggestions for policy reform if they are to effect any meaningful social change.

Such change may be possible if the history of intellectual property can inform what authors, journalists, and other creators of copyrightable content might do to better manage the ownership of their own work rather than rely wholesale upon the creative industries. Hyde's examination of Franklin was an inductive study of the available primary sources in an effort to construct a theory of the cultural commons. This chapter returns to and enlarges the scope of those sources to instead ask how Franklin interpreted *and* used proto-intellectual property rights in practice. As such, this chapter will begin with an examination of Franklin's worldview, and then continue with an analysis of thoughts and actions regarding issues that we now understand as related to intellectual property.

Franklin's Worldview

William Patry noted that the founders viewed private property as "a right created by society to further social goals," and sourced that claim with Franklin's articulation of

his own rather austere views on the subject.²⁹ On Christmas Day 1783, Franklin wrote to Robert Morris, a financier of the early republic, about his belief that “All Property indeed, except the Savage’s temporary Cabin, his Bow, his Matchcoat, and other little Acquisitions absolutely necessary for his Subsistence, seems to me to be the Creature of publick Convention.”³⁰ Franklin later remarked that “private Property therefore is a Creature of Society and is subject to the Calls of that Society whenever its Necessities shall require it, even to its last Farthing.”³¹ Connections between statements like these and an image of Franklin’s noble dedication to a great cultural commons are easy to make, and are valid to a certain extent. Yet, these particular sentiments were written late in Franklin’s life, and do not necessarily encapsulate the whole of his thoughts, much less his actions, regarding the ownership of property. To trace Franklin’s worldview in consideration of how it interacted with such proto-intellectual property issues it is helpful to begin much earlier.

Franklin remembered in his *Autobiography* that he displayed a talent for writing early on.³² This creative inclination quickly found material reward; he composed a poem that “sold wonderfully” when he was still a young man.³³ Not all his early efforts received his personal approval however. In 1725, he exhibited an unusual form of ownership upon a piece entitled *A Dissertation on Liberty and Necessity, Pleasure and Pain* which he published, regretted, and then set out to burn all copies but one. This endeavor was only partially successful; four copies are known to survive today.³⁴

It would be easy to imagine Franklin as possessing the stereotypically tempestuous personality often associated with artists and authors based on the episode with the *Dissertation*, but such a characterization would be incomplete. His considerable

talent was the result of both natural gifting and careful cultivation. An example can be found in his “Plan of Conduct” which began:

Those who write the art of poetry teach us that if we would write what may be worth the reading, we ought always, before we begin, to form a regular plan and design of our piece: otherwise, we shall be in danger of incongruity. I am apt to think it is the same as to life.³⁵

Franklin wrote this at a time when he was experiencing some ill effects from the capricious lifestyles led by other artistic friends, and he remained devoted to, if not a dogmatically consistent set of values, at least the value of values throughout his life.³⁶

The intangible benefit his affection for moral codes had upon him as a writer is perhaps difficult to evidence, but his ability to persuasively fuse the practical and the moral in his writings was a key to their popularity. Franklin did not always achieve the high moral standards that he set for himself, but he nonetheless had an eloquent ability to describe moral truths even as a young man. At the age of twenty he wrote in his journal that “Truth and sincerity have a certain distinguishing native lustre about them which cannot be perfectly counterfeited, they are like fire and flame that cannot be painted.”³⁷

Franklin improved upon the *Dissertation*'s weaknesses in a piece from late 1728 entitled “Articles of Belief and Acts of Religion,” a work that is commonly cited as evidence of his Deism. Franklin's religious beliefs, by his own admission, were always evolving, but this particular document reveals an important feature of Franklin's character: his level of comfort with a complex and countercultural worldview.³⁸ In this piece, Franklin imagined a supreme but distant deity, echoed the Enlightenment understanding of humankind as a rational animal, and even suggested the possibility of a polytheistic pantheon. Yet, he still found reason to “love [God]... for his Goodness” and

“*adore* him for his Wisdom.”³⁹ Franklin’s ability to radically reimagine the dominant contemporary worldview, and to interweave with his revision practical maxims that he found useful or appealing, is evidence of the ability to hold complex views that are not easily categorized.⁴⁰ This complexity was reiterated succinctly in his famous self-exhortation to “Imitate Jesus and Socrates.”⁴¹

Any consideration of Franklin’s worldview must be likewise complex. His many thoughts and actions regarding intellectual property issues have, thankfully, been preserved, but in multiple published works and private correspondences written over a long, eventful life rather than in a coherent thesis. As there was no plan for the work, the resulting incongruities are unsurprising. The Franklin who wrote in his *Autobiography* that “no Qualities were so likely to make a poor Man’s Fortune as those of Probity and Integrity,” was the same man who came to dominate the colonial Pennsylvania printing industry by a mixture of libelous journalism, hostile newspaper takeovers, and outright bribery of post riders.⁴² Still, to look away from him would be to ignore the most prolific and profitable creator of intellectual property in colonial America.

The Attribution of Ideas

In her 2008 history of medieval memory culture, Mary Carruthers noted that as we look to the past and impose a modern understanding of plagiarism upon classical literature it “is because we think of plagiarism as theft and authors as owners with enduring rights to their works.”⁴³ The term “plagiarism” first appeared in the late sixteenth century, and coincided with the “increased authorial prestige in a competitive environment” made possible by the printing press.⁴⁴ Elizabeth L. Eisenstein linked the emergence of printing technology with this cultural change in authorship and ownership:

Printing forced legal definition of what belonged in the public domain. A literary “common” became subject to “enclosure movements,” and possessive individualism began to characterize the attitude of writers to their work.⁴⁵

Eisenstein further noted Michael B. Kline’s observation that “the terms plagiarism and copyright did not exist for the minstrel. It was only after printing that they began to hold significance for the author.”⁴⁶

Just as Franklin’s writing career spanned the transition from contractual to statutory copyright protection, it also occurred during this transitional period in the perception of idea attribution. As such, there is no systematic understanding of what we now think of as plagiarism evident in his writings, but rather evidence of an evolving and pragmatic approach. *Poor Richard’s Almanack* is rightly credited with establishing a distinguishable genre of American fiction, but Franklin borrowed freely from existing almanacs when he created it. He was likewise comfortable with others borrowing from him for the most part, except, of course, when he was not.⁴⁷

The *Autobiography* contains an anecdote about the sermons of Samuel Hemphill that is illustrative of Franklin’s ambiguity on the attribution of ideas. Hemphill was an itinerant preacher from Ireland who came to America in the mid 1730s. Franklin took a liking to his sermons “as they had little of the dogmatical kind, but inculcated strongly the Practice of Virtue, or what in the religious Stile are called Good Works.”⁴⁸ This preference for practical application over theological abstraction was exactly to Franklin’s mind, and when Hemphill was accused of heterodoxy by the religious establishment Franklin wrote and published two pamphlets in his defense.⁴⁹ However, public support for Hemphill’s cause collapsed after the revelation that his sermons were not of his own making but had been plagiarized. Franklin personally “stuck by him however, as I rather

approv'd his giving us good Sermons compos'd by others, than bad ones of his own Manufacture; tho' the latter was the Practice of our common Teachers."⁵⁰

Franklin was himself later accused of plagiarism, though the accusation was unfounded. His interest was piqued into the emerging study of electricity while attending a scientific lecture given by Dr. Archibald Spencer in 1743. Two years later he received from his friend Peter Colinson "a Present of a Glass Tube, with some Account of the Use of it in making such [electrical] Experiments."⁵¹ The experiments he conducted so enamored his circle in Philadelphia that Franklin trained some of his friends to conduct them for public display, especially drawing up lectures on the subject to be delivered by Ebenezer Kinnersley. Kinnersley became so well known for dazzling audiences with these demonstrations that political enemies later falsely accused Franklin of plagiarizing his own electrical theories from his friend.⁵²

Franklin was at times careful to attribute ideas to their originator. In 1751, Dr. Thomas Bond sought to establish the first hospital in Philadelphia, and asked Franklin for help in raising the requisite funds. Franklin's scheme to raise the money was so successful that many in the city assumed the idea for the hospital was his, but he specifically corrected this misperception in the *Autobiography*.⁵³ At other times, he flouted all semblance of propriety. While acting as an ambassador to France, Franklin printed an elaborate forgery of the *Boston Independent Chronicle* and presented it as authentic to John Adams and other members of the American delegation. The fake edition included a fictional account of a battle between the Colonists and Native American forces backed by the British, and Franklin went so far as to author counterfeit real estate advertisements to make the forgery seem more authentic.⁵⁴ The purpose of this

ruse was to sway public opinion and provide cover for a back channel negotiation that Franklin was having with the British to end the Revolutionary War without the knowledge of the rest of the delegation.⁵⁵ It seems that Franklin avoided or embraced plagiarism, forgery, and other infringements of intellectual property based upon the expediency of doing so in the particular moment, and that each historical moment was comprised of a complex interaction between what individual expediency desired, what social norms would allow, and what political economy made possible.

The Development of Ideas

In their 2007 intellectual history of scientific objectivity, Lorraine Daston and Peter Galison noted the divisive effect that the philosophical and scientific revolutions of the nineteenth century had upon the arts and sciences:

In notable contrast to earlier views held from the Renaissance through the Enlightenment about the close analogies between artistic and scientific work, the public personas of artist and scientist polarized during this period. Artists were exhorted to express, even flaunt, their subjectivity, at the same time that scientists were admonished to restrain theirs.⁵⁶

Franklin predated this split between artistic subjectivity and scientific objectivity. As both the most important author and the most significant scientist in colonial America, his views on how innovative ideas were best fostered and developed were influential in both spheres.

Franklin established the American Philosophical Society (APS) in 1743 with a document that read in part:

The first Drudgery... is now pretty well over; and there are many in every Province in Circumstances that set them at Ease, and afford Leisure to cultivate the finer Arts, and improve the common Stock of Knowledge. To such of

these... many Observations occur, which if well-examined, pursued and improved, might produce Discoveries... to the Benefit of mankind in general.

Unfortunately, these persons were “widely separated, and seldom... converse,” and therefore their ideas were likely to “die with the Discoverers,” and be “lost to Mankind.”⁵⁷ Franklin was dedicated to preserving their discoveries and used his position as the colonial Postmaster to establish a vast network of correspondence between members of the APS.

He outlined his thoughts on academic institutions as incubators of idea innovation in the founding document of the University of Pennsylvania. The University was to provide for the “proper Education of Youth... imbuing their tender Minds with Principles of Rectitude and Morality,” and to offer coursework in “all useful Branches of liberal Arts and Sciences.” Franklin then outlined the academic bureaucracy in painstaking detail. Something like the modern faculty committee meeting is outlined in the document. Procedures for increases in faculty salaries were discussed, as well as an allowance for “Trustees to increase their Stock” by lending “their Money out at Interest.” Yet, this explicitly capitalist concession was tempered by an admonition that:

When the Fund is sufficient to bear the Charge, which it is hoped, thro’ the Bounty and Charity of well-disposed Persons, will soon come to pass, poor Children shall be admitted and taught gratis, what shall be thought suitable to their Capacities and Circumstances.⁵⁸

Thus, in Franklin’s design, the university was to be a fusion of capitalistic enterprise and philanthropic contribution to society.

He also contributed to an evolving understanding of the scientific process. When Franklin’s electrical treatises were published in Europe, they were vehemently attacked

by Jean-Antoine Nollet as they refuted his own theories which were currently in vogue. Franklin remembered in the *Autobiography* that he “once purposely answered” Nollet but instead:

...concluded to let my Papers shift for themselves; believing it was better to spend what time I could spare from public Business in making new Experiments, than in disputing about those already made.⁵⁹

In this case, Franklin’s choice to let the evidence speak for itself was vindicated. His so-called Single Fluid Theory of Electricity is considered a seminal breakthrough in the field.⁶⁰

In a series of correspondence during 1783 with his British friend Joseph Banks, Franklin described the hot air balloon experiments that were fashionable in Paris at the time. Franklin was a personal witness to many of these while serving as the American ambassador to France. The letters are significant for their description of early air travel alone, but they also contain implicit reference to Franklin’s thoughts on the form that academic inquiry should take. Franklin noted his desire for similar experiments to be carried out in England, and he contrasted British academic culture with that of France where experimental failure was met with self-deprecating humor rather than with ridicule from the scientific community. He also articulated a theoretical assumption about the justification for scientific discovery:

It does not seem to me a good reason to decline prosecuting a new Experiment which apparently increases the Power of Man over Matter, till we can see to what Use that Power may be applied... [Experiments] may be attended with important Consequences that no one can foresee. We should not suffer Pride to prevent our progress in Science.⁶¹

For Franklin, scientific curiosity held self-evident justification, and as such was a worthy expenditure of time and resources. His influence upon the philosophical underpinnings of higher education at the University of Pennsylvania helped to create a publically funded research university system in America. Yet, the true depth of Franklin's commitment to establishing open access to research findings was revealed in his willingness to publish his own freely, even while funding the research at his personal expense.

Copyright and Patent

Franklin's surviving papers contain several specific references to his views on an emerging understanding of copyright law. Some are minor, such as a receipt for a printing plate of an American map and the "Right to the Copy" of a book that interpreted it.⁶² The phrase "Right to the Copy" is indicative of understanding of copyright during this period in that it expresses a sense of the contractual right to the copying or printing of a book rather than of a statutory copyright with parameters that are designated by law. Other references are more substantial. In the *Autobiography's* passage about his electrical treatises, Franklin noted that their reprinting in England was quite profitable for the printer that published them, especially as it "cost him nothing for Copy-money."⁶³ The implication was that Franklin was not financially compensated for the European edition of his work.

Franklin carried out a long and lively correspondence with his friend William Strahan, an English printer and bookseller, throughout his life. As early as 1747, while still working in the print trade full-time, Franklin mentioned his strategic attempts to denounce a "piratical Edition" of a work that was undercutting his business model.⁶⁴

Speaking years later of copyright specifically, Franklin offered some advice to Strahan based on the state of copyright regulation in the American colonies circa 1784:

...the rapid Growth and extension of the English language in America, must become greatly Advantageous to the Booksellers, and holders of Copy Rights in England ...this will demand large, and of course profitable, Impressions of your most valuable Books. I would therefore If I possessed such rights, entail them, if such a thing be practicable, upon my Posterity; for their Worth will be continually Augmenting.⁶⁵

In his reply, Strahan informed Franklin that “as to what you say about Copy-rights, you do not know, perhaps that by a late Law the Possession of them is limited to 14 Years.”⁶⁶

Even in his final years Franklin wrote to Strahan of his determination to settle an account on the “Value of a Copy Right” he had negotiated with his former printing foreman, David Hall.⁶⁷ He duly reasserted his copyright in *Poor Richard's Almanack*, still in print by Hall years after its initial publication, in an undated document summarizing their accounts.⁶⁸ His last known mention related to what we now think of as copyright occurred in a letter to Edward Bancroft in which he corrected the “former Impressions” of one Mr. Dilly who thought he had “acquir'd some Right in the Copy” to publish a biography of Franklin.⁶⁹

Franklin's most discrete reference to intellectual property theorization comes from a passage in his *Autobiography* in which he related the invention and advertisement of his improvements to the iron stove, a common residential heat source in colonial America.⁷⁰ These improvements won the attention of the governor of Pennsylvania, George Thomas, who offered Franklin a patent for his design. Accepting this patent would have given him an exclusive right to profit from the sale of his invention for a set number of years, and Franklin would have been keenly aware of this opportunity's

lucrative potential. Yet, he “declin’d it from a Principle” and gave an interesting justification for doing so:

...as we enjoy great Advantages from the Inventions of others, we should be glad of an Opportunity to serve others by any Invention of ours, and this we should do freely and generously.⁷¹

This was a particularly magnanimous contribution, not only to society, but also to some specific individuals. Franklin goes on to record that an ironworker in London afterward received a British patent for a similar design, and Franklin scholar Paul M. Zall provided a note to this passage that Franklin’s designs for a carriage wheel and a copperplate engraver for ceramics were similarly patented by others.⁷²

Reconciling Contradictions

There are obvious inconsistencies, even contradictions, in Franklin’s thoughts and actions about intellectual property issues. His written works made him the most famous American of his generation, yet they are replete with the use of pseudonyms.⁷³ With his patentable inventions, as well as with his scientific treatises, he seemed content with contributing to a shared community of intellectuals rather than with maximizing economic capitalization. Yet, when it came to written work created before he retired from printing, such as *Poor Richard’s Almanack*, he was fastidious in asserting his rights throughout his lifetime.

In keeping with Lewis Hyde’s emphasis on the primacy of cultural commons in the founders’ worldview, a possible explanation of Franklin’s contradictory actions is that he viewed his work in the printing trade as his professional career, and his achievements in science and politics as benevolent community service facilitated by the wealth his literary endeavors provided him. As his health began to fail in his later years, he chose to

begin his last will and testament with “I Benjamin Franklin of Philadelphia, printer” rather than with any of the litany of political titles bestowed upon him in his lifetime. In one of his last pieces of writing before his death he amended that will to set up a trust for artisans and tradesmen in both Boston and Philadelphia that was to be a kind of repayment for the education and generosity that he had received as a young man.⁷⁴

Franklin, ever the punctilious businessman, was acutely aware of the debts, both monetary and intellectual, that he owed to those who had come before him. In response, he intentionally left behind a tangible means of assisting those who would come after.

The recovery of the founders’ emphasis on the public domain, especially of Franklin’s, has been a notable achievement of recent scholarship. The findings of this chapter are an addition to, rather than a refutation of, that view. While the evidence suggests that Franklin believed strongly in the value of the public domain, in business affairs his pragmatism and pursuit of wealth were equally undeniable. Worldview must be reconstructed not only as it was written in philosophical texts, but also as it materialized in everyday practice. This examination of the available primary sources, informed by a ritual economy framework that “privileges *both* ritual action and economic process,” reconstructs a more thorough picture of how Franklin negotiated proto-intellectual property rights.⁷⁵

Franklin was a prolific author and journalist, but he also cast the first set of type in the colonies, illustrated the first political cartoon, conceived and marketed an early American magazine, and designed a musical instrument for which Mozart composed.⁷⁶ All of these ideas and inventions would eventually enjoy legal classification as intellectual property. He wrote explicitly about patent and copyright, and he anticipated

where these kinds of discrete intellectual property matters would intersect with related ideas about the attribution and the development of ideas. Yet, to characterize Franklin as either the quintessential American capitalist or as the patron saint of American creativity is too simplistic. He was a gifted content creator *and* a skilled businessman who happened to live in a historical time and place where the synergy of these two skill sets could be exploited to the full. On the one hand, the quest for wealth was a defining characteristic of his life, especially of his writing career. On the other, once he obtained this wealth he consistently sought ways to use it for the common good.

Though the legal apparatus for assessing punitive damages for violations of intellectual property law was in its infancy, there existed in Franklin's time social norms that were effective in policing the misattribution of ideas and other infringements of intangible works. These social norms were in the midst of upheaval, however, and this led to a historical moment in which an individual with the talent to create content that had economic potential, with access to emerging distribution networks, and with a worldview that valorized financial success was particularly well positioned to obtain fame and wealth. Franklin seized this moment and fully exploited it.

In doing so, he became a prominent source of individual influence upon many aspects of early American culture including the theorization of intellectual property. Yet, for all his significant accomplishments and influence, the contradiction inherent in his legacy is something that the historical evidence shows and that must be accounted for. The American copyright system is ostensibly in place to protect authors and other content creators, and to ensure the public's right to the free flow of information, but the principal financial beneficiaries of this system have always been those who have control over

publishing and distribution. As American capitalism has advanced, and with it the specialization of labor, individual content creators have become increasingly unlikely to possess the creative control and direct access to distribution networks that Franklin enjoyed. The author has become subjugated under the thumb of the publisher, although in America both can look to Franklin as their patron founding father.

¹ “Poor Richard, 1733,” *The Papers of Benjamin Franklin* (hereafter *PBF*) accessible at <http://www.franklinpapers.org>. Franklin’s papers have been digitized and made available online in their entirety. The original language of these papers, including spelling and capitalization, is preserved throughout this chapter.

² James N. Green, “Benjamin Franklin as Publisher and Bookseller,” in *Reappraising Benjamin Franklin: A Bicentennial Perspective*, ed. J. A. Leo Lemay (Newark, NJ: University of Delaware Press, 1993), 98-99.

³ See U.S. Constitution, art. 1, sec. 8, cl. 8 which reads “The Congress shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

⁴ Meredith L. McGill, “Copyright,” in *A History of the Book in America, Volume 2 An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840*, eds. Robert A. Gross and Mary Kelley (Chapel Hill, NC: The University of North Carolina Press, 2010), 200.

⁵ The first state copyright statutes did not appear until 1783. See Thorvald Solberg, ed., *Copyright Enactments of the United States, 1783-1906* (Washington, DC: Government Printing Office, 1906), 11-31.

⁶ See, for example, “On Conversation,” October 15, 1730, *PBF*; “Apology for Printers,” June 10, 1731, *PBF*; “Alice Addertongue,” September 12, 1732, *PBF*; “On Literary Style,” August 2, 1733, *PBF*; and “Half-Hour’s Conversation with a Friend,” November 16, 1733, *PBF*.

⁷ There is no evidence of any direct influence by Franklin upon the language of The Copyright and Patent Clause. See Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, TN: Vanderbilt University Press, 1968), 192-196 for a succinct history of the clause’s inclusion in the U.S. Constitution.

⁸ Carl van Doren, *Benjamin Franklin* (New York, NY: The Viking Press, 1938), 782.

⁹ See, for example, Norman S. Grabo, "The Journalist as Man of Letters," in *Reappraising Benjamin Franklin: A Bicentennial Perspective*, ed. J. A. Leo Lemay (Newark, NJ: University of Delaware Press, 1993), 31-39; Patricia Bradley, "Forerunner of the 'Dark Ages': Philadelphia's Tradition of a Partisan Press," *American Journalism* 13, no. 2 (Spring 1996): 126-140; David Yerkes, "Franklin's Vocabulary," in *Reappraising Benjamin Franklin: A Bicentennial Perspective*, ed. J. A. Leo Lemay (Newark, NJ: University of Delaware Press, 1993), 396-411; J. A. Leo Lemay, *The Life of Benjamin Franklin, Volume 2: Printer and Publisher, 1730-1747* (Philadelphia, PA: University of Philadelphia Press, 2006), 124-134; Larzer Ziff, "A Silent Revolution: Benjamin Franklin and Print Culture," in *Publishing and Readership in Revolutionary France and America*, ed. Carol Armbruster (Westport, CT: Greenwood Press, 1993), 45-57; and Ralph Frasca, "'The Glorious Publick Virtue So Predominant in Our Rising Country': Benjamin Franklin's Printing Network During the Revolutionary Era," *American Journalism* 13, no. 1 (Winter 1996): 21-37.

¹⁰ Steven Wilf, "Intellectual Property," in *A Companion to American Legal History*, eds. Sally E. Hadden and Alfred L. Brophy (Hoboken, NJ: Blackwell Publishing Ltd, 2013), 443.

¹¹ See, for example, Ronald V. Bittig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder, CO: Westview Press, 1996); Ruth Towse, *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Cheltenham, UK: Edward Elgar Publishing Limited, 2001); Ruth Towse, *Copyright in the Cultural Industries* (Cheltenham, UK: Edward Elgar Publishing Limited, 2002); Melissa J. Homestead, *American Women Authors and Literary Property, 1822-1869* (Cambridge, UK: Cambridge University Press, 2005); Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, rev. ed. (London, UK: Verso, 2006), 47-65; and Martin T. Buinicki, *Negotiating Copyright: Authorship and the Discourse of Literary Property Rights in Nineteenth-Century America* (New York, NY: Routledge, 2006).

¹² See, for example, Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship'," *Duke Law Journal*, 1991, no. 2 (April, 1991): 455-502; Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America," in *Publishing and Readership in Revolutionary France and America*, ed. Carol Armbruster (Westport, CT: Greenwood Press, 1993), 95-114; Lyman Ray Patterson and Craig Joyce, "Copyright in 1791: An Essay Concerning the Founder's View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution," *Emory Law Journal* 52, (2003): 909-952; and Lawrence Lessig, "Re-crafting a Public Domain," *Yale Journal of Law & the Humanities* 18, (2006): 56-83.

¹³ Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993).

¹⁴ David Saunders, *Authorship and Copyright* (London, UK: Routledge, 1992), 154.

¹⁵ Grantland S. Rice, *The Transformation of Authorship in America* (Chicago, IL: The University of Chicago Press, 1997), 50-80.

¹⁶ Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton, NJ: Princeton University Press, 2014), 402.

¹⁷ See Ralph Frasca, *Benjamin Franklin's Printing Network: Disseminating Virtue in Early America* (Columbia, MO: University of Missouri Press, 2006), 13-15.

¹⁸ Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago, IL: University of Chicago Press, 2009), 191.

¹⁹ *Ibid.*, 197.

²⁰ Doron S. Ben-Atar, *Trade Secrets: Intellectual Piracy and the Origins of American Industrial Power* (New Haven, CT: Yale University Press, 2004), 77.

²¹ Lewis Hyde, *Common as Air: Revolution, Art and Ownership* (London, UK: Union Books, 2010), 99.

²² *Ibid.*, 127.

²³ *Ibid.*, 156.

²⁴ *Ibid.*, 177.

²⁵ *Ibid.*, 214.

²⁶ *Ibid.*, 253-276.

²⁷ *Ibid.*, 260.

²⁸ Jessica Litman, "The Politics of Intellectual Property," *Cardozo Arts & Entertainment Law Journal* 27, no. 2 (November 2009), 313-320.

²⁹ William Patry, *Moral Panics and the Copyright Wars* (Oxford, UK: Oxford University Press, 2009), 97.

³⁰ "To Robert Morris," December 25, 1783, *PBF*.

³¹ "From Benjamin Franklin: Queries and Remarks on 'Hints for the Members of Pennsylvania Convention' (unpublished)," November 3, 1789, *PBF*.

³² Benjamin Franklin, *The Autobiography of Benjamin Franklin* (hereafter *ABF*), eds. Leonard W. Labaree, Ralph L. Ketcham, Helen C. Boatfield, and Helene H. Fineman (New Haven, CT: Yale University Press, 1964), 53.

³³ *ABF*, 59.

³⁴ *ABF*, 96. See also John T. Winterich, "Benjamin Franklin: Printer and Publisher," in *Books and Printing: A Treasury for Typophiles*, ed. Paul A. Bennett (Cleveland, OH: The World Publishing Company, 1951), 359.

³⁵ "Plan of Conduct," 1726, *PBF*.

³⁶ *ABF*, 148-152.

³⁷ "Journal of a Voyage, 1726," July 29, 1726, *PBF*.

³⁸ See "From Benjamin Franklin: Speech in the Convention on the Constitution (unpublished)," September 17, 1787, *PBF*.

³⁹ "Articles of Belief and Acts of Religion," November 20, 1728, *PBF*, emphasis in original.

⁴⁰ See *ABF*, 114 for Franklin's comment on Deism that "tho' it might be true, was not very useful."

⁴¹ *ABF*, 150.

⁴² See *ABF*, 158; LeMay, *Benjamin Franklin, Volume 2*, 376-401; and Walter Isaacson, *Benjamin Franklin: An American Life* (New York, NY: Simon & Schuster, 2003), 60-72.

⁴³ Mary Carruthers, *The Book of Memory: A Study of Memory in Medieval Culture* (Cambridge, UK: Cambridge University Press, 2008), 273.

⁴⁴ Joseph Lowenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago, IL: The University of Chicago Press, 2002), 87.

⁴⁵ Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe*, 2nd ed. (Cambridge, UK: Cambridge University Press, 2005), 94.

⁴⁶ Michael B. Kline, *Rabelais and the Age of Printing* (Geneva: Librairie Droz, 1963), 54-55.

⁴⁷ Lemay, *Benjamin Franklin, Volume 2*, 170-191.

⁴⁸ *ABF*, 167.

⁴⁹ “A Defense of Mr. Hemphill’s Observations,” 1735, *PBF*; “Observations on the Proceedings against Mr. Hemphill, 1735, *PBF*.”

⁵⁰ *ABF*, 168.

⁵¹ *ABF*, 241.

⁵² J. A. Leo Lemay, *Ebenezer Kinnersley: Franklin’s Friend* (Philadelphia, PA: University of Philadelphia Press, 1964), 81-87.

⁵³ *ABF*, 199.

⁵⁴ “Supplement to the Boston Independent Chronicle,” April 22, 1782, *PBF*.

⁵⁵ Ellen R. Cohn, ed. et al., *The Papers of Benjamin Franklin Volume 37, March 16 through August 15, 1782* (New Haven, CT: Yale University Press, 2003), 184-186.

⁵⁶ Lorraine Daston and Peter Galison, *Objectivity* (New York, NY: Zone Books, 2007), 37.

⁵⁷ “A Proposal for Promoting Useful Knowledge,” May 14, 1743, *PBF*.

⁵⁸ “Constitutions of the Academy of Philadelphia,” November 13, 1749, *PBF*.

⁵⁹ *ABF*, 243-244.

⁶⁰ I. Bernard Cohen, *Benjamin Franklin’s Science* (Cambridge, MA: Harvard University Press, 1990) 9-10. See also Michael Brian Schiffer, *Draw the Lightning Down: Benjamin Franklin and Electrical Technology in the Age of Enlightenment* (Berkeley, CA: University of California Press, 2003), 47-66.

⁶¹ “To Sir Joseph Banks (unpublished),” November 21, 1783, *PBF*.

⁶² “Amelia Evans: Receipt,” February 19, 1766, *PBF*.

⁶³ *ABF*, 243.

⁶⁴ “To William Strahan,” July 29, 1747, *PBF*.

⁶⁵ “To William Strahan (unpublished),” August 19, 1784, *PBF*.

⁶⁶ “From William Strahan (unpublished),” November 21, 1784, *PBF*.

⁶⁷ “To William Strahan (unpublished),” March 5, 1785, *PBF*.

⁶⁸ “Observations on Mr. Parker’s State of the Account,” n.d., *PBF*. The content of this document suggests that it was written toward the end of Franklin’s life.

⁶⁹ “To Edward Bancroft (unpublished),” November 26, 1786, *PBF*.

⁷⁰ Franklin called his invention the “Pennsylvania Fire Place.” While his innovations did eventually influence what is today known as the “Franklin Stove,” there are fundamental design differences between the two.

⁷¹ *ABF*, 192, emphasis in original.

⁷² Paul M. Zall, *Franklin on Franklin* (Lexington, KY: The University of Kentucky Press, 2000), 145. See also Colin T. Ramsey, “Stealing Benjamin Franklin’s Stove: A New Identification for the ‘Ironmonger in London,’” *ANQ* 20, no. 2 (Spring 2007): 25-30.

⁷³ See, for example, “Silence Dogood, No. 1-14,” 1722, *PBF*; “The Busy-Body, No. 1-5,” 1729, *PBF*; and “The Speech of Miss Polly Baker,” April 15, 1747, *PBF*.

⁷⁴ “From Benjamin Franklin: Will and Codicil (unpublished),” July 17, 1788, *PBF*.

⁷⁵ Patricia A. McAnany and E. Christian Wells, “Toward a Theory of Ritual Economy,” in *Dimensions of Ritual Economy*, eds. E. Christian Wells and Patricia A. McAnany (Bingley, UK: Jai Press, 2012), 2, emphasis in original.

⁷⁶ *ABF*, 110; “Plain Truth,” November 17, 1747, *PBF*; “Advertisement of the General Magazine,” November 13, 1740, *PBF*; “To Giambatista Beccaria,” July 13, 1762, *PBF*.

CHAPTER 3

STEPHEN FOSTER: AMERICA'S FIRST UNPROFESSIONAL SONGWRITER

On the Fourth of July in 1826, Benjamin Franklin's fellow founders Thomas Jefferson and John Adams died within hours of each other. That same day on the outskirts of Pittsburgh, while cannon fire and patriotic music heralded the fiftieth anniversary of America's founding, Stephen Foster was born. During his short life, Foster would write several of the most popular songs in antebellum America, including a few such as "Oh Susanna!," "Camptown Races," and "Swanee River," that have enduring appeal today.

An 1867 *Atlantic Monthly* article that memorialized Foster three years after his death noted how remarkable the popularity of his first hit songs were considering the limited means for cultural communication at the time:

The piece elicited unanimous applause. Its success in the club-room opened to it a wider field, each member acting as an agent of dissemination outside, so that in the course of a few nights the song was sung in almost every parlor in Pittsburg [sic]... Although limited to the one slow process of communication,—from mouth to ear,—their fame spread far and wide...¹

While this description may be a bit hyperbolic, Foster's songs were widely popular, and they did play a role in the symbiotic development of antebellum popular culture and mass communication networks. Though only for a brief span during the 1850s, Foster was the first American to make a living as a professional songwriter.² He was also among the first to encounter the copyright dilemmas peculiar to popular music. This chapter will explore

Foster's interpretation and use of copyright to protect his songs. Context on the emergence of American popular culture and its relationship with copyright during the antebellum period will be considered. Foster's worldview and the ways he negotiated his copyright obligations throughout his career will be examined as well.

Copyright and Culture

Foster's interpretation and use of copyright are potentially illustrative as precedent setting in the ways that American popular musicians negotiated copyright obligations, but he was far from the first to protect his songs from infringement. A petition was filed in Massachusetts for the sole right to print the *New-England Psalm-Singer* as early as 1770, and in 1781 the Connecticut General Assembly granted relief to the author of the *Singing Master's Assistant* by issuing an exclusive patent.³ Like Benjamin Franklin's creative output, these works were not yet governed by federal statute, but that would soon change with the first Copyright Act in 1790.⁴

After 1790, the founders' emphasis on the public domain quickly came into conflict with their desire to secure compensation for content creators.⁵ Revolution had liberated America from British rule, but not from British culture. American demand for British literature was sizable, and the piracy of British works was firmly rooted in the American print industries.⁶ America would not provide copyright protection for international works until 1891, and throughout the nineteenth century popular British works could be obtained for little more than the cost of printing.⁷ As ideologically driven as the founders' interest in copyright may have been, emphasizing the public domain was also pragmatic because it legitimated the piracy of British literature and ensured it would not be stunted by imposing royalty payments on American publishers.⁸

Thus, in addition to articulating a cultural voice for a new nation, American content creators had to compete with works by their more established British counterparts sold at a price that made it difficult to recoup costs.⁹ Noah Webster recognized the harm this arrangement would do to the development of American culture and he advocated for copyright laws that favored authors' interests as early as 1782.¹⁰ While his dictionary and spelling books helped to spread mass culture by standardizing American English, Webster also directly influenced the passage of copyright reform with a speech before Congress in January 1831.¹¹ The resulting copyright amendment significantly extended the length of time that works could be protected. It also included "musical compositions" as a protectable category for the first time.¹²

The sheet music trade was inextricably bound up with the wider print culture in early America. Books and music were printed by the same firms, and both mediums catered to those with the requisite literacy and leisure time to enjoy them.¹³ Published in 1852, Harriett Beecher Stowe's *Uncle Tom's Cabin* demonstrated that American literature could generate substantial demand, both at home and abroad.¹⁴ The following year Stowe brought suit in a precedent setting copyright case against an unauthorized German version of her work. While she was ultimately denied royalties for the translation the nature of the case pointed to the book's cross-cultural popularity.¹⁵ Yet, it was a genre of popular music that took primacy as America's first cultural form to enjoy widespread domestic and international success.

Blackface minstrelsy was a form of entertainment in nineteenth-century America in which white men donned burnt cork makeup and derisive costumes to caricature African American music and culture. Also known as Ethiopian songs or plantation

melodies, minstrelsy's use of the banjo, primitive percussion instruments, and exaggerated black dialect had tremendous popular appeal for white audiences from Cincinnati to New York City.¹⁶ The genre grew in tandem with the increased popularity of piano parlors in the home that functioned as "material proof of middle-class standing in America."¹⁷ The leisure time and entertainment budget of the emerging middle class helped create a viable market for minstrel shows, and public minstrel performances in turn drove demand of sheet music for private use.

The *Atlantic Monthly* article that memorialized Foster began with a familiar origin myth about W. D. "Daddy" Rice as the first white man to "Jump Jim Crow" in Foster's hometown of Pittsburgh in 1830. Although the article claimed to be "authentic in every particular," the true origins of blackface minstrelsy have been as obscured in myth and memory as Foster's own story.¹⁸ Foster biographer Ken Emerson described minstrelsy as an expression of "an urban nostalgia for the agricultural economy, for a preindustrial, pastoral state of affairs, at the same time that it drew parallels between bondage on the Southern farm and in the Northern factory."¹⁹ The complex and contradictory meanings of this cultural phenomenon have been examined in previous literature.²⁰

Notably, Lawrence Levine's conceptualization of highbrow and lowbrow American culture was informed by his previous work on minstrelsy.²¹ Levine articulated his ideas on the sacralization of culture in part by noting how incorporation into the symphonies of Charles Ives reified Foster's minstrel melodies into the American musical canon.²² Foster came of age in the antebellum milieu that birthed minstrelsy, and more than any other composer of the time his work had crossover appeal between high and low cultural forms. Yet, by wedding minstrelsy's demeaning racial tropes with a more

sophisticated style of music he sentimentalized its content, making it more palatable to a wider audience and increasing its circulation.²³

The paradox between Foster's musical style and lyrical content has left him in a contested space in the literature. Scholars have rightly emphasized his importance in American music but have struggled to communicate that importance while critically analyzing his faults. Jennie Lightweis-Goff identified a problem of "hypercanonization" in Foster scholarship in which "the critic who offers insufficient praise risks becoming an aesthetic terrorist."²⁴ One way that hypercanonization has manifested itself is through a "conversion narrative" which has imposed "a fundamental cultural myth—the American exceptionalist conception of racial progress and progressive revelation—onto [Foster's] personal story."²⁵ Ritual economy may help to revise understandings of Foster's worldview by examining how it materialized in actual practice.

Foster's Worldview

The relative lack of sources in Foster's own hand has contributed to the proliferation of historical myths about his life.²⁶ Foster's brother Morrison actively burned any of his correspondence that might portray the Foster family in a negative light.²⁷ Apart from Foster's songs, only a few dozen letters, an account ledger, and a sketchbook of musical ideas survived the fire. These, along with relevant family letters, journalism, realia, and business records comprise the Foster Hall Collection in the Center for American Music at The University of Pittsburgh.²⁸

From the surviving evidence, Foster's early aptitude for music is clear. In 1832, his mother wrote to William Foster Jr., known in the family as Brother William, of a five-year-old Stephen who had "a drum and marche[d] about after the old way with a feather

in his hat... whistling old [sic] lang syne.”²⁹ At nine, Stephen performed “‘Zip Coon,’ ‘Long-tailed Blue,’ ‘Coal-Black Rose’ and ‘Jim Crow’” which “were the only Ethiopian songs then known,” and “his performance of these was so inimitable and true to nature that, child as he was, he was greeted with uproarious applause.”³⁰ At ten while away at school, Foster wrote to his father requesting a “commic [sic] songster” from which he would have learned more of the popular minstrel tunes of the day.³¹ In his early teens Foster had to promise Brother William “not to pay any attention to my music untill [sic] after eight Oclock in the evening” as it was interfering with his formal studies.³² This tendency was echoed by Foster’s father to Brother William in 1841 who noted that the boy’s “leisure hours are all devoted to musick, for which he possesses a strange talent.”³³

Like his serendipitously patriotic birthdate, these surviving sources have contributed to the mythic quality of Foster’s musical origins. Despite his musical preoccupations, Foster was able to pick up some accounting skills as well.³⁴ He worked for his brother Dunning’s shipping firm in that capacity until his songwriting income was sufficient to support his family.³⁵ Previous biographers have characterized Foster’s approach to songwriting as professional and businesslike, citing his accounting background as evidence for this.³⁶ Yet, the only real success he enjoyed lasted for less than a decade, and he spent the end of his life in poverty estranged from his family and selling his songs for a pittance. The business records Foster kept, including those related to copyright, have been considered in previous literature, but the problem of hypercanonization has permeated their interpretation.

A note on the political affiliations of his family is also necessary to understand Foster’s worldview, at least as it characterized his upbringing. William Foster Sr. was

among the first settlers of Pittsburgh, and held several government positions including the administration of military supplies through the settlement during the War of 1812.³⁷ The family's financial stability was irreparably damaged when their patriarch personally guaranteed an emergency shipment of food, clothing, and ammunition that helped General Andrew Jackson defeat the British at the Battle of New Orleans.³⁸ The American government never repaid Foster Sr. for his material display of patriotism, but despite the lack of remuneration the Fosters stayed politically loyal to Jackson's Democratic Party, especially to the future President James Buchanan to whom they were related by marriage.³⁹ Their motivation was partly economic, as they hoped to benefit from lucrative political appointments.⁴⁰ However, it was also ideological including the pro-slavery aspect of the Democratic Party platform. If Stephen Foster did, as previous work has claimed, evolve beyond the racial worldview exhibited in his early songs such an evolution would have represented a significant break from the views of his family.

What can be surmised of Foster's worldview through personal correspondence alone is limited. The lyrical content of his songs is also potentially evidential of his worldview, a theoretical assertion explored most recently by JoAnne O'Connell.⁴¹ Ritual economy suggests that one way to triangulate worldview is by examining how it materialized in actual economic practices. While Foster's copyright and business decisions have been examined in previous literature, they have not often been considered as illustrative of his worldview. This chapter will examine Foster's early copyright failures, his complicated attribution relationship with minstrel performer E. P. Christy, and the contracts and copyright royalty agreements he negotiated with music publishers to see what evidence of his worldview they may hold.

Early Copyright Failures

Stephen Foster's first original composition was written around the age of fifteen, and the only surviving copy of it was put to paper from his brother Morrison's memory some fifty years later.⁴² Foster's first song to be copyrighted was "Open Thy Lattice Love" in 1844, although it was inaccurately attributed to "L. C. Foster" and it is likely that he had to pay for the privilege of having it printed.⁴³ In just a short time, though, Foster would negotiate lucrative contracts with music publishers under unprecedentedly favorable terms. The *Atlantic Monthly* article that noted Foster's rapid rise to fame referred to a trio of songs that were most responsible for his change in fortunes: "Lou'siana Belle," "Uncle Ned," and "Oh! Susanna."⁴⁴

These songs were all copyrighted between 1847 and 1848.⁴⁵ Foster left some indication of the publishing arrangement he had at this time in a letter dated May 25, 1849:

I gave manuscript copies of each of the songs... to several persons before I gave them to Mr. Peters for publication, but in neither instance with any permission nor restriction in regard to publishing them.... Mr. Peters has my receipt for each of the songs.⁴⁶

This letter was addressed to William E. Millet, a New York publisher who had claimed a copyright in "Oh! Susanna" the previous year although no record of formal registration has survived.⁴⁷ Millet had written to Foster, rather than the authorized copyright holder Peters, enquiring about the copyright status of the song, and Foster's reply revealed valuable insider information that undercut his own interests.

Kevin Parks noted that Foster's decisions regarding "Oh Susanna!" "served as an object lesson against the practice of distributing too many manuscripts before

publication.”⁴⁸ Whatever amount Foster received for the song it was a trifle compared to its overall sales.⁴⁹ If Foster’s actions seem naïve, it must be noted that he had no notion of the success he would soon enjoy. Not only was Foster’s reputation unknown before “Oh Susanna!,” the song’s popularity would have been unparalleled even for an established composer. Because Foster proliferated manuscript copies to performers the song was widely pirated. Yet, despite its multiple editions the song sold in amounts that made many music publishers, including Millet and Peters, hefty sums.⁵⁰

If Foster was naïve in the early part of his career, the popularity of his songs gave him ample opportunity to learn their true value. The exposure he received from the success of “Oh Susanna!” led to a contract in 1849 with Firth, Pond, & Company, one of the largest publishing houses in America at the time.⁵¹ Foster did attempt to professionalize his business practices in the wake of this windfall. He had given the song “Nelly was a Lady” to an acquaintance in New York with a charge to circulate it to minstrel performers for use in their acts. After contracting with Firth & Pond, Foster took a deprecatory tone about the “miserable song” and suggested that if the acquaintance had “not already burned the copyright (as [Foster] certainly should have done) he may give it to Mess Firth & Pond any time.”⁵² There was a certain calculus in this self-effacing attempt to recover the document, as the acquaintance might have registered the copyright in his own name had he been aware of its economic potential. Morrison Foster later noted that the song “sold in immense numbers and to a profit of several thousands of dollars.”⁵³

The balance between maximizing exposure by circulating song manuscripts to popular minstrel performers and maximizing capitalization by limiting piracy was difficult to strike. The more widely a song was performed publically the more

manuscripts were available for unauthorized copying. Yet, public performance was the primary motivator for the purchase of authorized copies by antebellum Americans seeking to bring a piece of popular culture into their piano parlors at home. Foster's quick rise to fame meant that he was the first to sell his work in numbers that allowed him to compose music full-time, and he had to try and strike the balance between performance and piracy with little guidance. Firth & Pond gave this recommendation early in their relationship with Foster:

From your acquaintance with... bands of 'minstrels,' & from your known reputation, you can undoubtedly arrange with them to sing [your songs] & thus introduce them to the public in that way, but in order to secure the copyright exclusively for our house, it is safe to hand such persons printed copies only... for if manuscript copies are issued particularly by the author, the market will be flooded in a short time.⁵⁴

Foster's publishers further added that it was "advisable to compose only such pieces as are likely both in the sentiment & melody to take the public taste."⁵⁵

John Tasker Howard saw a redemptive element in Foster's early copyright failures, writing "Even though Foster made little or nothing from his earliest success, he learned two things: that he could write songs people liked to sing, and that these songs would bring money to the man who published them."⁵⁶ Yet, whatever lessons Foster may have learned early on his career, he was never able to translate them into a sustainable business model that would support himself and his family over the long term.

Copyright Complications

Perhaps influenced by the sage advice he received from Firth & Pond, beginning in 1850 Foster amended his strategy of passing song manuscripts out to any interested minstrel performer and instead attempted to partner with one in particular, Edwin Pearce

Christy. Several factors contributed to the stand-out success of Christy and his band. Minstrel music in general was more European than African in origin, but members of The Christy Minstrels paid close attention to the musicality of African-Americans, lending an air of authenticity to their sound.⁵⁷ Christy was also a particularly adept manager of the group's business affairs, and he recognized that Foster's sentimentalization of minstrelsy's content would help the genre make the transition from a lowbrow to a highbrow cultural form.⁵⁸ Emerson noted that "Commercial calculation probably played as great a role as politics in softening the minstrel shows E.P. Christy and other impresarios produced" and added that "E.P. Christy was above all else a businessman."⁵⁹

Foster's partnership with Christy included sending advanced copies of new songs so that by performance the public would be primed for the published versions when they became available, but it also went further. The two had an arrangement where Christy's name would be emblazoned upon the sheet music's title page as a kind of celebrity endorsement. The partnership was strained from the beginning though as Foster ran afoul of Christy's endorsement policies by also including the names of other popular minstrel acts on the title pages of "Gwine to run all night" (better known today as "Camptown Races") and "Dolly Day." Foster was apologetic in a letter dated February 23, 1850, claiming the page was "cut before I was informed of your desire that your name should not be used in connection with other bands." He promised to insist his publisher recut the title page and reiterated his "wish to unite with [Christy] in every effort to encourage a taste for this style of music so cried down by opera mongers."⁶⁰ In addition to evidencing an overt attempt to raise the cultural status of minstrelsy, this letter shows that Foster was making a sincere effort to professionalize his business dealings.

The following year, Foster attempted to strengthen his partnership with Christy by proposing an exclusive arrangement in which The Christy Minstrels would receive Foster's latest compositions in advance of publication for a fee of ten dollars per song. Foster began the proposal by claiming to have "received a letter from Mess. Firth, Pond & Co. stating that they have copy-righted a new song of mine ("Oh! boys, carry me 'long") but will not be able to issue it for some little time yet, owing to other engagements," which was a polite cover insinuating an intentional delay of publication so that demand for the song could be generated by Christy's performance. Foster confidently wrote that the "song is certain to become popular, as I have taken great pains with it" and emphasized the benefit his proposed arrangement would bring to Christy as "it will become notorious that your band brings out all the new songs."⁶¹

At this point in his career, Foster had cause for confidence in the popularity of his work, but the note of ostentation in Foster's tone likely did not set well with "the tough-minded minstrel man" Christy.⁶² Still, Christy did agree to the arrangement and sent the requested sum for an advance copy. In a letter acknowledging receipt of the payment, Foster urged Christy to "Remember [the song] should be sung in a pathetic, not a comic style" again indicating the sentimental turn in minstrel music that occurred in the early 1850s. Unfortunately for their working relationship, Foster yet again had to inform Christy of an attribution misstep and express his "regret that it is too late to have the name of your band on the title page," adding "but I will endeavor to place it (alone) on future songs, and will cheerfully do anything else in my humble way to advance your interest."⁶³

Christy could hardly be blamed if he grew tired of Foster's equivocation about song attribution and continued requests for money. Whether to assuage Christy's ire over past missteps, or as an attempt on Foster's part to distance his public persona from the lowbrow connotation of minstrelsy, a decision was made around this time to publically give full attribution for one of Foster's sentimental minstrel songs to Christy. The printed version of "The Old Folks at Home" (better known today as "Swanee River") issued by Firth, Pond, & Company attributed the song as "Written and Composed by E. P. Christy."⁶⁴ As Foster's reputation grew in the early 1850s, his options for creative control over his work likewise increased. There is some evidence that he desired to move beyond the racially-charged minstrel content he had relished as a child and rode to fame as a young man. "The Old Folks at Home" and "Ring de Banjo" were both copyrighted in 1851 and both featured lyrics written in exaggerated black dialect, but several other Foster songs were copyrighted that year written in a more genteel style and intended for the piano parlors of the middle class.⁶⁵ Yet, the overwhelmingly positive public reception of "The Old Folks at Home" after its release caused Foster to again renege on his agreement with Christy. Foster's explanation for doing so merits quoting at some length:

As I once intimated to you, I had the intention of omitting my name on my Ethiopian songs, owing to the prejudice against them by some, which might injure my reputation as a writer of another style of music, but I find that by my efforts I have done a great deal to build up a taste for the Ethiopian songs among refined people by making the words suitable to their taste, instead of the trashy and really offensive words which belong to some of that order.⁶⁶

Steven Saunders's discussion of this letter identified it as the "canonical text" of the Foster conversion narrative.⁶⁷ Previous work in that vein has focused on Foster's misgivings about his past use of "trashy and really offensive" racial slurs in his song

lyrics. Importantly though, it was concern over his reputation, rather than a conversion of worldview, that motivated him. Foster went on to request from Christy that he be allowed to “reinstate” his name on the song and he declared his intention to “pursue the Ethiopian business without fear or shame.” Foster’s pride was evident in the statement “I am not encouraged in undertaking this so long as ‘The Old Folks At Home’ stares me in the face with another’s name on it.” After promising to refund the money Christy had paid for the privilege of purchasing the song’s attribution rights, Foster revealed something of what truly motivated him as an artist, confessing “I find I cannot write at all unless I write for public approbation and get credit for what I write.”⁶⁸ The copy of this letter held in the Foster Hall Collection bears the following revelation of Christy’s thoughts on this request written on the verso: “S.C. Foster - A mean & contemptible – vascillating [sic] skunk & plagiarist.”⁶⁹

Foster hoped the reputation he had built upon blackface minstrel songs would allow him to transition into more respectable parlor music, but he had no moral qualms about continuing to produce whatever content the public was interested in buying. To avoid a negative association with the racialized language of “The Old Folks at Home,” Foster accepted some amount of compensation to attribute its lyrics and music to Christy. After it became clear the song and its sentimental depiction of the “’ol plantation” would be a tipping point in minstrelsy’s cultural reception, Foster vacillated and attempted to recover his lost social currency. Regarding Foster’s racial worldview, the series of correspondence with Christy does not reveal a conversion, but rather Foster’s investment in the “values of the middle class” and that while he was “palpably uncomfortable with some of the low, vulgar, and low-class associations of minstrelsy,” he understood the

financial imperative of composing such work.⁷⁰ Regarding Foster's interpretation and use of copyright, his initial attribution decision regarding "The Old Folks at Home" was an attempt to divorce legal ownership from public perception that ultimately backfired. From the beginning, Firth & Pond registered the copyright in the song on Foster's behalf and paid the royalties to him, but by not initially taking ownership in the court of public opinion Foster's long-term interests in the song suffered.⁷¹

Copyright and Contracts

The dysfunction in Foster's work life was mirrored at home. Foster married Jane McDowell on July 26, 1850, and their relationship was strained by periods of long separation throughout his thirteen remaining years.⁷² Their daughter Marion, born nine months in to the marriage, would be their only child.⁷³ With proper management the income Foster earned from songwriting at this time could have comfortably supported his young family, but Foster struggled to stay within his means.⁷⁴ After his father's financial troubles the family depended on Brother William for support, and Foster transferred that co-dependent patronage relationship to Morrison in his own adult years.

A letter to Morrison dated July 8, 1853 illustrated the arrangement. Foster repaid a loan from his brother with a check from Firth & Pond, found he had "rather stinted" himself by paying the loan back early, and requested the money be returned for the time being. Foster boasted about his impending song earnings, promising to "take the first occasion to pay" Morrison back in full. While Foster claimed he was "not living expensively," his letter also mentioned attending races at the Hippodrome, spending time at a new saloon, plans to take in an opera performance, and a visit the Crystal Palace in the coming weeks.⁷⁵ When Foster's financial reality did not meet with his worldview of

how an artist of his stature should live, he chose to keep up appearances rather than amend his behavior.

Foster's financial situation was not the result of unfair treatment from his publishers. When he wrote to Morrison requesting his loan repayment back, he was only two months into a new contract with Firth & Pond that was more favorable than his first in 1849. His 1854 contract, still extant in the Foster Hall Collection, was more favorable still offering Foster as much as a ten percent royalty on his best-selling compositions.⁷⁶ Howard examined the contract and related copyright records in depth, and noted the fact it was written in Foster's own hand "prompts one to speculate whether the composer, with the aid of an able lawyer, dictated his own terms," adding "by this time he was no doubt in a powerful enough position to do so."⁷⁷ This speculation could well be true, but bargaining acumen did not equate to fiscal responsibility in Foster's case.

In the mid-1850s, money was coming in from Foster's songs, but he continued to live beyond his means by drawing advances on his future interests from Firth & Pond. The account book Foster kept provides detailed evidence of this practice.⁷⁸ Worse still, Foster's compositional output lagged as he only copyrighted one song a year in 1856 and 1857, despite having the strongest contractual incentive of his career to produce new music.⁷⁹ Matters must have been dire, because it was at this time that Foster made an irrevocable decision regarding his future interests that displayed a fundamental misinterpretation and misuse of the copyrights he held in his songs.

The contract Foster inked with Firth & Pond in 1858 had similar terms as its predecessor, including up to ten percent royalties on future compositions. However, in this contract Foster agreed to relinquish all future interests in his previous songs.⁸⁰ A

document exists in which Foster tallied what he had earned for each of the songs published by Firth, Pond, & Company with an estimate of future earnings in an adjoining column. The list began with best sellers such as “The Old Folks at Home” and “My Old Kentucky Home” but also included Foster’s lesser known titles. All told, Foster reckoned the thirty-six songs on the list had earned him \$9,436.96 in just over six years, and he estimated his future earnings in the amount of \$2,786.77.⁸¹ He ultimately accepted a one-time payment of just \$1,872.28 for the entire repertoire on March 14, 1857.⁸²

Harmonizing Dissonance

By the time their final contract expired in August of 1860, Foster’s consistent requests for advances on future earnings had left him in debt to Firth & Pond to the tune of \$1,396.64 and they refused to send any more money.⁸³ Foster acknowledged this in a letter to Morrison that began straight to the point by asking to borrow twelve dollars, and then downplayed the seriousness of the Firth & Pond situation as a minor dispute. Foster tried to save face by saying he was inclined to sign with another publishing house once his current agreement expired.⁸⁴ Yet, a month later Foster requested of his brother another fifty dollars.⁸⁵ Both letters mention that he hoped to soon be on his way to New York.

Foster, along with his wife and daughter, arrived in New York before the election of President Abraham Lincoln in late 1860.⁸⁶ The following year, Jane would take Marion back to the more stable environs of Pennsylvania, but Foster would remain until his death on January 13, 1864.⁸⁷ Accounts from acquaintances, some written down decades later, offer all that is known about the end of Foster’s life.⁸⁸ Ironically, while he

had less financial incentive than ever to compose new music, the copyright record shows that this period was one of the most musically productive of Foster's career.⁸⁹

A particularly fruitful partnership was formed with Union veteran George Cooper after Cooper returned to New York from fighting in the Battle of Gettysburg. O'Connell noted that the two men, "produc[ed] eighteen songs in six months," and that "When Cooper penned the words to Foster's songs, they had just the right amount of sentimentality to make them moving, but not tragic."⁹⁰ In addition to copyright records, an ambrotype of the two men circa 1863 evidenced their collaboration.⁹¹ It also evidenced just how far Foster's star had fallen. The quality of the image suggests it was taken at one of the many discount establishments that crowded Foster's lower Broadway haunts, rather than at the more prestigious studios of Jeremiah Gurney or Mathew Brady that would have once appealed to Foster's class sensibilities.⁹² Foster's image is also blurred, suggesting that he had trouble standing still during the three to five second exposure necessary to make a quality image.

George Birdseye, a contemporary and sometime collaborator of Foster's during this period, characterized him as an alcoholic and wrote "it was not seldom, in consequence, that a publisher would take advantage of his miserable condition, paying him a paltry sum for what other composers would demand and receive a fair remuneration."⁹³ Birdseye gets several details demonstrably wrong in his account, but Foster likely did struggle with alcoholism. In his later years, Foster could no longer command royalty agreements, much less advances, and instead had to sell his work outright for whatever he could get.

In some ways, Foster was a casualty of the sharp decline in music sales during the American Civil War. The public was no longer interested in his signature sentimental renderings of Southern life, and even the market for pro-Union patriotic songs was as divided as the nation itself.⁹⁴ But Foster was also a victim of his own addictions and poor business decisions that left him destitute. Had he lived even a few years longer, he would have seen public interest in his songs revive after the end of the war. He was at least spared the sting of realizing just how foolish his decision to sell out his royalty interests in them was.

The application of ritual economy to uncover Foster's interpretation and use of copyright reveals a fundamental misunderstanding about its purpose. Foster's obsession with reputation, coupled with his personal demons, resulted in a copyright strategy that favored short-term expediency over long-term investment. Stephen Foster was not "America's first professional songwriter."⁹⁵ He was incredibly talented, but the unprofessional approach to his musical interests revealed by his interpretation and use of copyright has been as much obscured by the problem of hypercanonization as his racial worldview. The popularity of his songs rightly deserves a place of primacy in American music history, but the precedent that he helped set for inequality in American popular culture and for content creators being more focused on fame than financial fairness are also undeniable parts of his legacy.

¹ R. P. Nevin, "Stephen C. Foster and Negro Minstrelsy," *Atlantic Monthly* 220, no. 121: 613-614.

² See Kevin Parks, *Music & Copyright in America: Toward the Celestial Jukebox* (Chicago, IL: American Bar Association, Section of Intellectual Property Law, 2012), 13-20.

³ William Lichtenwanger, "Music and Copyright Law in the United States," in *Music Publishing and Collecting: Essays in Honor of Donald W. Krummel*, ed. David Hunter (Urbana, IL: Graduate School of Library and Information Science, University of Illinois at Urbana-Champaign, 1994), 70-71.

⁴ *An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned*, Chapter 15, *U.S. Statutes at Large* 1 (May 31, 1790): 124-126.

⁵ Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, TN: Vanderbilt University Press, 1968), 180-183.

⁶ Meredith L. McGill, "Copyright," in *A History of the Book in America, Volume 2 An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840*, eds. Robert A. Gross and Mary Kelley (Chapel Hill, NC: The University of North Carolina Press, 2010), 198-200.

⁷ Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton, NJ: Princeton University Press, 2014), 82-122.

⁸ Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago, IL: The University of Chicago Press, 1998), 179-211.

⁹ See Meredith L. McGill, *American Literature and the Culture of Reprinting, 1834-1853* (Philadelphia, PA: University of Pennsylvania Press, 2013), 1-8.

¹⁰ Joshua Kendall, *The Forgotten Founding Father: Noah Webster's Obsession and the Creation of an American Culture* (New York, NY: Berkley Books, 2010), 89-90.

¹¹ *Ibid.*, 351-357.

¹² *An Act to amend the several Acts respecting Copyright*, Chapter 16, *U.S. Statutes at Large* 4 (February 3, 1831): 436-439.

¹³ See Russell Sanjek, *American Popular Music and its Business: The First Four Hundred Years, Volume 2 From 1790 to 1909* (New York, NY: Oxford University Press, 1988), 3-32 for a seminal discussion of the early American sheet music trade and its connections with American publishing.

¹⁴ See Melissa J. Homestead, *American Women Authors and Literary Property, 1822-1869* (Cambridge, UK: Cambridge University Press, 2005), 105-149 and Martin T. Buinicki, *Negotiating Copyright: Authorship and the Discourse of Literary Property Rights in Nineteenth-Century America* (New York, NY: Routledge, 2006), 63-106 for extended discussions of *Uncle Tom's Cabin*, Harriett Beecher Stowe, and copyright.

¹⁵ *Stowe v. Thomas*, 23 F. Cas. 201 (1853).

¹⁶ See Robert C. Toll, *Blackening Up: The Minstrel Show in Nineteenth-Century America* (New York, NY: Oxford University Press, 1974), 3-21 for a seminal discussion of blackface minstrelsy and its origins.

¹⁷ Stephanie Dunson, "The Minstrel in the Parlor: Nineteenth-Century Sheet Music and the Domestication of Blackface Minstrelsy," *ATQ (The American Transcendental Quarterly)* 16, no. 4 (December 2002): 245.

¹⁸ Nevin, "Negro Minstrelsy," 610.

¹⁹ Ken Emerson, *Doo-Dah!: Stephen Foster and the Rise of American Popular Culture* (New York, NY: Simon & Schuster, 1997), 65.

²⁰ See, for example, Gilbert Chase, *America's Music: From the Pilgrims to the Present* (New York, NY: McGraw-Hill Book Company, Inc., 1955), 259-300; Alexander Saxton, "Blackface Minstrelsy and Jacksonian Ideology," *American Quarterly* 27, no. 1 (March 1975): 3-28; Charles Hamm, *Yesterdays: Popular Song in America* (New York, NY: W. W. Norton & Company, 1979), 109-140; Dale Cockrell, *Demons of Disorder: Early Blackface Minstrels and Their World* (Cambridge, UK: Cambridge University Press, 1997); Eric Lott, *Love and Theft: Blackface Minstrelsy and the American Working Class* (Oxford, UK: Oxford University Press, 2013); and Douglas A. Jones Jr., "Black Politics but Not Black People: Rethinking the Social and "Racial" History of Early Minstrelsy," *TDR: The Drama Review* 57, no. 2 (Summer 2013): 21-37.

²¹ Lawrence Levine, *Highbrow / Lowbrow: The Emergence of Cultural Hierarchy in America* (Cambridge, MA: Harvard University Press, 1988), 9. See also Lawrence Levine, *Black Culture and Black Consciousness: Afro-American Folk Thought from Slavery to Freedom* (Oxford, UK: Oxford University Press, 1977).

²² *Ibid.*, 140-141.

²³ See Nicholas Tawa, *A Music for the Millions: Antebellum Democratic Attitudes and the Birth of American Popular Music* (New York, NY: Pendragon Press, 1984), 37-47; Susan Key, "Sound and Sentimentality: Nostalgia in the Songs of Stephen Foster," *American Music* 13, no. 2 (Summer 1995): 145-166; Lee Glazer and Susan Key, "Carry Me Back: Nostalgia for the Old South in Nineteenth-Century Popular Culture," *Journal of American Studies* 30, no. 1 (April 1996): 1-24; and Susan Key, "Forever in Our Ears": Nature, Voice, and Sentiment in Stephen Foster's Parlor Style," *American Music* 30, no. 3 (Fall 2012): 290-307.

²⁴ Jennie Lightweis-Goff, "'Long Time I Trabble on de Way': Stephen Foster's Conversion Narrative," *Journal of Popular Music Studies* 20, no. 2 (June 2008): 150.

²⁵ *Ibid.*, 151.

²⁶ See Deane Leslie Root, “The ‘Mythtory’ of Stephen C. Foster or Why His True Story Remains Untold,” *American Music Center Research Journal* 1, no. 1 (1991): 20-36.

²⁷ *Ibid.*, 26.

²⁸ See Calvin Elliker, “The Collector and Reception History: The Case of Josiah Kirby Lilly,” in *Music Publishing and Collecting: Essays in Honor of Donald W. Krummel*, ed. David Hunter (Urbana, IL: Graduate School of Library and Information Science, University of Illinois at Urbana-Champaign, 1994), 189-203 and Mariana Whitmer, “Josiah Kirby Lilly and the Foster Hall Collection,” *American Music* 30, no. 3 (Fall 2012): 326-343 on the provenance of the Foster Hall Collection.

²⁹ Eliza C. Foster to William B. Foster, Jr., May 14, 1832, Foster Hall Collection, CAM.FHC.2011.01, Center for American Music, University of Pittsburgh (hereafter FHC). Note that much of this collection is digitized and available online at <http://www.pitt.edu/~amerimus/>.

³⁰ Morrison Foster, *Biography, Songs, and Musical Compositions of Stephen C. Foster, Author of “The Old Folks at Home”* (Pittsburgh, PA: Percy F. Smith Printing and Lithographic Company, 1896), 10-11.

³¹ Stephen C. Foster to William B. Foster, Sr., January 14, 1837, FHC.

³² Stephen C. Foster to William B. Foster, Jr., c. 1840-1841, FHC.

³³ William B. Foster, Sr. to William B. Foster, Jr., September 3, 1841, FHC.

³⁴ John Tasker Howard, *Stephen Foster: America’s Troubadour*, rev. ed. (New York, NY: Thomas Y. Crowell Company, 1953), 92-93.

³⁵ JoAnne O’Connell, *The Life and Songs of Stephen Foster: A Revealing Portrait of the Forgotten Man behind “Swanee River,” “Beautiful Dreamer,” and “My Old Kentucky Home”* (Lanham, MD: Rowman & Littlefield, 2016), 83-86.

³⁶ See, for example, Howard, *America’s Troubadour*, 132-138; Emerson, *Doo-Dah!*, 118-138; and O’Connell, *A Revealing Portrait*, 83-101. Note that, in contrast, William W. Austin, “Susanna,” “Jeanine,” and “The Old Folks at Home”: *The Songs of Stephen Foster from His Time to Ours*, 2nd ed. (Urbana, IL: University of Illinois Press, 1987), 13-26 does consider the risks Foster undertook by pursuing songwriting full-time and Austin’s analysis provides a helpful counterpoint to the hypercanonized narrative.

³⁷ Evelyn Foster Morneweck, *Chronicles of Stephen Foster’s Family, Volume 1* (Pittsburgh, PA: University of Pittsburgh Press, 1944), 1-9.

³⁸ Foster, *Biography, Songs, and Musical Compositions*, 7-8.

³⁹ Morneweck, *Chronicles*, 50.

⁴⁰ See, for example, Stephen C. Foster to Ann Eliza Foster, September 15, 1845, FHC where Foster mentions his interest in taking over a clerkship in Washington, D.C. that was held by his brother Henry.

⁴¹ See O'Connell, *A Revealing Portrait*, xxv-xxxii for a theoretical and methodological argument that positions Foster's songs as evidential of his worldview.

⁴² Foster, *Biography, Songs, and Musical Compositions*, 13.

⁴³ Parks, *Music & Copyright*, 14.

⁴⁴ Nevin, "Negro Minstrelsy," 613-614.

⁴⁵ Calvin Elliker, *Stephen Collins Foster: A Guide to Research* (New York, NY: Garland Publishing, Inc., 1988), 8-11.

⁴⁶ Stephen C. Foster to William E. Millet, May 25, 1849, FHC.

⁴⁷ Howard, *America's Troubadour*, 139.

⁴⁸ Parks, *Music & Copyright*, 15.

⁴⁹ Howard, *America's Troubadour*, 136-138.

⁵⁰ John Tasker Howard, "Stephen Foster and His Publishers," *The Musical Quarterly* 20, no. 1 (January 1934): 78-79.

⁵¹ Though no copy of the 1849 contract has survived, details can be surmised from references to it in extant contracts from 1854 and 1858.

⁵² Stephen C. Foster to Morrison Foster, April 4, 1849, FHC.

⁵³ Ibid.

⁵⁴ From Firth, Pond & Company, September 12, 1849, FHC.

⁵⁵ Ibid.

⁵⁶ Howard, "Stephen Foster and His Publishers," 79.

⁵⁷ Toll, *Blackening Up*, 46-47. See also Tracy C. Davis, "I Long for My Home in Kentuck': Christy's Minstrels in Mid-19th-Century Britain," *TDR: The Drama Review* 57, no. 2 (Summer 2013): 38-65 and Chinua Thelwell, "The young men must blacken

their faces': The Blackface Minstrel Show in Preindustrial South Africa," *TDR: The Drama Review* 57, no. 2 (Summer 2013): 66-85.

⁵⁸ Cockrell, *Demons of Disorder*, 154.

⁵⁹ Emerson, *Doo-Dah!*, 95.

⁶⁰ From Stephen C. Foster to E. P. Christy, February 23, 1850, FHC. Note that this copy is a photocopy. The original is held by the Library of Congress, call number ML95.F8.

⁶¹ From Stephen C. Foster to E. P. Christy, June 12, 1851, FHC. Note that this copy is a photocopy. The original is held by the Henry E. Huntington Library, San Marino, California.

⁶² Sanjek, *American Popular Music*, 76.

⁶³ From Stephen C. Foster to E. P. Christy, June 20, 1851, reprinted in Elliker, *Guide to Research*, 96. The original is held by the Henry E. Huntington Library, San Marino, California.

⁶⁴ Steven Saunders and Deane L. Root, *The Music of Stephen C. Foster, Volume 1 1844-1855* (Washington, D.C.: Smithsonian Institution Press, 1990), 191.

⁶⁵ Elliker, *Guide to Research*, 5-17.

⁶⁶ From Stephen C. Foster to E. P. Christy, May 25, 1852, FHC.

⁶⁷ Steven Saunders, "The Social Agenda of Stephen Foster's Plantation Melodies," *American Music* 30, no. 3 (Fall 2012): 278.

⁶⁸ From Stephen C. Foster to E. P. Christy, May 25, 1852, FHC.

⁶⁹ Ibid. Note that this copy was included as enclosure for C869c correspondence from Monroe Crannell to Morrison Foster. Although Elliker states that the original of the 1852 letter is in the Foster collection, it appears only this copy, made in Mr. Crannell's hand, is held by the Center for American Music. The whereabouts of the original document are not currently known.

⁷⁰ Saunders, "Social Agenda," 281.

⁷¹ See O'Connell, *A Revealing Portrait*, 134-141.

⁷² From Stephen C. Foster to Ann Eliza Buchanan, July 16, 1850, FHC.

⁷³ Stephen Foster's Sketchbook, 1851-1863, FHC contains a tabulation on the inside of the back cover that seems to calculate the time from Foster's marriage to Marion's birth,

perhaps indicating that Foster had doubts about her paternity. See Emerson, *Doo-Dah!*, 152-153 for a further discussion.

⁷⁴ Howard, "Stephen Foster and His Publishers," 88 estimated that Foster made over \$1,400 a year from 1851 to 1855.

⁷⁵ From Stephen C. Foster to Morrison Foster, July 8, 1853, FHC.

⁷⁶ Contract between Foster and Firth, Pond & Company, 1854, FHC.

⁷⁷ Howard, "Stephen Foster and His Publishers," 83.

⁷⁸ Stephen Foster's Account Book, 1837-1863, FHC.

⁷⁹ Elliker, *Guide to Research*, 5-6.

⁸⁰ Contract between Foster and Firth, Pond & Company, 1858, FHC.

⁸¹ From Stephen C. Foster to Firth, Pond, & Co., List of songs with prediction of future earnings, undated, FHC. The original is held by the Library of Congress, call number ML95.F8. Note that Howard, "Stephen Foster and His Publishers," 84 dated this list as January 21, 1857 and helpfully inserted the copyright dates for each song into his published reprint.

⁸² Stephen Foster's Account Book, 1837-1863, FHC.

⁸³ Howard, "Stephen Foster and His Publishers," 90.

⁸⁴ From Stephen C. Foster to Morrison Foster, April 27, 1860, FHC.

⁸⁵ From Stephen C. Foster to Morrison Foster, May 31, 1860, FHC.

⁸⁶ O'Connell, *A Revealing Portrait*, 235.

⁸⁷ *Ibid.*, 246. See also 321-340 for O'Connell's argument that Foster's death may have been a suicide, rather than an accidental fall as has commonly been claimed.

⁸⁸ See, for example, John Mahon, "The Last Years of Stephen C. Foster," *New York Clipper*, March 24, 1877, 412 and Effie Parkhurst Duer, "Personal Recollections of the Last Days of Stephen Foster," *The Etude* 34, no. 9 (September 1916): 625-626.

⁸⁹ Elliker, *Guide to Research*, 3-17.

⁹⁰ O'Connell, *A Revealing Portrait*, 273.

⁹¹ Original ambrotype of Stephen Foster and George Cooper, 1863, FHC.

⁹² See Edwin G. Burrows and Mike Wallace, *Gotham: A History of New York City to 1898* (Oxford, UK: Oxford University Press, 1999), 687-690 for a discussion of the portrait photography trade on Broadway in New York during the American Civil War.

⁹³ George W. Birdseye, "Sketch of the late Stephen C. Foster," *Western Musical World* 9, no. 1 (January 1867): 3.

⁹⁴ Sanjek, *American Popular Music*, 228-239.

⁹⁵ O'Connell, *A Revealing Portrait*, xxix.

CHAPTER 4

MATHEW BRADY: ILL-PROTECTED PORTRAITS

Like Foster, Mathew Brady was also born in the 1820s, but he would live much longer.¹ During his long career Brady became the most well-known photographer in nineteenth-century America. In an 1891 interview with *New York World* reporter George Alfred Townsend, Brady revealed the motivation behind his efforts to photographically document the Civil War. “From the first I regarded myself as under obligation to my country to preserve the faces of its historic men and mothers,” he said, adding:

My wife and my most conservative friends had looked unfavorably upon the departure from commercial business to pictorial war correspondence, and I can only describe the destiny that overruled me by saying that, like Euphorion, I felt that I had to go. A spirit in my feet said, ‘Go,’ and I went. After that I had men in all parts of the army, like a rich newspaper... I spent over \$100,000 in my war enterprises.

Brady also claimed in this interview that “...many, I might say most, of the pictures I see floating about this country are from my ill-protected portraits.”²

Brady’s attempts to use copyright law to protect his photographs before and during the Civil War are the subject of this chapter. Context on the legal, technological, and aesthetic history of early photography necessary to explore this case will be considered. A look into Brady’s worldview will be followed by an exposition of relevant archival sources including copyright registrations, copyright notices on printed photographs, and the case of *Brady & Gibson v. Bellew* (1865). These sources suggest that Brady had a surprising degree of agency in establishing copyright protection for

photography, and that his worldview may be illustrative of how content creators view copyright today.

Law, Technology, and Art

In the aforementioned interview, published five years before Brady's death, time and age had perhaps obscured the details of his memory. Many of the photographers documenting the Civil War worked for Brady when it began, but by May 1863 Alexander Gardner, business manager for Brady's Washington, D.C. operations, had left to start his own gallery. When Gardner left several of Brady's operators went with him as well as hundreds of negatives from the first two years of the war. The cause of this split has been the subject of speculation for decades, and early historical narratives often identified quarrels over attribution for the work being done as central to the rift.³

Brady prospered during the golden age of the daguerreotype by capitalizing on the "American appetite for images [that] developed in tandem with a larger revolution in mass communication" in the mid-nineteenth century.⁴ However, the \$100,000 figure he quoted for his Civil War project would be difficult to prove. Gardner required that fastidious financial records be kept, but when he left Brady struggled to find an actuarial talent to complement his own flair for marketing and promotion.⁵ In fact, very few business records and personal correspondence from Brady's career have survived, complicating the efforts of historians seeking to reconstruct his life and legacy.

The photographs themselves are the most salient records Brady left behind. Bob Zeller characterized Brady's early attempts to register his work for copyright as "a curious phenomenon that merits further study," and this chapter contextualizes and expands upon the source material Zeller has previously considered.⁶ Perhaps the most

curious aspect of this phenomenon is that, although photography would not gain explicit eligibility for copyright protection until 1865, Brady anticipated statutory protection by personally filing his work well before the Civil War.⁷ It is likely that Brady would have viewed submitting photographs as a continuation of the long-standing precedent for image-based work in American copyright law. The first American Copyright Act in 1790 protected “any map, chart, book or books,” notably placing the image-based items first.⁸ An amendment in 1802 extended “the benefits thereof to designing, engraving, and etching historical and other prints.”⁹ Brady had submitted lithographic engravings made from his daguerreotypes for copyright protection early on in his career, so it would have been quite natural for him to register his photographs as well once photography matured into a viable medium with mass commercial appeal [Figure 1].

The early history of photography involved a complex series of interconnected technological innovations that progressed rapidly, at times simultaneously, around the globe. The daguerreotype process of exposing images directly on to a silver plate was first brought to America in 1839 by Samuel F. B. Morse. He learned the technique from Louis Daguerre himself while Morse was abroad seeking a French patent to protect his telegraph from European infringement. Morse began teaching daguerreotypy to others in New York shortly after his return.¹⁰ Brady learned the process either from Morse’s lectures or through Morse’s pupil William Page, who had given art lessons to Brady as a young man.¹¹

Initial daguerreotype technology created a single positive image that was difficult to mass produce. The daguerreotype process was especially suited to fine portraiture because of the detailed images created when light entering the camera’s aperture reacted



Figure 1. Francis D'Avignon, *Jenny Lind* (Lithograph bearing the labels "Lith. by F. D'Avignon" and "from Dag. by Brady" as well as the inscription "Entered according to act of Congress in the year 1850, by M.B. BBrady [sic] and F. D'Avignon, in the Clerk's office of the District Court of the Southern district of N.Y." Handwritten along the bottom are the words "Deposited in the Clerk's office So. Dist. N.Y. Sept. 26, 1850"), 1850. From Library of Congress, Prints & Photographs Division, LC-DIG-pga-08759. <http://www.loc.gov/pictures/item/2003664989/>. Public Domain.

with the silver-treated plate inserted at its back. Yet, for these same reasons daguerreotype materials were cost-intensive, fragile, and chemically hazardous. The transition in America from daguerreotypy to photography and the series of innovations that led to the wet-plate collodion negative have been treated in detail in previous work.¹² Central to a discussion of copyright is the corresponding ability to turn mass produced images into a marketable commodity.

Formats like the daguerreotype, along with the ambrotype and tin-type, were inherently personal in nature. Images of family members and loved ones were in high demand at the onset of the Civil War as soldiers sent them home and carried them into the field.¹³ These mediums needed no copyright protection as they were intended for individual ownership, but the same technological convergence that made personal photography possible also enabled mass produced formats. *Cartes-de-visite* sporting images of presidents, senators, and generals sold widely and were kept in family keepsake albums alongside personal images.¹⁴ Trademarks from the studio that produced them were often printed on their backs, but copyright notices were printed on the front directly under the image itself.¹⁵ Stereographs provided an immersive viewing experience for mid-nineteenth century Americans. By inverting two images taken from slightly different angles and then viewing them through a stereoscope, a three-dimensional effect could be achieved. Copyright notices were printed on stereographs at least as early as 1854 [Figure 2].¹⁶

The poet and philosopher Oliver Wendell Holmes invented a popular, handheld version of the stereoscope, so it is unsurprising that he also used his pen to write about



Figure 2. Frederick Langenheim, *The Bible House* (Stereograph bearing the inscription “Entered according to Act of Congress in the year 1854 by F. Langenheim in the Clerks office of the district Court for the Eastern district of Pennsylvania”), 1854. From the private collection of Bob Zeller. Public Domain.

photography.¹⁷ Holmes wrote of The Brady Gallery's images from the Battle of Antietam:

...the truthful sunbeam has delineated in all their dread reality... the dead.... Let him who wishes to know what war is look at this series of illustrations. These wrecks of manhood thrown together in careless heaps or ranged in ghastly rows for burial were alive but yesterday.¹⁸

These foreboding words echoed an unnamed *New York Times* reporter who said of the Antietam images shortly after they were made public that “Mr. BRADY has done something to bring home to us the terrible reality and earnestness of war. If he has not brought bodies and laid them in our dooryards and along the streets, he has done something very like it.”¹⁹

Holmes's reference to “the truthful sunbeam” was also an echo of earlier work. William Henry Fox Talbot invented a photographic process in England that was simultaneous to Daugerre's discoveries in France.²⁰ Talbot published six photographically illustrated fascicles from 1844 to 1846 under the title *The Pencil of Nature*, and references to photography as a natural product of the sun would continue throughout the nineteenth century.²¹ In these early days, situating photography as a product of nature or of the sun, rather than of the photographer's own creativity, was framed as a mark of authenticity that set photography apart from the painted canvas.²² Townsend was still writing in this mode in 1891 when he said that because of Brady's work “...we possess many a face in the pencil of the sun and the tint of the soul thereof which otherwise would have been imbecile in description or fictitious by the perversion of some portrait painter.”²³

The tension between natural and human authorship has called into question whether photography can be “art” in its truest sense. Lincoln Kirstein characterized Brady as unconcerned with “the theoretical right to claim the prestige of an artist.”²⁴ Robert Taft emphasized Brady’s contributions to Civil War documentation while intentionally desacralizing him as an artist.²⁵ Beaumont Newhall agreed, writing “The credit ‘From a Daguerreotype by Brady,’ which appeared time and again beneath wood engravings in the illustrated magazines of the [eighteen] fifties and as frontispieces of biographies, was the trademark of a firm, not the signature of an artist.”²⁶ These seminal early histories may have intended to subvert a belief in the popular imagination that Brady was responsible for every photograph taken during the Civil War.²⁷ More recently, historians such as William Frassanito and Bob Zeller have meticulously documented the origins of extant war images, and in doing so have demonstrated both the breadth and the limit of Brady’s contributions.²⁸ Sarah Kate Gillespie’s conceptualization of early photography as an intersection of “‘fine art,’ ‘science,’ and ‘technology’” has further recovered the aesthetic contributions of pioneers like Brady while contextualizing them within the complex milieu of imagery, industry, and ideas that was nineteenth-century America.²⁹

Theorists such as Walter Benjamin, Susan Sontag, and Roland Barthes have emphasized the photograph’s reproducibility and omnipresence as well as its inherent connection to historical preservation.³⁰ These considerations, along with the question of photography’s artistic status, have important theoretical implications, but central to an understanding of photography and copyright is a problem of authorship. By making his name synonymous with Civil War photography, Brady fulfilled something like the

“author function” Foucault described as “characteristic of the mode of existence, circulation, and functioning of certain discourses within a society.”³¹ The clearest evidence for this is photography’s attainment of copyright status, as copyright in the American statutory understanding could only be granted to authors of original works.³² The intricate historical processes that culminated in photographic copyright demonstrate a surprising amount of agency on the part of photographers, particularly by Brady. However, this agency would be undetectable utilizing Foucault’s paradigm, and instead requires a theoretical framework that privileges an understanding of individual worldview and historical process in the management of meaning and the shaping of interpretation. Ritual economy provides such a theory.³³

Brady’s Worldview

Source material on Brady’s early career relies mainly on his own reminiscences from late in life, but the contours are clear. Details about his youthful interest in art come through in the Townsend interview and in the writings of James Edward Kelly, who befriended Brady in his final years.³⁴ Brady’s first job in New York City was as a clerk at A. T. Stewart’s department store, known for hiring well-mannered, appearance-minded young men.³⁵ He then became a manufacturer of daguerreotype cases for a short while before opening the first of many successful New York studios in 1844.³⁶ To help make ends meet in those early days, Brady once oversaw the photography of prisoners for use as illustrations in Marmaduke Sampson’s phrenological text *The Rationale of Crime*.³⁷

As his career progressed however, Brady sought to associate his name exclusively with images of the elite. C. Edwards Lester wrote of him in 1851 for *The Photographic Art Journal* that “he was treated with courtesy and attention by the most distinguished

men” in Washington after Brady opened his first studio there.³⁸ Lester’s article was a thinly veiled advertisement for a subscription book that he and Brady put together with images and biographies of famous politicians, explorers, and scientists entitled the *Gallery of Illustrious Americans*.³⁹ Brady’s work continued to enjoy an elevated status in the press during the Civil War. James Horan compiled a bibliography of Brady images that were turned into engravings by *Harper’s Weekly* and *Frank Leslie’s Illustrated Newspaper* from 1861-1865, and the regularity with which these publications featured his work leaves a convincing record of its popularity.⁴⁰

After a subtle rebrand to *The Photographic and Fine Art Journal*, Brady’s name again appeared in the publication’s pages in an 1858 piece that began “No feeling is more common everywhere than a desire to see great or famous people.”⁴¹ Daniel Boorstin connected the increased ubiquity of image-based work resulting from “The Graphic Revolution” with “the means of fabricating well-knownness,” and his insight inspired other scholars to link technological advances in photography with the advent of celebrity image.⁴² Barbara McCandless noted the paradox between the inherently democratic promulgation of affordable photography in antebellum America juxtaposed with photography’s enablement of a celebrity culture in which the masses could participate.⁴³ Brady’s business strategy was built upon that emerging celebrity culture.

An 1860 article on the opening of Brady’s National Portrait Gallery described what fashionable New York patrons would have witnessed as they entered its doors at Broadway and Tenth:

The ample stairway of rich carved wood, introduces you to a very Valhalla of celebrities.... In this deep-tinted luxurious room, are gathered the senators and the sentimentalists, the

bankers and the poets, the lawyers and the divines of the state
and of the nation...⁴⁴

Brady's instinct to promote celebrity culture was financially rewarding. Business was brisk before the war, and the celebrity status Brady himself achieved opened many doors for him that lesser-known photographers could not have accessed. Yet, to characterize Brady's primary motivation as economic is too simplistic. In his own words, he was motivated by a preservation of history, albeit a version of history that exclusively privileged the rich and famous. To take but one example, Brady "might well have created the biggest print of anyone of his time" when he produced a huge photographic billboard in celebration of the completion of the Atlantic Cable that bore the likenesses of Cyrus Field, Samuel Morse, and Benjamin Franklin.⁴⁵

Yet, Mary Panzer demonstrated by an examination of the R. G. Dun & Co. credit records that Brady's attempts to lure customers with opulent galleries were precarious financially.⁴⁶ Deliberately spending more than is necessary to sustain a profitable enterprise does not suggest economic gain as a primary motivator. Brady was likely motivated by a complex, and even contradictory, set of economic, journalistic, and historical interests. An examination of his interpretation and use of copyright also reveals the desire for celebrity as a driving force in Brady's worldview.

Copyright Registrations

Brady's first Washington gallery opened in 1849. It initially flourished during the lead up to Zachary Taylor's presidential inauguration, but was forced to close the following year because Brady could not capture a large enough share of the crowded daguerreotype market to cover his costs.⁴⁷ He retreated to the relative stability of his New York studios, but returned to the nation's capital in 1858, this time with an able manager

to run the day-to-day operations.⁴⁸ Alexander Gardner had only recently immigrated from Scotland, but his previous experience in photography, journalism, and business quickly landed him a position in Brady's inner circle.⁴⁹

Prior to 1870, copyright registrations were made in local District Courts.⁵⁰ Brady's name first appeared in the copyright register for the District Court of the District of Columbia on October 11, 1859, but his was not the first photograph to be registered there. "Veterans of 1812 at the Tomb of Washington" had been registered on February 20, 1855, and a photograph of President Buchanan's inauguration was registered on March 6, 1857. Four months before Brady's submission twelve stereographs of various views around Washington were registered, all bearing "Photographed and published by Bryant & Smith" as part of their title. With subtle contrast, the title of Brady's first submission was "Photograph of the Administration 1859, designed and photographed by M. B. Brady," and the explicit mention of design can be interpreted as a mark of the artistry and authorship Brady believed he could claim in the image [Figure 3].⁵¹

Brady continued registering photographs for copyright in 1860 and 1861, but a significant spike in registrations throughout 1862 invites special scrutiny. Brady and his operators accounted for more than eighty percent of all copyright registrations in the District of Columbia that year, and they increased the total number of registrations from thirty-one in 1861 to two hundred thirteen in 1862. Despite this exponential increase:

Brady's gallery failed to come even close to formally copyrighting everything it produced. The 174 copyrights that flooded the clerk's office in 1862, nearly all for stereoscopic photographs, represented less than half of the [Brady] gallery's output of more than 400 images that year. Each Brady-mounted print nevertheless carried a copyright line.⁵²

No. 38,
 District of Columbia to wit:
 Be it remembered, that on the eleventh day of October
 Anno Domini one thousand eight hundred and fifty nine
 M. B. Brady of the District of Columbia has deposited in
 this office a Photograph the title of which is in the
 words following:
 "Photograph
 of the Administration
 1859,
 designed and photographed
 by
 M. B. Brady"
 the right whereof he claims as designer and proprietor
 in conformity with an act of Congress, entitled, "An act
 to amend the several acts respecting copy rights."
 E. J. Middleton
 Clerk of the District

Deposited 11th October 1859

Figure 3. *Copyright Registration, 1859* (Copyright registration entry for "Photograph of the Administration 1859, designed and photographed by M. B. Brady"), October 11, 1859. Copyrights and Assignments, Book 1, District of Columbia, 1845-1870, Rare Book and Special Collections, Library of Congress, Washington, D.C.

In addition to the formality of recording each entry by hand in the copyright registration book, it was common at the time to submit some evidence of the piece being registered. For books, this evidence was often a printed title page. Dramatic plays and musical compositions might include a strip of paper torn from a printed version of the work and bearing its title. Throughout 1862, first Brady and then his operators George Barnard, James Gibson, and Alexander Gardner submitted various substitutes for title pages along with their copyright registrations. Brady's first on January 6 was simply handwritten on a scrap of paper. No accompanying title page submissions have survived from the set of photographs he registered on January 11, but for those registered on March 12 Brady included blank *cartes-de-visite* labels that bore a copyright inscription on the front and the deposit date handwritten on the back. He also included various labels with the sets of photographs he submitted on May 5 and 7. On these same days, his employees Barnard and Gibson filed, for the first time, sets of photographs for copyright protection in their own names. In all, the box holding these title pages at the National Archives in Washington displays a wide variety of printed matter used as title page substitutes. The last two items that mention Brady's specific role in creating a photograph were printed advertisements submitted on June 3 that list him as "Artist," although their associated copyrights were registered in publisher George E. H. Day's name [Figure 4].⁵³

In early 1863, shifting political winds would have an effect upon copyright registration activity in the District of Columbia. President Abraham Lincoln had tired of Judge William Merrick's intransigent opposition to his war-time policies, and the most expedient way to out maneuver Merrick was to dissolve the District Court and reorganize it as the Supreme Court of the District of Columbia.⁵⁴ This change necessitated new



Figure 4. Title Pages
 (TOP LEFT: A title page submission handwritten on a scrap of paper.
 MIDDLE LEFT: A blank cart de visite label used as a title page submission.
 TOP RIGHT: A photograph back label glued to lined paper and used as a title page submission.
 MIDDLE RIGHT: The bottom of a large cart de visite label used a title page submission.

BOTTOM: An advertisement for "Photographic Portraits" used as a title page submission), 1862. Title Pages of Photographs Submitted for Copyright, 1854-1863, Records of the District Courts of the United States, RG 21, Box 1, Entry 40, National Archives and Records Administration, Washington, D.C.

judicial appointments as well as a new clerk of court, and future president Andrew Johnson suggested to Lincoln in a telegram that he could “make no better appointment for any office” than an “eminently qualified” R. J. Meigs.⁵⁵ Whatever Meigs’s qualifications may have been, they did not include exemplary attention to his duties as copyright registrar. The beautifully even handwriting of former clerk E. J. Middleton gave way to Meigs’s less readable script in the D.C. registration book on February 6, 1863. Throughout Meigs’s tenure the quality of entries steadily degrades. He signed the first three entries of 1863 under Middleton’s name, perhaps due to some formality with the reorganization, but he failed to correctly follow his predecessor’s numbering scheme and eventually abandoned it altogether. One entry was crossed out after a mistake was made, another was written illegibly small to fit within the bottom of a page, and several were left unsigned.⁵⁶ Perhaps the battles raging dangerously close to the nation’s capital made compliance with the intricate formalities of copyright seem trivial to the new clerk, for no title page submissions in the District of Columbia are extant for the year 1863.⁵⁷

Copyright Notices

With the 1802 extension of copyright protection to “historical and other prints,” Congress encountered the difficulties of copyright expansion into non-textual mediums. To accommodate these difficulties, a new formality required copyright notices “to be impressed on the face” of printed images such as maps, charts, and lithographic engravings.⁵⁸ The fact that such notices appeared upon the face of early printed photographs, despite the absence of specific copyright guidelines for photography, is further evidence that many American photographers assumed the new medium would enjoy the same legal classification that image-based work had for decades.

As with copyright registration, Brady was not the first to imprint such notices on his work, but he did craft specific language to assert his aesthetic and authorial prerogative. The exact wording of the copyright notice was legally mandated and had to be printed close to the image itself so that if reproduced without it a clear intent to evade the law would be demonstrated. The best-selling image formats during this period often carried a back label as well bearing the studio name, an image number if applicable, and the image title. The back labels of some formats from the Brady's Album Gallery series added this intimidating statement: "The Photographs of this series were taken directly from nature, at considerable cost. Warning is therefore given that legal proceedings will be at once instituted against any party infringing the copyright" [Figure 5].

Despite the widespread use of nature metaphors to describe nineteenth-century photography, this statement is probably the closest that Mathew Brady ever came to personally allow for nature's influence upon his work.⁵⁹ While it gives a clear legal warning, it also says something about Brady's understanding of natural versus human authorship. Brady acknowledged nature's role in the image's creation but emphasized his own costs in procuring them. Once the image was "taken," ownership was conferred. Such logic can find precedent in the foundational text of American copyright law, the Copyright and Patent Clause of the U.S. Constitution. From the beginning, copyright was conceived to "secure" an "exclusive right" to profit from the fruits of one's creative labor, and Brady asserted his rights with the same confidence that any author or inventor who had duly registered their work might.⁶⁰

Another augmentation of the copyright notice by The Brady Gallery appeared around this time. The Battle of Antietam on September 17, 1862, in addition to being the

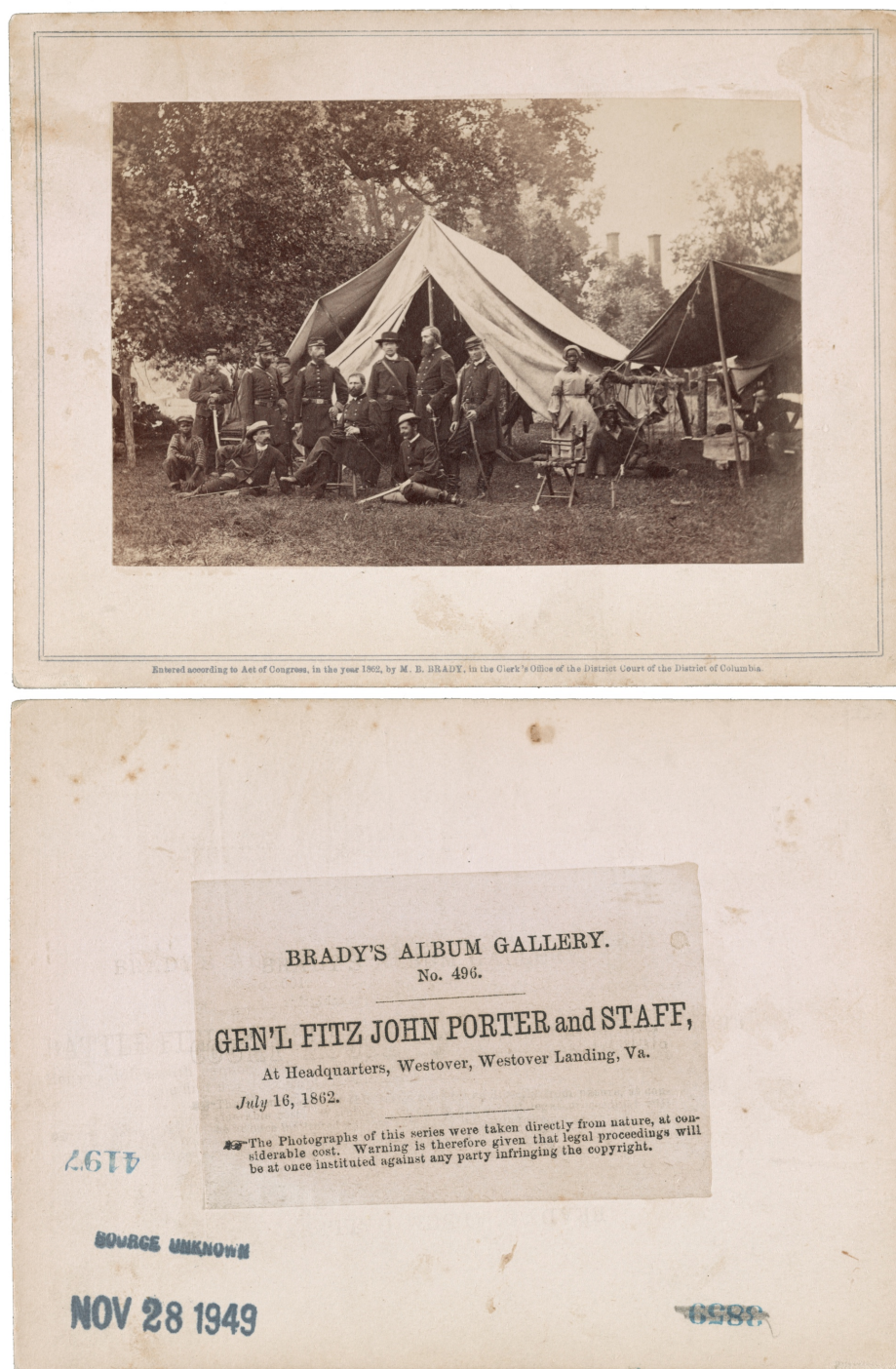


Figure 5. M. B. Brady, *Gen'l Fitz John Porter and Staff* (Photograph bearing a copyright inscription to M. B. Brady on its face and a back label with the line "The Photographs of this series were taken directly from nature, at considerable cost. Warning is therefore given that legal proceedings will be at once instituted against any party infringing the copyright"), July 16, 1862. From Library of Congress, Prints & Photographs Division, LC-DIG-ds-05156 and LC-DIG-ds-05157. <http://www.loc.gov/pictures/item/2014646920/>. Public Domain.

single bloodiest day of the Civil War, was a landmark in the history of photography as it produced the first widely publicized images of bodies on the battlefield.⁶¹ Gardner and Gibson, still working under Brady's auspices, took more than one hundred photographs of dead soldiers, live Generals, and war-torn landscapes in the aftermath.⁶² Not only were these images registered for copyright in Gardner's name, large format prints beginning in late 1862 took the added step of defining specific roles. Just below the copyright notice were displayed "GARDNER, Photographer" on the left-hand side and "M. B. BRADY, Publisher" on the right [Figure 6]. Notwithstanding these efforts to specify attribution, it was still "Mr. BRADY" who received credit in the press for "The Dead of Antietam" series.⁶³

Zeller discovered an imprint bearing both Gardner's and Brady's names and dated as late as November 1862, suggesting that Brady and Gardner must have split between then and the May 1863 opening of Gardner's Gallery.⁶⁴ Gardner continued registering his photographs for copyright and submitting title page substitutes throughout 1862. After Gardner's Gallery opened, its culture of attribution seemed to be more egalitarian than Brady's, and individual operators were meticulously identified with their specific works. As details about the specific practices of major Civil War photographers have come to light, including these efforts at discreet attribution, origin myths that imagined Brady as responsible for all photographs of the war have been revised.⁶⁵ It is important to note though that legal ownership of a copyright and credit in the public imagination are two very different things. Even imprinting a copyright notice bearing one's name directly upon the face of an image cannot ensure the right's holder will receive their due in the court of public opinion.

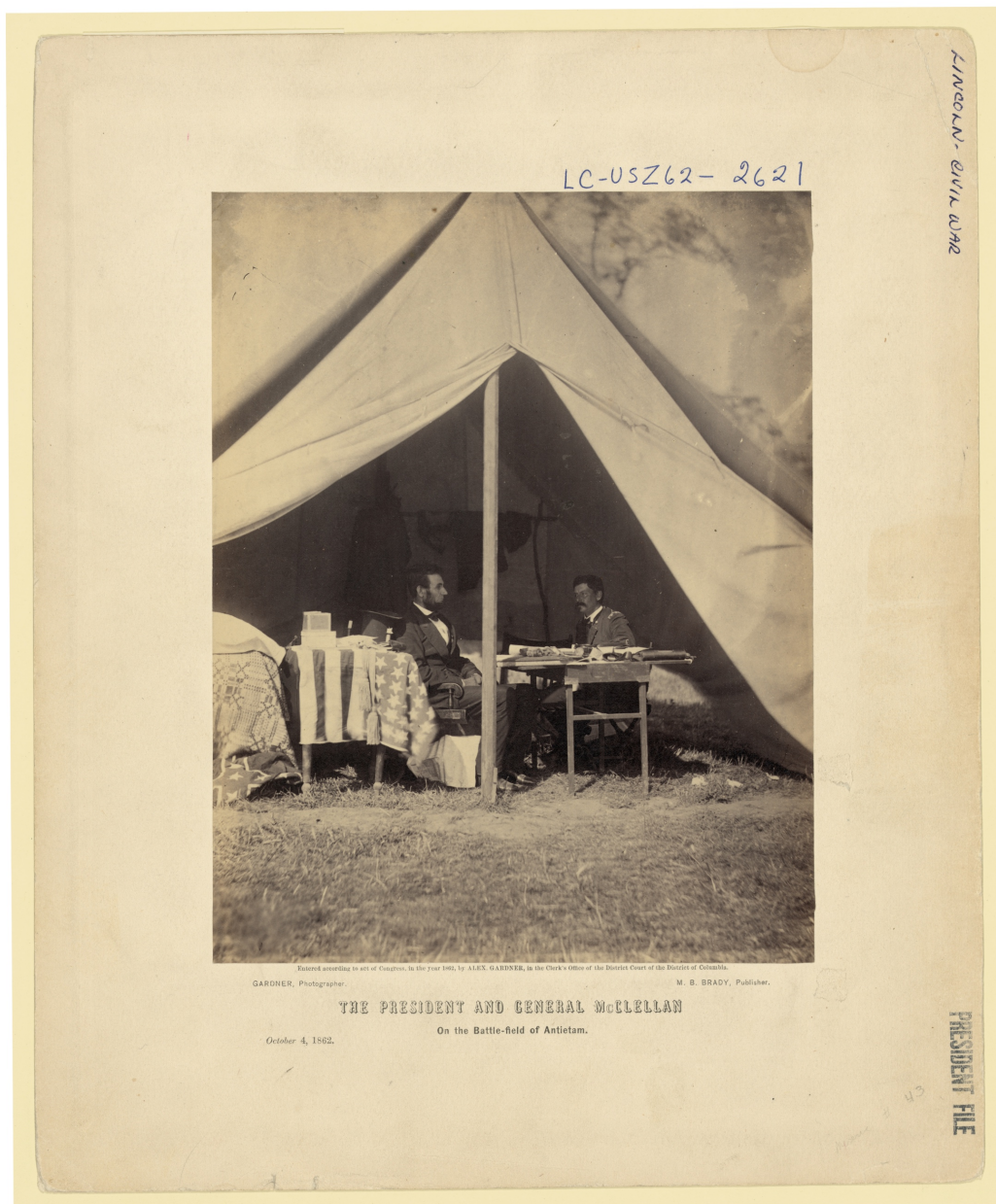


Figure 6. Alexander Gardner, *The President and General McClellan* (Photograph bearing a copyright inscription to Alex. Gardner and the labels “GARDNER, Photographer.” and “M. B. BRADY, Publisher.”), October 4, 1862. From Library of Congress, Prints and Photographs Division, LC-DIG-ppmsca-23719. <http://www.loc.gov/pictures/item/2010645740/>. Public Domain.

Copyright in Court

Mathew Brady was a plaintiff in one of the earliest copyright cases involving photography.⁶⁶ When Gardner left, James Gibson went with him, but by the end of the war Gibson was back as a full partner in charge of the Washington Gallery while Brady concentrated his efforts in New York.⁶⁷ Thus it was that both men's names appeared in the equity court file for a complaint filed on May 29, 1865 against P. J. Bellew.

At issue in this case was a photograph of Andrew Johnson procured soon after he became president upon Lincoln's assassination [Figure 7]. On May 1, 1865, the photograph was duly registered for copyright in the D.C. District Court.⁶⁸ As the complaint averred, Bellew "copied, in a smaller form by diminishing the main design with intent to evade the law" the Johnson photograph which resulted "in great loss and injury" to Brady and Gibson's business and was "of great profit to said defendant." The plaintiffs further requested that Bellew appear in court to "state how many of said photographs he has sold and disposed of, what he received for the same and give a true and accurate account of the profits derived from the sale." The presiding judge agreed with this assessment and issued a subpoena ordering Bellew to appear before him the following day. An injunction that prohibited Bellew from further "printing, publishing, selling or exposing for sale" copies of his altered version was issued on June 7.⁶⁹

Unfortunately for Brady and Gibson, this was a pyrrhic victory. No record exists in the case file of any remuneration received, but even if reparations were made the energy and expense spent in prosecuting the case would have taken valuable time away from the normal course of business. No significant change in day-to-day operations at Brady's galleries appears to have resulted from the case, and its existence has been



Figure 7. M. B. Brady, *President Johnson* (Photograph entered as evidence in the case of *Brady & Gibson v. Bellew*), 1865. From Equity Case File 444, May-June 1865, Records of the District Courts of the United States, RG 21, Box 26, Entry 69, National Archives and Records Administration, Washington, D.C.

overlooked by Brady scholars with the exception of Josephine Cobb.⁷⁰ The case's importance does not lie in its legal ramifications, but in illuminating the limitations of copyright in the mid-nineteenth century.

From its beginning, photography benefitted from a culture of innovation that was fueled by the sharing of ideas. In lieu of a restrictive patent, Daguerre accepted an annual stipend from the French government.⁷¹ This arrangement allowed for widespread use of the new technology. Morse's lectures on daguerreotypy were not free, but they were open to the public at a reasonable price and Brady claimed to be a direct benefactor of Morse's tutelage.⁷² Holmes's decision to not patent his stereoscope led to rapid improvements in its design.⁷³ Conversely, when James A. Cutting was issued a patent in 1854 for a bromide process used in making ambrotypes, his attempts to procure royalties from fellow photographers, and even from the U.S. Government, were met with derision from the photographic community.⁷⁴ William Welling suggested that Cutting's restrictive strategy was responsible for stymying development of the ambrotype as a medium.⁷⁵ Collective resistance to the Cutting patent led to formation of the National Photographic Association.⁷⁶

Still, communal drive for innovation must be balanced with the individual's need for compensation. Holmes could afford to contribute his stereoscope to the cultural commons because photography was his hobby, not his career. Those in the trade full time did not have the same luxury. The nineteenth-century photographer was at once an artist, a business owner, a chemist, and a marketing professional.⁷⁷ Personal portraits comprised the bulk of the business, but to balance the bottom line local galleries also sold images of celebrities with little regard for their point of origin.⁷⁸ "No photographer could afford not

to ‘steal’ occasionally.”⁷⁹ Darrah identified Brady’s marketing of John Wilkes Booth’s likeness as one of the most notorious examples of mid-nineteenth century photographic piracy, and this scandal would have been contemporaneous to Brady’s suit against Bellew.⁸⁰

Zeller claimed Brady’s early zeal for copyright registration suggested he “was more concerned about piracy than most photographers.”⁸¹ That is likely true, but the complexity of Brady’s concern begs further scrutiny. Certainly, he wanted to be paid for his work, but economic gain was not the sole motivation. Copyright was also a way to legally link his name to the creation of photographs he believed would have enduring historical value. By establishing the Brady name as synonymous with images of the great men of the Civil War, he could both promote the celebrity culture he admired and ensure his own celebrity status.

Pulling Focus

If Brady’s injunction against Bellew did not produce the reparations he had hoped, a federal court decision in New York the following year must have dealt a devastating blow. Judge Shipman ruled in *Wood v. Abbott* (1866) that all photographic copyrights registered before the amendment of March 3, 1865, which is to say the vast majority of Civil War images, were invalid because photographs were not “prints” in the sense intended by the previous act.⁸² An article in the photography trade press described this development as “an interesting example of how the changes and advances in science compel changes in the law.”⁸³

Nonetheless, printed versions of Civil War images produced for the mass market continued to carry copyright inscriptions. By war’s end, Brady had transferred hundreds

of original negatives to the E. and H. T. Anthony Company to cover his debts for photographic supplies.⁸⁴ A significant portion of the stereographs issued in the Anthony's popular "War for the Union" series came from these Brady negatives.⁸⁵ In addition to bearing copyright inscriptions on their face, there were several variations of back labels. Some carried no mention of copyright at all while others included the phrase "Copyright Secured." Despite his financial troubles, Brady's name still carried weight. The images in this series attributed to him bore the added imprint of "Negative by Brady & Co.," an honor not afforded to any of the other contributing photographers. At least one of the images in this series claimed to be both secured for copyright and from an authentic Brady negative [Figure 8].

Some years later, John Taylor acquired the rights to the "War for the Union" series and issued several reprints.⁸⁶ An early reissue carried back labels that stated simply "[Copyrighted.]," as well as the line "These are the *original* views taken by 'Brady,' the Government Artist," printed on all the images whether or not they originated from Brady's Gallery. A later reissue dropped the copyright claim and replaced it with the line "Sole Owners of the Original War Views" along with an elaborate story entitled "A Word As To Prices" that functioned as a kind of moral plea for the public to accept the elevated cost of the images [Figure 9].

Brady was still alive while Taylor was reissuing "War for the Union" stereographs, and he certainly could have benefitted from a portion of their proceeds had his original copyrights been valid. After the war, Brady's name lent status to its associated images, but Brady the man did not fare as well. Gibson had run the Washington Gallery into irreparable financial ruin by 1868, and Brady's own efforts to

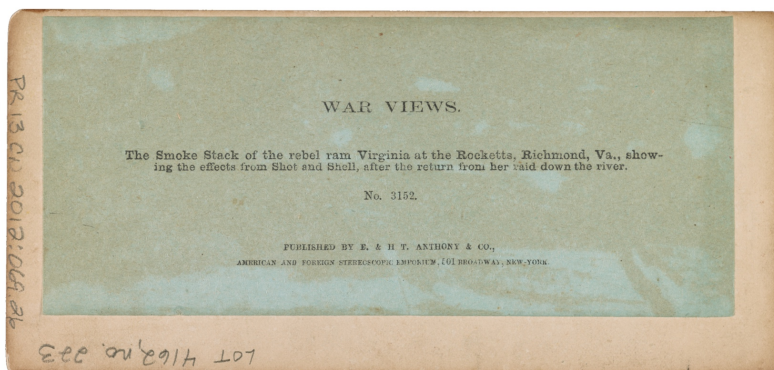


Figure 8A. *War Views* No. 3152 (Stereograph back label bearing no copyright claim), 1865. From Library of Congress, Prints and Photographs Division, LC-DIG-stereo-2s04356. <http://www.loc.gov/pictures/item/2015647576/>. Public Domain.

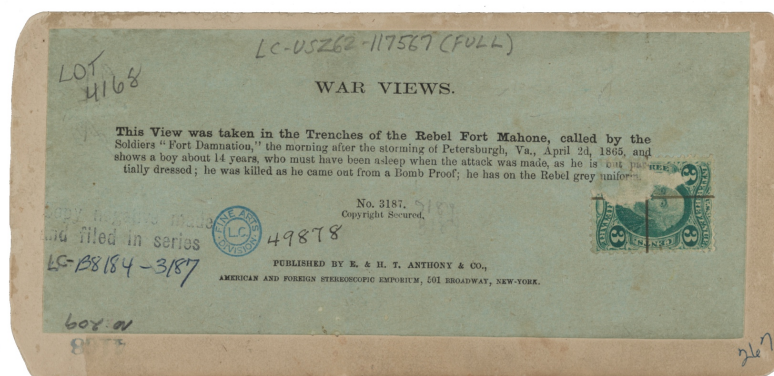


Figure 8B. *War Views* No. 3187 (Stereograph back label bearing the claim "Copyright Secured"), 1865. From Library of Congress, Prints and Photographs Division, LC-DIG-stereo-2s02686. <http://www.loc.gov/pictures/item/2011649961/>. Public Domain.

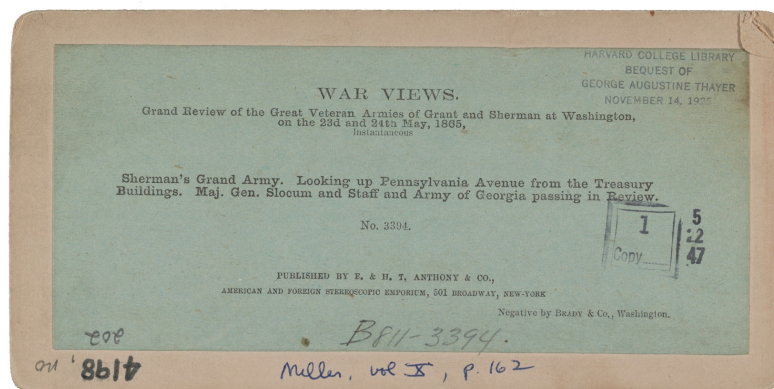


Figure 8C. *War Views* No. 3394 (Stereograph back label bearing the attribution "Negative by M. B. Brady & Co., Washington"), 1865. From Library of Congress, Prints and Photographs Division, LC-DIG-stereo-2s02875. <http://www.loc.gov/pictures/item/2011661096/>. Public Domain.

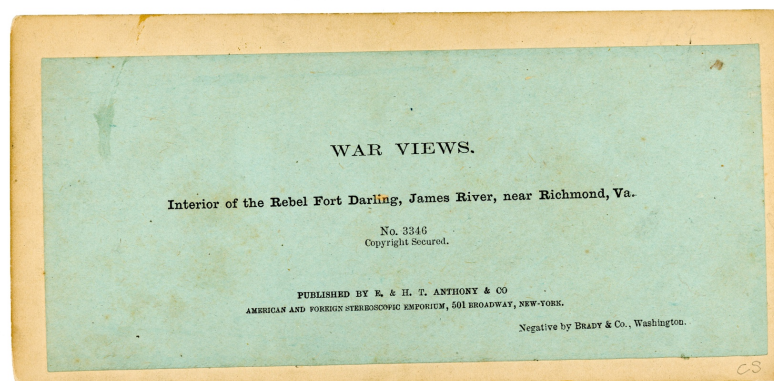


Figure 8D. *War Views* No. 3346 (Stereograph back label bearing both the claim "Copyright Secured" and the attribution "Negative by M. B. Brady & Co."), 1865. From the private collection of Bob Zeller. Public Domain.

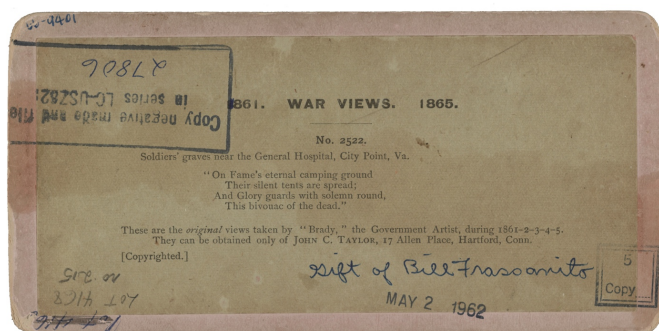


Figure 9A. *Soldiers' graves near the General Hospital, City Point, Va.* (Stereograph bearing the claim “[Copyrighted.]” as well as the line “These are the *original* views taken by ‘Brady,’ the Government Artist” printed on the back although this is not a Brady Gallery image), c. 1880s. From Library of Congress, Prints and Photographs Division, LC-DIG-stereo-1s02692 and LC-DIG-stereo-2s02692. <http://www.loc.gov/pictures/item/2011649967/>. Public Domain.

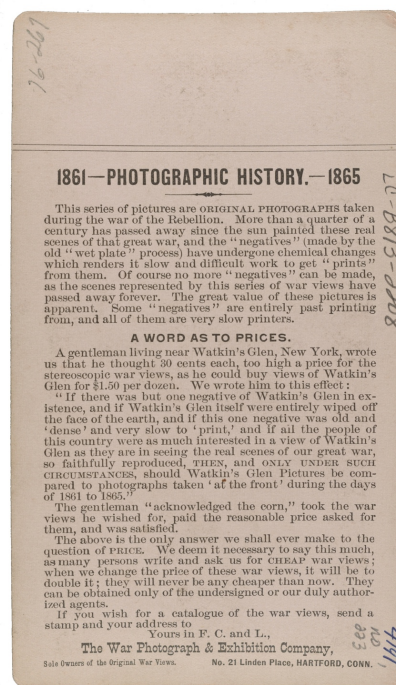


Figure 9B. *Taylor Back Label* (Stereograph back label bearing the line “Sole Owners of the Original War Views” as well as the story “A Word As To Prices”), c. 1890s. From Library of Congress, Prints and Photographs Division, LC-DIG-stereo-2s02864. <http://www.loc.gov/pictures/item/2011661086/>. Public Domain.

revitalize his New York operations were unsuccessful.⁸⁷ Brady exaggerated the piracy of his work to Townsend near the end of his life, but his bitterness over “ill-protected portraits” made sense because his lived experience had not matched up with his personal worldview.⁸⁸ Brady believed that men of creative genius deserved to be celebrated for their achievements, and that they had a legal and moral right to profit from their creative labor. From his perspective, copyright was an expression of both his legal and moral rights, and he was understandably upset when his efforts to duly copyright his work did not secure what he felt was rightfully his.

To Washington politicians of the nineteenth century, photographs were essential social currency.⁸⁹ Congressional action to grant photography copyright status in 1865 reflected its importance, and the subsequent judicial invalidation of previous copyrights was likely an unintended consequence.⁹⁰ Lincoln may have even had Brady in mind as he signed the bill, as Brady had photographed the President numerous times including the famous photograph from Lincoln’s 1860 trip to speak at New York’s Cooper Union.⁹¹ Brady would later claim that Lincoln said of that image and its subsequent publicity, “Brady and the Cooper Institute made me President.”⁹²

Such claims of direct influence seldom bear out in the available evidence, but one final comment on Brady’s influential career does bear mention here. Brady’s love of celebrity was rooted in a logic similar to an underlying assumption of American copyright philosophy – that great men can have great ideas and that individual expressions of those ideas deserve protection on par with private property.⁹³ However, the reality of creative production is much more complex. Celebrity culture was a driving force in Mathew Brady’s worldview, a fact evidenced by his extant Civil War

photographs and his attempts to copyright them. Just as Brady “still shapes the way in which we see” the Civil War, the influence of Brady’s interpretation and use of copyright can still be seen in the ways that modern content creators incongruously expect copyright registration to secure compensation, protect from infringement, and legitimize the celebrity that can accompany artistic ownership.⁹⁴

The anti-climactic arc to Brady’s career may, on the surface, undercut an argument that he had a high degree of agency in influencing photographic copyright. However, agency is not evidenced by material success, but by an availability of options and an ability to pursue them. When Brady undertook his project of Civil War documentation, he knew the risks involved and chose to assume them for a complex set of motivations that reflected a complex worldview. Using ritual economy to theorize Brady’s worldview by considering how it materialized in actual practices like copyright decisions helps to illuminate a richer understanding of what motivated Brady and how his influence may still be recognizable today.

¹ Brady’s exact birthdate is not known, but it was likely in 1823. He would have been in his early seventies at his death on January 15, 1896.

² George Alfred Townsend, “Still Taking Pictures,” *New York World*, April 12, 1891, 26.

³ See Francis Trevelyan Miller, ed., *The Photographic History of the Civil War, Volume I* (New York, NY: The Review of Reviews Co., 1912), 30-54 for a turn of the century narrative that heavily credits Brady but mentions Gardner only in passing. See Roy Meredith, *Mr. Lincoln’s Camera Man: Mathew B. Brady* (New York, NY: Charles Scribner’s Sons, 1946), 144-145; Josephine Cobb, “Mathew B. Brady’s Photographic Gallery in Washington,” *Records of The Columbia Historical Society, Washington, D.C.* 53/56 (1953): 52-54; and James D. Horan, *Mathew Brady: Historian with a Camera* (New York, NY: Crown Publishers, Inc., 1955), 47 for mid-twentieth century accounts that theorize attribution as central to the rift between Brady and Gardner.

⁴ Keith F. Davis, "A Terrible Distinctness: Photography of the Civil War Era," in *Photography in Nineteenth-Century America*, ed. Martha A. Sandweiss (New York, NY and Fort Worth, TX: Harry N. Abrams, Inc. and Amon Carter Museum, 1991), 148.

⁵ D. Mark Katz, *Witness to an Era: The Life and Photographs of Alexander Gardner, The Civil War, Lincoln, and The West* (New York, NY: Viking, 1991), 15.

⁶ Bob Zeller, *The Blue and Gray in Black and White: A History of Civil War Photography* (Westport, CT: Praeger, 2005), 103.

⁷ *An Act supplemental to an Act entitled "An Act to amend the several Acts respecting Copyright," approved February third, eighteen hundred and thirty-one, and to the Acts in Addition thereto and Amendment thereof*, Chapter 126, *U.S. Statutes at Large* 13 (March 3, 1865): 540-541.

⁸ *An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned*, Chapter 15, *U.S. Statutes at Large* 1 (May 31, 1790): 124-126.

⁹ *An Act supplementary to an act, intituled [sic] "An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints*, Chapter 36, *U.S. Statutes at Large* 2 (April 29, 1802): 171-172.

¹⁰ Sarah Catherine Gillespie, "Samuel F. B. Morse and the Daguerreotype: Art and Science in American Culture, 1835-55" (PhD diss., The City University of New York, 2006), 64.

¹¹ Robert Wilson, *Mathew Brady: Portraits of a Nation* (New York, NY: Bloomsbury, 2013), 8-10.

¹² See, for example, Robert Taft, *Photography and the American Scene: A Social History, 1839-1889* (New York, NY: Dover Publications, Inc., 1939), 76-122; Richard Rudisill, *Mirror Image: The Influence of the Daguerreotype on American Society* (Albuquerque, NM: University of New Mexico Press, 1971), 71-88; William Welling, *Photography in America: The Formative Years, 1839-1900* (Albuquerque, NM: University of New Mexico Press, 1978), 81-96; and Alan Trachtenberg, *Reading American Photographs: Images as History, Mathew Brady to Walker Evans* (New York, NY: Hill and Wang, 1989), 21-70.

¹³ Michael L. Carlebach, *The Origins of Photojournalism in America* (Washington, D.C.: Smithsonian Institution Press, 1992), 62-74.

¹⁴ Elizabeth Siegel, *Galleries of Friendship and Fame: A History of Nineteenth-Century American Photograph Albums* (New Haven, CT: Yale University Press, 2010), 15-67.

¹⁵ William C. Darrah, *Cartes de Visite in Nineteenth Century Photography* (Gettysburg, PA: W. C. Darrah, Publisher, 1981), 1-11.

¹⁶ See Jeff L. Rosenheim, *Photography and the American Civil War* (New York, NY: The Metropolitan Museum of Art, 2013), 17-27 for an illustrated discussion of image formats and their uses before and during the Civil War.

¹⁷ William C. Darrah, *The World of Stereographs* (Gettysburg, PA: W. C. Darrah, Publisher, 1977), 2.

¹⁸ Oliver Wendell Holmes, "Doings of the Sunbeam," *Atlantic Monthly* 12, no. 69 (July 1862): 14.

¹⁹ *New York Times*, "Brady's Photographs: Pictures of the Dead at Antietam," October 20, 1862 [emphasis in original].

²⁰ Beaumont Newhall, *The History of Photography from 1839 to the Present*, rev. and enlrg. ed. (New York, NY: The Museum of Modern Art, 1982).

²¹ See William Henry Fox Talbot, *The Pencil of Nature* (New York, NY: Da Capo Press, 1969) for a compilation reprint of the original six fascicle series.

²² *Ibid.*, 4.

²³ Townsend, "Still Taking Pictures."

²⁴ Lincoln Kirstein, "Photographs of America: Walker Evans," in *Walker Evans: American Photographs*, by Walker Evans (New York, NY: Museum of Modern Art, 1938; reprint, New York, NY: East River Press, 1975), 184.

²⁵ Taft, *American Scene*, 55-60.

²⁶ Newhall, *History of Photography*, 34.

²⁷ See Mary Panzer, *Mathew Brady and the Image of History* (Washington, D.C.: Smithsonian Institution Press, 1997), 3-7.

²⁸ See William A. Frassanito, *Gettysburg: A Journey in Time* (New York, NY: Charles Scribner's Sons, 1975), 35-40; William A. Frassanito, *Antietam: The Photographic Legacy of America's Bloodiest Day* (New York, NY: Charles Scribner's Sons, 1978), 27-36; William A. Frassanito, *Grant and Lee: The Virginia Campaigns, 1864-1865* (New York, NY: Charles Scribner's Sons, 1983), 165-197; and Zeller, *Blue and Gray*, 49-81, 101-118.

²⁹ Sarah Kate Gillespie, *The Early American Daguerreotype: Cross-Currents in Art and Technology* (Cambridge, MA: The MIT Press, 2016), 3.

³⁰ See Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction," in *Illuminations: Essays and Reflections*, ed. Hannah Arendt, trans. Harry Zohn (New York, NY: Schocken, 1968), 217–251; Susan Sontag, *On Photography* (New York, NY: Farrar, Straus and Giroux, 1977); and Roland Barthes, *Camera Lucida* (New York, NY: Hill and Wang, 1981).

³¹ Michel Foucault, "What is an Author?," in *The Foucault Reader*, ed. Paul Rabinow (New York, NY: Pantheon, 1984), 108.

³² See Jason Lee Guthrie, "Taking the Liberty: Toward a Theory of Copyright and Creativity," *Journal of the Music and Entertainment Industry Educators Association* 16, no. 1 (2016): 97-123.

³³ See Patricia A. McAnany and E. Christian Wells, "Toward a Theory of Ritual Economy," in *Dimensions of Ritual Economy*, eds. E. Christian Wells and Patricia A. McAnany (Bingley, UK: Jai Press, 2012), 3 for a theoretical definition of ritual economy articulated as the "process of provisioning and consuming that materializes and substantiates worldview for managing meaning and shaping interpretation."

³⁴ See Townsend, "Still Taking Pictures" and James Edward Kelly, "Matthew [sic] B. Brady, Great Historical and Patriot Photographer," James Edward Kelly Papers, Archives of American Art, Smithsonian Institution, Washington, D.C.

³⁵ Edwin G. Burrows and Mike Wallace, *Gotham: A History of New York City to 1898* (Oxford, UK: Oxford University Press, 1999), 689. See also Wilson, *Portraits of a Nation*, 10.

³⁶ Beaumont Newhall, *The Daguerreotype in America* (New York, NY: Duell, Sloan & Pearce, 1961), 55-59.

³⁷ Madeleine B. Stern, "Mathew B. Brady and the Rationale of Crime: A Discovery in Daguerreotypes," *The Quarterly Journal of the Library of Congress* 31, no. 3 (July 1974): 126-135.

³⁸ C. Edwards Lester, "M. B. Brady and the Photographic Art," *The Photographic Art Journal* 1 (1851): 38.

³⁹ Wilson, *Portraits of a Nation*, 29.

⁴⁰ Horan, *Historian with a Camera*, 235-238.

⁴¹ *New York Daily Times*, "Brady's Gallery in New York," reprinted in *The Photographic and Fine Art Journal* (December 1858): 378.

⁴² Daniel J. Boorstin, *The Image; or, What Happened to the American Dream* (New York, NY: Atheneum, 1962), 47. See also Thomas N. Baker, *Sentiment & Celebrity: Nathaniel Parker Willis and the Trails of Literary Fame* (New York, NY and Oxford, UK: Oxford University Press, 1999); Charles L. Ponce de Leon, *Self-Exposure: Human Interest Journalism and the Emergence of Celebrity in America, 1890-1940* (Chapel Hill, NC: The University of North Carolina Press, 2002); and Richard Salmon, “‘What the World Says’: Henry James’ The Reverberator, Celebrity Journalism, and Global Space” *Comparative American Studies An International Journal* 14, no. 1 (2016): 76-89

⁴³ Barbara McCandless, “The Portrait Studio and the Celebrity: Promoting the Art,” in *Photography in Nineteenth-Century America*, ed. Martha A. Sandweiss (New York, NY and Fort Worth, TX: Harry N. Abrams, Inc. and Amon Carter Museum, 1991), 48-75.

⁴⁴ *New York Times*, “A Broadway Valhalla: Opening of Brady’s New Gallery,” October 6, 1860.

⁴⁵ Wilson, *Portraits of a Nation*, 51.

⁴⁶ Panzer, *Image of History*, 13-17. Note that several of the primary sources cited in this section are helpfully reprinted in an Appendix to Panzer’s book entitled “Contemporary Descriptions of Mathew Brady,” 209-226.

⁴⁷ Wilson, *Portraits of a Nation*, 25-27.

⁴⁸ Rosenheim, *American Civil War*, 20.

⁴⁹ Katz, *Witness to an Era*, 14-19.

⁵⁰ *An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights*, Chapter 230, *U.S. Statutes at Large* 16 (July 8, 1870): 198-217. See also Martin A. Roberts, “Records in the Copyright Office of the Library of Congress Deposited by the United States District Courts, 1790-1870,” *The Papers of The Bibliographical Society of America* 31, no. 2 (1937): 81-101 for an explanation of copyright registration formalities prior to 1870 and a detailed bibliographic analysis of the extant District Court records. Note that this chapter focuses on the D.C. records because that is where Brady’s Civil War images were predominantly registered, but Brady also actively registered work in New York during this time.

⁵¹ Copyrights and Assignments, Book 1, District of Columbia, 1845-1870, Rare Book and Special Collections, Library of Congress.

⁵² Zeller, *Blue and Gray*, 103.

⁵³ Title Pages of Photographs Submitted for Copyright, 1862, Records of the District Courts of the United States, RG 21, Box 1, NC-2, Entry 40, National Archives and Records Administration, Washington, D.C.

⁵⁴ Jonathan W. White, "Sweltering with Treason: The Civil War Trials of William Matthew Merrick," *Prologue* 39, no. 2 (Summer 2007): 26-36.

⁵⁵ Andrew Johnson to Abraham Lincoln (telegram), February 04, 1863, Abraham Lincoln Papers at the Library of Congress, Manuscript Division, Washington, D.C.
<http://memory.loc.gov/ammem/alhtml/alhome.html>

⁵⁶ Copyrights and Assignments, Book 1, District of Columbia, 1845-1870, Rare Book and Special Collections, Library of Congress.

⁵⁷ Title Pages of Works Submitted for Copyright, 1854-1863, Records of the District Courts of the United States, RG 21, Box 1, NC-2, Entry 40, National Archives and Records Administration, Washington, D.C. Note that although this box ostensibly contains title page submissions for the years 1854-1863, no extant submissions from the years 1857, 1858, 1860, or 1863 were included as of August 4, 2017. Furthermore, the years 1854 and 1855 merely included a list registration dates and their title, but no actual title page submissions. Also note that of the 174 photographs Zeller counted among 1862 copyright registrations in the District Court of the District of Columbia, only 164 accompanying title page submissions are extant.

⁵⁸ *An Act supplementary to an act, intituled [sic] "An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints,* Chapter 36, *U.S. Statutes at Large* 2 (April 29, 1802): 171-172.

⁵⁹ See Wilson, *Portraits of a Nation*, 4 that claimed Brady "never once credited the sun with taking even a single image."

⁶⁰ U.S. Constitution, art. 1, sec. 8, cl. 8 which reads "The Congress shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

⁶¹ Robert J. Kalasky, *Shadows of Antietam* (Kent, OH: The Kent State University Press, 2012), 1-27.

⁶² Zeller, *Blue and Gray*, 65-81.

⁶³ *New York Times*, "Brady's Photographs" [emphasis in original].

⁶⁴ Zeller, *Blue and Gray*, 208, note 2.

⁶⁵ See Frassanito, *Gettysburg*, 232-233; Frassanito, *Antietam*, 284-287; Davis, "A Terrible Distinctness," 138-142; Katz, *Witness to an Era*, 34-52; Carlebach, *Photojournalism*, 75-79; Zeller, *Blue and Gray*, 101-109; Kalasky, *Shadows of Antietam*, 160-161; Rosenheim, *American Civil War*, 80-113; and Wilson, *Portraits of a Nation*, 147-150 for more recent accounts that ground theories about the rift between Brady and Gardner in the available evidence, and go into detail about their respective attribution practices.

⁶⁶ Photographs were not legally made eligible for copyright until March 3, 1865. *Brady & Gibson v. Bellew* (1865) centered around a dispute over a photograph that was registered for copyright on May 1, 1865 and the first case brief was filed on May 29, less than three months after photographic eligibility was ratified. Therefore, this is certainly among the earliest photographic copyright cases.

⁶⁷ See Thomas Waldsmith, "James F. Gibson: Out from the Shadows," *Stereo World* 2, no. 6 (January-February 1976): 5 and Wilson, *Portraits of a Nation*, 200-202.

⁶⁸ Copyrights and Assignments, Book 1, District of Columbia, 1845-1870, Rare Book and Special Collections, Library of Congress.

⁶⁹ Equity Case File 444, May-June 1865, Records of the District Courts of the United States, RG 21, Box 26, A1, Entry 69, National Archives and Records Administration, Washington, D.C.

⁷⁰ Cobb, "Brady's Photographic Gallery," 58. Cobb's position as Archivist-in-charge of the Still Pictures Branch of the National Archives likely led to her discovery of the case's existence. An ancillary document among the equity case files dated May 11, 1948 that regards the filing status of the photograph of President Johnson used in the original case bears Cobb's signature.

⁷¹ Taft, *American Scene*, 3-6.

⁷² Kelly, "Historical and Patriot Photographer."

⁷³ Darrah, *Stereographs*, 3.

⁷⁴ Taft, *American Scene*, 129-130.

⁷⁵ Welling, *Photography in America*, 110-111.

⁷⁶ *Ibid.*, 198.

⁷⁷ See Mazie M. Harris, "Inventors and Manipulators: Photography as Intellectual Property in Nineteenth-Century New York" (PhD diss., Brown University, 2014), 1-3.

⁷⁸ Darrah, *Cartes de Visite*, 12-23.

⁷⁹ Dorothy Meserve Kunhardt and Phillip B. Kunhardt, Jr., *Mathew Brady and his World* (Alexandria, VA: Time-Life Books, 1977), 29.

⁸⁰ Darrah, *Cartes de Visite*, 57.

⁸¹ Zeller, *Blue and Gray*, 103.

⁸² *Wood v. Abbott*, 30 F. Cas. 424 (1866).

⁸³ *Humphrey's Journal*, "Copyrighting Photographs," July 1, 1866, 73.

⁸⁴ Jeana K. Foley, "Recollecting the Past: A Collection Chronicle of Mathew Brady's Photographs," in *Mathew Brady and the Image of History*, by Mary Panzer (Washington, D.C.: Smithsonian Institution Press, 1997), 190.

⁸⁵ Zeller, *Blue and Gray*, 180-181.

⁸⁶ *Ibid.*, 191. Zeller cited an early twentieth century account that dates Taylor's purchase as "around 1879." Apparently included were a remaining stock of orange mounts to which Taylor applied his own back label. Taylor reissues on orange mounts can be dated as c. 1880s. A later reissue that carried no copyright claim was advertised in 1890, and can be dated as c. 1890s.

⁸⁷ Wilson, *Portraits of a Nation*, 200-203.

⁸⁸ Townsend, "Still Taking Pictures."

⁸⁹ Robert A. Mayer, "Photographing the American Presidency," *Image* 27, no. 3 (September 1984): 2-14.

⁹⁰ See William F. Patry, *Copyright Law and Practice, Volume 1* (Washington, D.C.: The Bureau of National Affairs, Inc., 1994), 43, note 134 on the "remarkably short legislative history" of the 1865 amendment that suggests there was widespread political support for photographic copyright.

⁹¹ Harold Holzer, *Lincoln at Cooper Union: The Speech That Made Abraham Lincoln President* (New York, NY: Simon & Schuster, 2004), 88-100.

⁹² Townsend, "Still Taking Pictures."

⁹³ *Baker v. Selden*, 101 U.S. 99 (1880) codified the American position the copyright protected expressions of ideas, not the ideas themselves. However, the way courts apply copyright and the way content creators interpret and use it are not necessarily the same.

⁹⁴ Panzer, *Image of History*, 7.

CHAPTER 5

CONCLUSION

Considering the content creators' perspective alongside the legal history of copyright is an important addition because it highlights disparities between the intent of policy makers and the ways that copyright law materialized in practice. Justice Joseph Story noted the difficulties of legislating creativity and creative labor in his opinion to *Folsom v. Marsh* (1841), writing "Patents and copyrights approach, nearer than any other class of cases... what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle [sic] and refined, and, sometimes, almost evanescent."¹ If even those trained in the law have struggled to articulate the complexity and ambiguity of copyright, it is little wonder that content creators often find it difficult to negotiate their copyright obligations and to effectively secure their long-term interests.

Metaphysics requires an underlying belief system to serve as a framework for interpretation, and in each of the three cases considered in this dissertation the content creator's belief about what copyright *should* protect and symbolize influenced their decision making, for better or worse. Franklin, Foster, and Brady all exhibited their own unique worldviews that, in interaction with particular historical processes, resulted in specific material actions regarding copyright protection of their work. Ritual economy's emphasis on the materialization of worldview and on the processes by which meaning is managed and interpretation is shaped helps to reconstruct a deeper understanding of the ways that each interpreted and used copyright in practice.

The difficulties Justice Story noted have only become more intransigent in the wake of modern technological innovations. Just as American copyright law expanded from protecting “any map, chart, book or books” to include emerging creative media such as sheet music and photography in the nineteenth century, it has continued to expand, both in scope and duration, up until the present day.² Eventually recorded sound, moving images, and computer software were classified as intellectual property and fell under the auspices of copyright law.³ The pragmatic interest the founders had in their isolationist approach to intellectual property did not change because of ideology but because of economy. When protection for international authors was finally added in 1891, more than a century after the first Copyright Act, it was only because it had finally become financially advantageous for the American publishing industry to make the change.⁴ William Patry noted that the founders’ initial term limit of fourteen years has now ballooned to functional infinity at the lobbying of “proponents of ever-expanding rights” who “have greatly over-promised what copyright laws can accomplish.”⁵

Content creators are obliged to interact with the political economy of copyright if they wish to participate in the market, but it is by better understanding their interactions that spaces for agency and resistance can be found. Certainly, one method of addressing inequality in the current system is through legislative reform. However, there are inherent challenges to adequately reforming statutory copyright protection because of the disparate rhythms of technology and legislation. Perhaps an approach led by content creators themselves that taps into the symbolic social rituals still inherent in the production of creative works will be more successful.⁶ If so, it is in better understanding the creative worldview and how it influences decision making, rather than in suggestions

for policy reform, that the way forward lies. This concluding chapter evaluates the efficacy of ritual economy in theorizing individual creativity and creative labor by revisiting and comparing the findings of previous chapters. It then considers how the actions of content creators may interact with the legal system in shaping policy and interpretation.

Ritual Economy Reprise

To begin, it is helpful to reprise Patricia McAnany and E. Christian Wells's theoretical definition of ritual economy as:

...the process of provisioning and consuming that materializes and substantiates worldview for managing meaning and shaping interpretation. Thus, ritual and economy are linked but are not reducible to one another.... this codification has the surgical advantage of emphasizing the following three critical areas of inquiry: (1) economic practice, i.e. provisioning and consuming; (2) resultant elements of practice, i.e. materialization and substantiation; (3) and, finally, the important social role of ritual practice in shading meaning and contouring the interpretation of life experiences.⁷

Several elements stand out here as evident in the research presented in this dissertation. By conceptualizing ritual and economy as linked but irreducible this research avoided setting up a false dichotomy between the two.⁸ By emphasizing both the ritual and the economic aspects of worldview, this research has avoided the problems of reflection theory and reductionism.⁹

Ritual economy provided a viable alternative to previous perspectives by legitimating individual creativity while simultaneously exploring its dynamic relationship with culture and political economy, thus answering the critiques noted in Chapter One. It also questioned assumptions that inform modern copyright theories, such as the cultural

commons model discussed in Chapter Two. Chapters Three and Four touched on recent additions to the copyright discourse informed by perspectives that redefine the nature of creative agency and that challenge hegemonic power structures. Ritual economy can enrich these perspectives by conceiving of worldview as central, rather than auxiliary, to discussions of creativity and creative labor.

The centrality of worldview in ritual economy proved useful in informing this dissertation's methodology as well. By focusing on potentially illustrative individuals, seeking to understand first the scope of their own interpretation and use of copyright, and then contextualizing that interpretation and use, this research avoided a tendency to selectively choose only those primary sources that fit a predetermined narrative. This yielded several revisions to current understandings. Franklin's supposed allegiance to the public domain must be tempered by acknowledging the totality of his dealings in the printing business. Just as the hypercanonization of Foster's racial conversion has been challenged in recent work, understandings of his professionalism need to be revised as well. Brady's attainment of photographic authorship expands the notion of artistic agency and provides an important example of ground-up influence in copyright history. Such theoretical and methodological strengths present a strong case for the efficacy of ritual economy.

This research also demonstrated the importance of copyright records as primary sources in historical work on creativity, technology, and mass communication. To further develop a discussion of the efficacy of ritual economy, comment will be made on each of its three dimensions – 1) provisioning and consuming, 2) materialization and substantiation, and 3) meaning and interpretation – by considering similarities and

contrasts between Franklin, Foster, and Brady. To address the specific need to rehabilitate authorship in theoretical literature, a comparison of the attainment of authorship by Foster and Brady will be offered, and then contextualized by the outcomes of two major Supreme Court cases regarding copyright that bridged American copyright policy in the nineteenth century with the mass communication revolutions of the twentieth century. This chapter will conclude by suggesting ways ritual economy might inform future research.

Provisioning and Consuming

The contradiction evident in Franklin's interpretation and use of copyright in some ways presaged the contradictions that plague American intellectual property law today. The cyclical difficulties encountered by legislators attempting to reform the American copyright system may stem from an ambiguity that has always been present in the theorization of intellectual property protection. The American system may have intended to put the public first, the author next, and the publisher last, but in practice it has always been vulnerable to whomever can establish ownership, whether through social negotiation or by litigation, most effectively.¹⁰ This reading of early American copyright thought does not refute the idealism noted by Lewis Hyde and Doron Ben-Atar, but is more in line with Peter Baldwin's assessment that legal histories cannot be considered as a "stately, hermetically buffered progress" apart from cultural and economic developments.¹¹

Whatever the initial theory underpinning American copyright law may have been, as that theory materialized in case law and legislative reform it most often benefitted whomever was best positioned to steer it in their desired direction at the time.¹² This

suggests that any return to a cultural commons emphasis in American copyright policy will need to be more than a legislative revision to be effective. It must begin with a cultural reconsideration of the value of creative work, and a greater public resolve to allocate the resources necessary to sustain its production.

The final installment in 1758 of *Poor Richard's Almanack* found Franklin's protagonist shrugging off a lack of recognition from his literary peers, concluding instead that "the People were the best Judges of my Merit; for they buy my Works."¹³ In the centuries since this idea has entered the discourse of the creative industries in a profound way. It is of obvious use for publishers and distributors to maintain a narrative among both content creators and consumers that preserves a veneer of meritocracy in production decisions, but the reality is much more complex. In the modern system of copyright protection, highly skilled content creators regularly find themselves in inequitable arrangements with corporate publishing and distribution interests. These corporate interests often absorb a significant portion of the revenue generated by creative works, and they make decisions about their promotion and availability that obscure any direct link between public taste and profitability. The invisible hand puts on flesh and bone, materialized in the commodification of intangible works.

Statutory copyright may actually be a part of the problem. Meredith McGill noted that "Copyright law's establishment of authorial rights... was a crucial factor in the larger shift in publishing practice whereby authors were disentangled from the process of production."¹⁴ It is in the investigation of this disentangling process that previous work in the history of the book has found traction in understanding the ways nineteenth-century American authors interpreted and used copyright.¹⁵ Because Foster and Brady were not

writers their surviving textual evidence was limited compared to Franklin's. However, ritual economy's emphasis on the materialization of worldview in economic transactions allowed for them to "speak" about their interpretation and use of copyright much the same as their literary peers.

Platitudes that have characterized Foster as "America's first professional songwriter" ring hollow when considering how unprofessionally Foster handled contractual obligations during his career.¹⁶ There is a certain nobility in claiming Brady had "a higher passion than money" that implicitly valorizes the sacrifices he made to document the Civil War, but such a claim can also obscure the regular interactions that all content creators must have with market forces that are often beyond their immediate control.¹⁷ Franklin, Foster, and Brady all experienced varying levels of economic success that were connected to their individual business acumen, their ability to create work the public was willing to pay for, and their ability to cope with the changing political economy of their times. Yet, it seems insufficient to claim that Franklin was the only one whose success carried all the way to the end of his career solely because he had more ability. It is possible that the disentangling effect of copyright actually made it more difficult for Foster and Brady to enjoy the kind of success that Franklin achieved.

Materialization and Substantiation

An emphasis on process in history is not a novel formulation, but the linking in ritual economy between process and worldview is.¹⁸ One example can be found in the subtle but important shift in viewing Franklin as illustrative, rather than representative. Gordon S. Wood noted a tendency in the literature on Franklin to link the level of notoriety and influence that he achieved with him being somehow representative of an

idealistic vision of colonial America.¹⁹ Franklin himself was among the first to intentionally cultivate these kinds of archetypical American visions in his prose.²⁰ Historical work however, and especially work on the history of ideas, must restrain itself from the kind of rhetorical license that Franklin notoriously used in his journalism and fiction. The argument for Franklin as a representative of American Enlightenment philosophy has been well-evidenced.²¹ As a content creator however, it is because Franklin's success was so atypical for his time, and therefore unrepresentative, that his story has illustrative potential.

Ritual economy also helped to connect Foster's material economic decisions with his worldview in a theoretically grounded way that can address the problem of hypercanonization.²² To critique a recent example, JoAnne O'Connell's 2016 biography asserted that "With Foster, it is best to deal with intentions, rather than with external communications, because he left no formal record of his true feelings on politics."²³ Later, she paradoxically claimed "That Stephen was antislavery in his heart, there is no doubt."²⁴ This claim revealed a questionable theorization of individual worldview since, if Foster did not leave record of his deepest thoughts on the politics of slavery and race relations, we cannot know what was "in his heart."

The American popular music industry was in its infancy in the mid-nineteenth century, but popular song was still produced with an economic motivation in mind. It is contradictory to claim that Foster composed pro-Union war songs "In response to the changing tastes of the people and probably the demands of his publishers..." but then assert "If we accept these [war] songs as an expression of Stephen's wartime loyalties, they provide a key to understanding a politically circumspect man."²⁵ It is certainly

possible to write lyrics that both appealed to the public's taste and expressed individual worldview, but there is simply not convincing evidence that this was true in Foster's case. Arguably, songs written before he was aware of their economic value were more evidential of what was "in his heart" than songs written while estranged from his family, struggling with alcoholism, and desperate to sell anything his publishers would buy. The distinction between O'Connell's findings and the findings of this dissertation regarding Foster's professionalism and authorial intent are important to make here because they speak to the efficacy of ritual economy as a theoretical framework. Using ritual economy to give a basis for reconstructing worldview that was grounded in actual economic practice helped to avoid the tendency towards hypercanonization and may help to inform future readings of Foster's legacy and the reception history of his work.²⁶

Brady's interpretation and use of copyright prior to explicit statutory protection exhibited a range of motivations. While Foster used publishing intermediaries throughout his career, Brady often registered his own work in person, which was perhaps emblematic of the individual authorship Brady felt he could claim. The spike in registrations in 1862, as well as the printing of copyright inscriptions on all images whether or not they had been duly registered, suggests that Brady and his operators felt they had recorded something of significant value at The Battle of Antietam. The submission of title page substitutes suggests a desire to comply with the formalities necessary to secure protection as well as a tacit assertion that photography was a creative medium on par with literature, art, and music. Brady paradoxically used copyright as an intimidation tactic and as a moral appeal, although the strength of that appeal would have been severely undercut to anyone who was aware of Brady's own piracy.

Meaning and Interpretation

The proliferation of printing technology that gave rise to statutory copyright protection in the eighteenth century was part of a continuous historical process that is quickly maturing to the point that individual content creators can now, more than ever, produce and distribute their work independently of industry mechanisms if they so choose. With increased access to information about intellectual property, including to the history of ideas about it, content creators can better navigate existing legal protections and make more informed decisions about the ownership of their work. Of such diligence and industry on the part of modern content creators Benjamin Franklin would likely approve.

Still, as Chapters Two, Three, and Four show, the historical processes that connect Franklin's time to ours have been fraught with pitfalls for content creators. Calls for a return to the cultural commons model of copyright are underscored by a line of thinking often taken for granted in American historical memory, that returning to the founders' original design for a given issue will necessarily lead to a solution. The same Constitution that established initial authority for federal copyright protection also designated slaves as three fifths of a person.²⁷ It is and always has been an imperfect document in need of constant revision and in danger of enabling injustice as much as restraining it. Just as the founders saw little contradiction between an emphasis on the public domain and a desire to compensate content creators, neither did they anticipate a potential conflict between copyright protection and free speech, and yet these two American ideals are in competition as often as they are complementary.²⁸ The short sightedness evident in early copyright theorization undercuts the notion that simply

returning to the founders' intent will fix copyright. Like previous perspectives, the cultural commons model will have to grapple with valid critiques if it is to achieve meaningful change.

McGill's observation that "Copyright was understood by the founders to be an important tool of nation building" and that it was "paradoxically, both greatly valued and little used" in early America provides a convenient point of departure here.²⁹ A valorization of the founders' motives in establishing intellectual property protection anachronistically imposes modern values upon a group of men whose worldview was informed by radically different philosophical and economic contexts than our own. Just as the founders' emphasis on the right to bear arms could never have anticipated automatic weapons capable of mass destruction, their understanding of intellectual property was limited to what could be transferred from precedent in real property law and from what the technology of their time made possible.

Thomas Jefferson wrestled with these differences, writing to a friend in 1813:

If nature has made any one thing less susceptible, than all others, of exclusive property, it is the action of the thinking power called an Idea; which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it.³⁰

Jefferson wrote this decades before the idea versus expression dichotomy was codified in *Baker v. Selden* (1880). The opinion for that case admitted protection for an idea was impractical and thus only an expression could receive copyright.³¹ Throughout the nineteenth century, and up until the present day, intellectual property has proven time and again to have fundamentally different needs for legal protection than real property, and

the gap between legislative reform and technological innovation has widened rather than closed.

The efficacy of ritual economy in theorizing copyright from the content creators' perspective can also be seen in its compatibility with recent feminist, critical race, and post-colonial critiques of copyright. Melissa Homestead's work utilized a similar methodological approach as that used in this dissertation in her study of nineteenth-century American women authors.³² Her methodology also included comparative work that explored how female magazine writers, journalists, and editors obtained agency.³³ Among her most interesting findings were the similarities between copyright and coverture laws, similarities that makes sense when one realizes that many of the same wealthy white men helped to author both.³⁴ Stephen Best likewise drew comparisons between copyright's notion of fugitive property and the legal justification articulated by the Fugitive Slave Law of 1850.³⁵ Neil Netanel noted that "copyright unduly chills minority voices" by formalizing the way that protection and power are obtained, and he joined other recent work in demonstrating how copyright can be used as an overt instrument of cultural colonialism.³⁶

Attaining Authorship

As a final comment on the efficacy of ritual economy, this dissertation will offer a brief comparison of the legacies of Foster and Brady. The degree to which each, as forerunners in their mediums, obtained the status of author may have influenced the divergent ways we receive audio-based and image-based creative work today.

The histories considered here expose the complexity of authorship in early America. Stephen Foster's reluctance to establish himself as the author of his most

popular and best-selling works had disastrous consequences for his career. Registering for copyright was certainly part of establishing authorship in a legal sense, and it helped to satisfy obligations to the political economy of the creative industries. Yet, the public reception of authorship, or what can be considered part of the socio-cultural dimension of creative work, was just as important to both Foster's sense of satisfaction with his career and to his bottom line. Foster's works were popular in his own time, and during the 1850s favorable public reception provided him leverage to negotiate favorable contracts. Yet, for a complex set of personal, social, and political reasons his music failed to keep up with changing tastes. His career, and ultimately his life, were cut short as a result.

In contrast, Brady achieved a level of name recognition beyond that of any other photographer of the medium's first generation. This allowed him to transcend the role of operator and attain the status of an author. Brady's interpretation and use of copyright provides examples of this, but there are others. Nathaniel Parker Willis coined the term "Brady'd together" to denote an exceptionally well composed image, and this phrase is telling of how Brady's persona and work became intertwined.³⁷ Other photographers of note came to be identified as "the confederate Brady," "Brady of the West," or "Canada's Mathew Brady," an honorific that indicated a high level of achievement in one's sphere of influence.³⁸

As if he suspected that copyright registration alone may not sufficiently secure his authorship, Brady personally appeared in many of his Civil War photographs from the conflict's beginning.³⁹ An image taken after the Battle of Gettysburg is representative of this practice. It depicted a man pointing into the distance standing beside Brady, who is posed with his back to the camera inviting the viewer to see the scene from his point-of-

view. Situating himself within his own images was a practical defense against piracy, as well as marker of authenticity and reliability in the minds of the viewing public that harkened back to pre-photographic illustrations.⁴⁰ It also made a statement about the relationship between image and photographer.⁴¹ These examples are all indicative of the ways in which Brady fulfilled the Foucauldian author function and helped to establish photographic authorship in the sense necessary to gain copyright protection.

The influence of Brady's attainment of authorship status may be evident in the case of *Burrow-Giles Lithographic Co. v. Sarony* (1884). This case is significant not only for reinforcing the legality of copyright protection for photographs, but also for what it reveals about the status that photographers had achieved by the late nineteenth century. Justice Samuel Miller wrote the unanimous opinion for the court that referred to the defendant as "the author, inventor, designer, and proprietor of the photograph."⁴² This language evokes both sides of the author and inventor dichotomy in the Constitutional clause, weds them with the intentionality of design, and legitimizes the marriage of that statutory construct with the professional status of proprietorship.⁴³

Conversely, *White-Smith Music Publishing Co. v. Apollo Co.* (1908) found that manufacturers of player piano rolls did not have to pay royalties to the composer of the song imprinted on the roll. While Justice William Day acknowledged the plaintiff's argument that music "is intended for the ear as writing is for the eye," he and the rest of the court were not persuaded that musical composition deserved the same authorship status awarded to photography in the *Sarony* decision.⁴⁴ Instead, the rolls were determined to be a part of the machinery of the player piano, and therefore could not infringe upon the sheet music in which the copyright for the original composition was

vested. This decision was superseded by the Copyright Act of 1909, which mandated a compulsory license for the mechanical reproductions of musical works, but historical factors that resulted in legitimizing protection for image work over audio still show a vestige of influence today.⁴⁵ Foster's abdication of authorship may not have caused this prejudice directly, but it is an example of one such historical factor. The work of both Foster and Brady would have been well known to the judges writing the opinions to these cases, and further research may uncover evidence of discrete influence.

Future Research

At the dawn of the era of mass communication, content creators in emerging media were obliged to take on the persona of authorship to receive the legitimization necessary for copyright protection and its economic incentives. This dissertation explored how copyright obligations were negotiated in three individual cases. Its findings can inform a richer historicism of copyright development in general and suggest ways for modern content creators to better manage protection of their own work.

In many cases, content creators are better off to obtain a basic understanding of copyright formalities and manage ownership of their work themselves. If reliance upon the creative industries is warranted, content creators should be highly selective about the contractual rights they relinquish and should insist upon an equitable relationship that acknowledges the value of their work. Shared community with other creators, increasingly enabled by the same digital tools that have challenged production and distribution monopolies, may also help to disseminate valuable insider knowledge and collectively advocate for legal rights. Cultivating a moral audience that reinforces the

value of creative work by internally discouraging infringement is just as essential to long-term capitalization as obtaining the necessary legal support to prosecute infringement.

Recent financial collapses in copyright industries such as music, news, and books may be evidence of an economy for those items that has become overly commodified and has strayed from an understanding of the ways that both content creators and audiences assign value to them.⁴⁶ Previous work has helped to theorize commodification in these industries, as well as the cyclical resistance to hegemony by various subcultures. What it has struggled to explain is how ritual symbolism asserts itself into the economic decisions of content creators and their audiences. When dominant theoretical frameworks are hindered by their inability to explain the ritual behavior evident in the economics of cultural production, the history of cultural production needs to be reconsidered. As the intersection of the law, political economy, and creativity, the history of copyright is an ideal place for that work to begin.

If a central justification of statutory copyright law is the protection of content creators' interests, a better understanding of their strengths and vulnerabilities is essential to informing the copyright reform discourse. If there is any hope of liberating creativity from the modes of production that are currently dominant, that hope is more likely to be realized by empowering content creators to make informed choices about the ownership of their work than from legislating equality into an innately exploitable environment. As such, the thrust of scholarly inquiry into the history of copyright must move beyond efforts to suggest avenues for legal reform, especially when the history of copyright policy reform shows that research-based suggestions are often ignored.⁴⁷ Instead, it must find ways for content creators to obtain some agency in the making of their own history.

Copyright is a sphere in which the letter of the law and the spirit of the law are highly disparate. Future work on the history of copyright law that adopts the ritual economy framework proposed here may help to explain that division, and, hopefully, to mend it.

¹ *Folsom v. Marsh*, 9 F. Cas. 342 (1841).

² *An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned*, Chapter 15, *U.S. Statutes at Large* 1 (May 31, 1790): 124-126.

³ See Jessica Reyman, *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture* (New York, NY: Routledge, 2010), 1-23.

⁴ Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton, NJ: Princeton University Press, 2014), 121-122.

⁵ William Patry, *How to Fix Copyright* (Oxford, UK: Oxford University Press, 2011), 11.

⁶ See Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham, UK: Edward Elgar Publishing Limited, 2011), 1-7.

⁷ Patricia A. McAnany and E. Christian Wells, "Toward a Theory of Ritual Economy," in *Dimensions of Ritual Economy*, eds. E. Christian Wells and Patricia A. McAnany (Bingley, UK: Jai Press, 2012), 3. Note that this passage cites Wells's previous work for this definition, but that it is codified in this precise wording for the first time in the passage cited here.

⁸ See John Durham Peters, "John Locke, the Individual, and the Origin of Communication," *Quarterly Journal of Speech* 75, no. 4 (November 1989): 387-399.

⁹ See Janice Peck, "Itinerary of a Thought: Stuart Hall, Cultural Studies, and the Unresolved Problem of the Relation of Culture to 'Not Culture'," *Cultural Critique* 48, no. 1 (Spring 2001): 200-249.

¹⁰ See Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, TN: Vanderbilt University Press, 1968), 180-183 for a seminal analysis of the balance struck between content creators, publishers, and the public in American copyright legislation circa 1783-1834.

¹¹ Baldwin, *Copyright Wars*, 405.

¹² *Ibid.*, 405-409.

¹³ “Poor Richard Improved, 1758,” *The Papers of Benjamin Franklin* (hereafter *PBF*) accessible at <http://www.franklinpapers.org>.

¹⁴ Meredith L. McGill, “Copyright,” in *A History of the Book in America, Volume 2 An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840*, eds. Robert A. Gross and Mary Kelley (Chapel Hill, NC: The University of North Carolina Press, 2010), 199.

¹⁵ See, for example, Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York, NY: New York University Press, 2001); Melissa J. Homestead, *American Women Authors and Literary Property, 1822-1869* (Cambridge, UK: Cambridge University Press, 2005); Martin T. Buinicki, *Negotiating Copyright: Authorship and the Discourse of Literary Property Rights in Nineteenth-Century America* (New York, NY: Routledge, 2006); and Meredith L. McGill, *American Literature and the Culture of Reprinting, 1834-1853* (Philadelphia, PA: University of Pennsylvania Press, 2013).

¹⁶ JoAnne O’Connell, *The Life and Songs of Stephen Foster: A Revealing Portrait of the Forgotten Man behind “Swanee River,” “Beautiful Dreamer,” and “My Old Kentucky Home”* (Lanham, MD: Rowman & Littlefield, 2016), xxix.

¹⁷ George Alfred Townsend, “Still Taking Pictures,” *New York World*, April 12, 1891, 26.

¹⁸ See Michael Bentley, *Modern Historiography: An Introduction* (London, UK: Routledge, 1999), 1-7.

¹⁹ Gordon S. Wood, *The Americanization of Benjamin Franklin* (New York, NY: The Penguin Press, 2004), 1-16.

²⁰ See, for example, “Information To Those Who Would Remove To America,” March 9, 1784, *PBF* which described “the kind of persons to whom an Emigration to America may be advantageous” such as industrious farmers, tradesmen, and artisans.

²¹ See, for example, Paul W. Conner, *Poor Richard’s Politicks: Benjamin Franklin and his New American Order* (New York, NY: Oxford University Press, 1965); Jeffery A. Smith, *Franklin and Bache: Envisioning the Enlightened Republic* (New York, NY: Oxford University Press, 1990); Joyce E. Chaplain, *The First Scientific American: Benjamin Franklin and the Pursuit of Genius* (New York, NY: Basic Books, 2006); and Douglas Anderson, *The Unfinished Life of Benjamin Franklin* (Baltimore, MD: The Johns Hopkins University Press, 2012).

²² See Jennie Lightweis-Goff, “‘Long Time I Trabble on de Way’: Stephen Foster’s Conversion Narrative,” *Journal of Popular Music Studies* 20, no. 2 (June 2008): 150-165.

²³ O'Connell, *A Revealing Portrait*, xxvii.

²⁴ *Ibid.*, 213.

²⁵ *Ibid.*, 251.

²⁶ See, for example, Jon Stratton, "Producing an Australian Popular Music: From Stephen Foster to Jack O'Hagan," *JAS: Australia's Public Intellectual Forum*, no. 90 (January 2007): 153-165; Kazuko Miyashita, "Foster's Songs in Japan," *American Music* 30, no. 3 (Fall 2012): 308-325; Joanna R. Smolko, "Southern Fried Foster: Representing Race and Place through Music in Looney Tunes Cartoons," *American Music* 30, no. 3 (Fall 2012): 344-372; Kathryn Miller Haines, "Stephen Foster's Music in Motion Pictures and Television," *American Music* 30, no. 3 (Fall 2012): 373-388; and Joe Weed, "Foster's Songs in Old-Time String Band and Bluegrass Music," *American Music* 30, no. 3 (Fall 2012): 389-396 for discussions of Foster's legacy and reception history.

²⁷ See U.S. Constitution, art. 1, sec. 2, cl. 3.

²⁸ See Lyman Ray Patterson and Craig Joyce, "Copyright in 1791: An Essay Concerning the Founder's View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution," *Emory Law Journal* 52, (2003): 909-952. See also Neil Weinstock Netanel, *Copyright's Paradox* (Oxford, UK: Oxford University Press, 2008), 3-12.

²⁹ McGill, "Copyright," 198.

³⁰ Thomas Jefferson, Letter to Isaac McPherson, Monticello, August 13, 1813, in J. Jefferson Looney, ed. et al., *The Papers of Thomas Jefferson: Retirement Series, Volume 6, 11 March to 27 August 1813* (Princeton, NJ: Princeton University Press, 2009), 383.

³¹ *Baker v. Selden*, 101 U.S. 99 (1880)

³² Homestead, *American Women Authors*, 63-149.

³³ *Ibid.*, 150-238.

³⁴ *Ibid.*, 21-62.

³⁵ Stephen M. Best, *The Fugitive's Property: Law and the Poetics of Possession* (Chicago, IL: The University of Chicago Press, 2004), 1-25.

³⁶ Netanel, *Copyright's Paradox*, 4. See also Michael D. Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (Oxford, UK: Oxford University Press, 2012) and Peter Drahos, *Intellectual Property, Indigenous People, and their Knowledge* (Cambridge, UK: Cambridge University Press, 2014).

³⁷ N. Parker Willis, *The Convalescent* (New York, NY: Charles Scribner, 1859), 284.

³⁸ See Paul Vanderbilt, *Guide to the Special Collections of Prints & Photographs in the Library of Congress* (Washington, D.C.: The Library of Congress, 1955), 20; Mark H. Brown and W. R. Felton, "L. A. Huffman: Brady of the West," *Montana: The Magazine of Western History* 6, no. 1 (Winter 1956): 29; and Joan M. Schwartz, "Another Side of William Notman," *History of Photography* 10, no. 1 (January-March 1986): 63.

³⁹ Steve Woolf, "Brady Discovered in Rare First Bull Run-Related Photograph," *Battlefield Photographer* 13, no. 3 (December 2015): 16-18.

⁴⁰ See Warren Francke, "Sensationalism and the Development of 19th-Century Reporting: The Broom Sweeps Sensory Details." *Journalism History* 12, no. 3-4 (Autumn-Winter 1985): 80-85.

⁴¹ See Robert Wilson, *Mathew Brady: Portraits of a Nation* (New York, NY: Bloomsbury, 2013), 159-164.

⁴² *Burrow-Giles Lithographic Company v. Sarony*, 111 U.S. 53 (1884).

⁴³ See U.S. Constitution, art. 1, sec. 8, cl. 8.

⁴⁴ *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1908).

⁴⁵ *An Act To amend and consolidate the Acts respecting copyright*, Chapter 320, *U.S. Statutes at Large* 35, Part 1 (March 4, 1909): 1075-1088.

⁴⁶ See Jason Lee Guthrie, "Economy of the Ether: Early Radio History and the Commodification of Music," *Journal of the Music and Entertainment Industry Educators Association* 14, no. 1 (2014), 288-290.

⁴⁷ See Jessica Litman, "The Politics of Intellectual Property," *Cardozo Arts & Entertainment Law Journal* 27, no. 2 (November 2009), 313-320.

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