

# Paradise Lost or Fantasy Island? The Payment of British Authors in 19<sup>th</sup> Century America's Copyright Wilderness

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*Abstract:* The payments by American publishers to British authors during the mid-19<sup>th</sup> century, when the works of British authors lacked American copyright protection, has been presented as evidence that copyright might have little impact on the payment to authors. This paper investigates this claim by reexamining the evidence used to support this claim and inspecting data on payments to British authors by a leading American publisher. The main finding is that payments to British authors only occurred after the establishment of a cartel-like no-compete agreement among leading American publishers with regards to the works of British authors. Even under the auspices of this agreement, many British authors were not paid, and those who were paid received considerably less than they would have received under copyright. Because such no-compete agreements are disallowed under modern antitrust regimes, the removal of copyright in modern economies would likely eviscerate payments to authors.

## Introduction

Society's reliance on copyright to promote the production of creative works has been a contentious political issue since the Statute of Anne, over three centuries ago. The economic debate regarding copyright has traditionally focused on the price that consumers of creative works would pay under different legal regimes. Alternatives to copyright's provision of ownership rights over creative works, such as rewards, honors, lead time to market, or patronage, have been suggested as possibly being superior to copyright because, according to proponents of these alternative mechanisms, consumers would not be required to pay so-called "monopoly"<sup>1</sup> prices, at least not for very long.<sup>2</sup>

The focus of many current copyright policy debates is on whether it is possible to find a mechanism that would continue to provide incentives to encourage the supply of creative works while imposing a smaller negative impact on the consumption of copyrighted works (e.g., Boyle, 2009).<sup>3</sup> Proponents of alternatives to copyright have sometimes also suggested that copyright does not provide much additional revenue to creators, so that these alternative mechanisms would not need to scale a particularly high bar to match or exceed copyright's payments to creators.

This paper examines the question of whether copyright has a significant positive impact on the payments to creators. The claim that copyright has little impact on the revenues to creators is an empirical one and generally seems to originate with one of the earliest attacks on copyright made by an economist. I refer to the 1934 article by Arnold Plant, who is otherwise known for being Ronald Coase's mentor. Plant's paper provided a vociferous and erudite attack on the logic copyright, although it was also lopsided and at times logically questionable. That article also provided putative empirical support for the claim that copyright did not seem to provide much extra revenue to authors. The ideas in that article, although seemingly ignored for its first forty years, have been resurrected in the literature, perhaps because they provided something of a template for virtually all the known criticisms that can be made of copyright, while including a detailed history of the subject.<sup>4</sup> The suggestion that copyright provides little extra revenue to creators has been accepted, repeated, and

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<sup>1</sup> Contrary to its common treatment, copyright does not provide a monopoly. It merely provides a property right over a creative work, of which there can be any number of very close substitutes or even, in principle, identical works, as long as they are independently created. Note that every property right can be thought of as a nominal monopoly over that narrowly defined object, although there is generally no monopoly power in this nominal monopoly. Copyright also provides this nominal monopoly, but because it does not restrict competition in the creation of substitutes, by itself it provides no economic monopoly. See Kitch (2000) or Liebowitz (2015).

<sup>2</sup> Being first to market is a substitute to copyright because it provides temporary "ownership" over the work until other publishers can bring copies to market.

<sup>3</sup> A different relatively recent concern has been copyright's increased costs to those follow-on creators who incorporate the prior works of others in their new works. This concern was explored in the seminal model of Landes and Posner (1989).

<sup>4</sup> Google Scholar reports (as of May 26, 2016) only 16 citations to Plant's 1934 article prior to 1990, 21 during the 1990s, 120 during the 2000s and 80 from 2010 until May 26, 2016.

enhanced by authors of influential articles, such as Justice Stephen Breyer (1969) and Michele Boldrin and David Levine (2008).<sup>5</sup>

Notably, Plant planted the thesis that publishers would pay authors for their works even in the absence of copyright protection.<sup>6</sup> Plant provided various explanations for why publishers might be expected to pay authors even when there was no legal obligation to do so. Publishers, for example, should have been willing to pay authors for the ability to have first access to print their books, either through the use of “early sheets” or stereotype plates.<sup>7</sup> This would give the “authorized” early edition a lead time before other publishers could obtain copies of the book from which to publish their own competing copies. Such a head start could provide a window of market control for the initial publisher although several researchers have claimed that such lead time was merely a matter of hours or days, even with the technology of the 19<sup>th</sup> century.<sup>8</sup> Plant also noted that some readers favored editions of books that were “authorized” by the author.

The most compelling empirical evidence provided by Plant to support the claim that copyright provided little extra revenue to authors, supplemented by Breyer’s scholarship and accepted by many others, came from a natural experiment that took place in the U.S. in the mid-19<sup>th</sup> century. At that time, only American authors were protected by American copyright, meaning that books written by British authors, which often were very popular in the U.S., received no American copyright protection.

Plant’s investigation of that natural experiment consisted of his examination of the evidence presented to a UK Royal Commission on Copyright (“Royal Commission”), conducted in the late 1870s.<sup>9</sup> Plant concluded, or seemed to conclude,<sup>10</sup> that American publishers paid amounts to British authors similar

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<sup>5</sup> The impact of Plant’s ideas has been magnified by the highly cited article by Breyer (1309 citations), which repeatedly cited and quoted Plant, and the book by Boldrin and Levine, which also cited and quoted Plant and has itself received 860 citations.

<sup>6</sup> It is not clear that Plant, if pushed, would go as far as his followers have gone. Plant admits (p. 192) “More authors write books because copyright exists, and a greater variety of books is published,” although he suggests that this larger quantity of books might be detrimental to society. He also states (p. 175) “The abolition of copyright need not therefore result in the complete abandonment of the business of book production either by publishers or by professional authors.” Both statements seem at odds with the view that copyright has only a tiny effect on the market.

<sup>7</sup> The term “early sheets” (or advance sheets) indicates a manuscript from the author prior to the printed book being available to other publishers. Authors (or publishers) could also provide stereotype plates, which were materials that a printer could use to directly print a book without having to set the type. Access to these plates obviously lowered the printing costs and were therefore of substantial value to publishers.

<sup>8</sup> Plant’s lead-time argument appears convincing, since it seems likely that weeks or months would pass before competing editions could be produced and distributed. Other researchers, however, such as Johns (2010), Kahn (2004), and Spoo (2013) have provided evidence that in the 1800s a book could be very quickly copied, in a matter of hours or days, by having numerous printers all working concurrently on small but different portions of the book., although increasing the speed of production should raise costs, and misprints and other errors were more likely when a book was reproduced in this manner. For these reasons it seems likely that this very speedy copying of books would take place only for the most successful titles, and a slower, less costly form of copying would take place for more ordinary titles. Spoo and Johns quote various written statements by American publishers to British authors claiming that the authors’ provision of advance sheets would give publishers an advantage of only one or two days, although it would be in the self-interest of the American publishers to exaggerate the speed of the copying in order to negotiate lower the payments to British authors for advance sheets.

<sup>9</sup> “The Royal Commissions and The Report Of The Commissioners” and “Minutes of the Evidence Taken Before the Royal Commission on Copyright,” The Royal Commission on Copyright, (1878).

<sup>10</sup> Plant’s tone seems to support a more compelling case than the actual words that he uses, as discussed in footnote 6.

to those they paid to American authors, even though the British authors had no copyright protections. If this empirical claim were true, it would seem to support a conclusion that copyright has little impact on the creation of works.

In this paper, I scrutinize these empirical claims about the payment of British authors by American publishers by re-examining the Royal Commission report and by introducing evidence on the payments to British authors by a leading American publisher. This new investigation shows that, contrary to the claims of Plant, Breyer and their followers, the copyright held by American authors made a large difference in the payment they received relative to the payments received by British authors. Under normal, competitive market conditions, it was rare for British authors to be paid when their books were published in America.

I also examine the payments to British authors when American publishers were able to reduce competition among themselves by agreeing not to publish “unauthorized” editions of books by British authors. Under these circumstances, the payment to British authors became more common, although many and perhaps most British authors did not receive payments, and the payments made were still, in most cases, considerably less than payments made under copyright.

Because agreements to not compete are illegal under the antitrust regimes found in modern economies, the former finding, of virtually no payment made to British authors, is the appropriate evidence to be used in predicting the payment to authors if copyright were to be removed.

## I. Was the American treatment of British authors a Copyright Eden?

Here is Plant framing his approach:

A convenient approach to the whole subject is to try to visualise the organisation of production of books, which we select as a typical commodity for the purpose of this inquiry, in the absence of any sort of copyright provisions...Would firstly authors, and secondly publishers, find it possible to make arrangements of a sufficiently remunerative kind to induce them to continue in the business of book production? [p. 168]

He answered this question by pointing out that the United States, in the mid-19th century, did not provide copyright protection to British authors. He concluded that British authors were nevertheless paid by American publishers, even without the benefit of copyright protection. Here is his key statement:

...*many* English authors were *regularly* receiving payment from publishers in a country which had no copyright law for foreign books. During the nineteenth century anyone was free in the United States to reprint a foreign publication, and yet American publishers found it profitable to make arrangements with English authors. Evidence before the 1876-8 Commission shows that English authors *sometimes* received more from the sale of their books by American publishers, where they had no copyright, than from their royalties in this country [England]. From the economic standpoint it is highly significant that, although there was no

legislative restraint on the copying of books published abroad, competition remained sufficiently removed from that abstract condition of "perfection," in which there could exist no margin between receipts and costs for the remuneration of authors, for "handsome sums" in fact to be paid [p. 172, my emphasis].

Plant's claim that "many" English authors were paid by American publishers is actually rather vague, since a small percentage of all English authors with works published in America might be all that is required for the term "many" to be technically defensible. Plant does not use the term "most," although some readers will likely read that meaning into his statement. Similarly, Plant's statement that "sometimes" English authors were paid more by their American than by their British publishers might mean no more than that this might have happened once or twice, although some readers might interpret it to mean that it was common.

As evidence that these possibly exaggerated interpretations of Plant are not just possible, but have actually taken place, note that Michele Boldrin and David Levine reproduce this very quote from Plant in their 2008 book *Against Intellectual Monopoly*, but then when they later reprise the claim in their own words they change the word "sometimes" to "often," ("the amount of revenues British authors received up front from American publishers *often* exceeded the amount they were able to collect over a number of years from royalties in the UK").<sup>11</sup> Similarly, Justice Breyer after reading Plant and the Royal Commission evidence, converts Plant's claim that *sometimes* English authors earned more in the U.S. than in England to say instead that "many English writers" earned more in the U.S. than in England, which again lends itself to an interpretation that it was a common event.<sup>12</sup> It seems fair to believe that some readers, and possibly many, after encountering these analyses, will interpret "sometimes" to mean "often" and "many" to mean "most."

Because counter-intuitive results are interesting, Plant and Breyer's rendition of the American publishers' treatment of British authors still seems vibrant and fresh, and the historical aspect of the evidence only adds to its intrigue. The representation of the Royal Commission evidence they put forward has been taken to be a correct representation, uncritically accepted and repeated by other researchers including not only Michele Boldrin and David Levine (2008) but also Kai-Lung Hui and Ivan Png (2002), Hal Varian (2005), and myself (Liebowitz 1985), among many others.

Still, it is fair to ask whether this overall representation of the Royal Commission evidence was accurate. We can answer this question by taking an independent look at the Royal Commission

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<sup>11</sup> This quote can be found on their pages 22-23 of Chapter 2. I have added the emphasis.

<sup>12</sup> See page 300 of Breyer (1970) "many English writers earned more from the sale of advance proofs to American publishers (despite lack of copyright protection in America) than from the copyright royalties on their English sales." Breyer references this claim to Louis Mallet's minority statement contained in the Royal Commission report, and indeed Mallet does make a related but somewhat weaker claim: "it is the interest of [American] publishers to make arrangements with British authors of eminence, by which they receive a remuneration which, if not equal by way of a percentage on profits to that which they receive from the publishers of this country [England] under the copyright law, is, nevertheless, of a substantial kind, and *sometimes*, in consequence of the larger circulation of their works at a cheaper price, *larger even in amount* than that which they derive from their copyright editions at home" [my italics]. Mallet does not provide an exact source for his claim.

evidence. Further, we can broaden our examination of this issue by using the financial records of a leading American publisher which paid British authors upon publishing their works in the U.S.<sup>13</sup>

The reader should note that the Royal Commission hearings took place in 1876-77, whereas the information from the leading U.S. publisher begins in 1840 and ends in 1859, so there is some difference in time periods. This difference in time periods actual works to our advantage, however, since the time period for the records of the U.S. publisher includes an important change in the industrial organization of the American publishing industry while the legal rules of the American copyright system were the same throughout.

## II. The Evidence to be Examined

The UK Royal Commission was established in April of 1876, with 15 members. The Commission's charge was to investigate the "laws and regulations relating to Home, Colonial, and International Copyright." The Commission's brief was very broad and the payment of British authors by American publishers was by no means the primary interest of the Commission. The hearings and testimony of approximately fifty experts (many illustrious) took place over many days during 1876-1877. The Commission's report was completed in May of 1878.

The report and the transcripts of the testimony contain many different voices and perspectives on the part of the witnesses, on the part of the questioners, and on the part of the authors of the main report (who did not have unanimous opinions on all the conclusions reached).<sup>14</sup> It is somewhat jarring, in reading this testimony, to realize that almost all the current academic disputes about copyright seem to have been discussed, with virtually the same arguments, in those hearings one hundred and forty years ago.

In addition to reexamining the Royal Commission report, I rely upon the account books of a leading American publisher to provide evidence on the relative payments to British and American authors. Some of the accounting (cost) books of the publishing firm, Ticknor and Fields, which is currently known as Houghton Mifflin Harcourt,<sup>15</sup> have been examined and transcribed by researchers interested

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<sup>13</sup> Throughout this paper I will refer to the payments made by the American publishers for foreign works, as payments to authors, when in fact the payments may have gone entirely to the foreign publisher instead of the author.

<sup>14</sup> The main report, which contained 294 paragraphs, was signed by 14 members with 1 member (Mallet) unwilling to sign. However, 9 of the 14 signatories included separate notes where they dissented in some way with the main report. These raw numbers overstate the degree of dissention, however. Of these 9 dissenters, 5 objections (Daldy, Manners, Smith, Trollope and Wolff) were focused on only one or two paragraphs and 3 objections (Jenkins, Rose, Young) were more serious but were based mainly concerned with whether the term of copyright should be a fixed number of years or be related to the life of the author. The final dissenter (Stephen) objected to the breadth of copyright with regard to derivative works and objected to copyright on statues and photographs. Thus there is little dissent in the Commission Reports on American payments to British authors, the main topics of focus in this paper, although the discussions during the evidentiary hearings revealed a strong diversity of opinions.

<sup>15</sup> Ticknor and Fields began as Allen and Ticknor. In the early 1840s it became just Ticknor, and then in the late 1840s became Ticknor, Reed and Fields. In the mid 1850s it became Ticknor and Fields which was the name of the firm during its glory days. It later became Fields, Osgood and Co, then Houghton, Osgood and Co, and then Houghton, Mifflin and Co.

in the history of U.S. book publishing, in particular Tryon and Charvat (1949).<sup>16</sup> The work of Tryon and Charvat in creating a data set was extended by Michael Winship (1995), who also went further than Tryon and Charvat by analyzing and categorizing the raw numbers. I lean heavily on both works.

Many of the details of interactions between publishers and authors are often derived from correspondence or memoirs. The advantage of using account books, besides their being more complete, is that they were not created years after the fact, nor with the intention of making a particular ideological or political point, as is often the case with memoirs and letters. Being more complete, however, is not the same as being totally complete. There were apparently some payments that did not show up in the cost books but do show up in letters and correspondence.

Ticknor and Fields (T&F), based in Boston, was a “preeminent” publisher of literary works during the middle of the 19th century, according to Winship, and one of the “most famous” and “most successful” publishers in the U.S., according to Tebbel’s lengthy 1972 history of the American publishing industry. T&F’s list of authors, whose “literary brilliance” no other publisher “could match,” according to Tebbel, included Horatio Alger, Richard Dana, Ralph Waldo Emerson, Nathaniel Hawthorne, Oliver Wendell Holmes Sr., Henry David Thoreau, Henry W. Longfellow and Harriet Beecher Stowe, as well as “authorized” works of leading British authors such as Robert Browning, Thomas De Quincey, Charles Dickens and Alfred Tennyson.

Here is a description of the firm, from a correspondent reporting for an 1856 issue of *American Publishers’ Circular and Literary Gazette*:

The publications of this house are known everywhere throughout the country, by their neatness, convenience of size, and general excellence. No other establishment in the Union, issues annually a more attractive and carefully selected list of belles lettres. ... It is worthy of notice, also, in connection with this establishment, that we have seen letters from several English authors, thankfully acknowledging the receipt of various sums of money — being the "copyright" upon the American editions of their books, published by Ticknor and Fields. [Winship, p. 21]

The correspondent, by taking note of the fact that T&F paid its English authors, implied that such payments were not standard at that time. The use of the term copyright, in quotes, reflects the existence of trade courtesy, discussed in the next section.

Because it was the leading literary publisher, with a readership likely to care about its treatment of authors, Ticknor and Fields would be expected to treat British authors better than a typical American publisher with a less literary emphasis. It was one of only a handful of American publishers to pay British authors. Thus we can use it as an example of the best treatment that British authors were likely to receive from American publishers.

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<sup>16</sup> Tryon and Charvat took the (handwritten) raw numbers in two cost books, putting them in a useable format, while also checking for errors, inconsistencies, and sometimes, background information such as letters and correspondence and reproduced that raw information in book form. Winship built upon the work of Tryon and Charvat in examining a larger number of records, with more ledgers with which to double check figures.

Before we begin examining the empirical evidence, however, it is informative to illustrate how important British books were to T&F. Table 1 indicates that the production of foreign (almost exclusively British<sup>17</sup>) titles played an important role in firm’s finances (less so during 1845-49 but more so during 1855-59). Clearly, foreign works were of sufficient importance to the firm over this period that its payment to foreign authors would be more than an afterthought.

	American Works	Foreign Works	% Foreign
1840-1844	39,106	14,248	26.70%
1845-1849	155,344	16,820	9.77%
1850-1854	349,332	146,040	29.48%
1855-1859	358,879	470,698	56.74%

From Table 3.7 in Winship

### III. Some Historical Background: Courtesy of the Trade

During the mid-1800s, some American publishers were able to limit competition among themselves in the publishing of works by British authors. When a leading American publisher reached a financial agreement with a British author to publish a particular work, it would announce this agreement (and the financial arrangement) in trade magazines and, in response, other leading American publishers would refrain from publishing competing versions of the same work, although there was no legal requirement restricting the publication of a competing version. The financial payments were generally for early sheets.

A leading American publisher of the era (D. Appleton) described trade courtesy when testifying before the Royal Commission (the questions are in italics, the answers are not italicized, and the paragraphs are numbered the same as in the Commission testimony):

3587. *We have been told that there is in America a kind of honourable understanding between the publishers that if one publisher has expended a considerable sum of money in bringing out a [foreign] book, others will not reprint it?*—Yes, what is called a courtesy copyright, that is an understanding which theoretically exists between all firms in America, but practically only amongst the five or six largest firms. [Minutes of Evidence, p. 181]

This agreement among publishers was known by the term “courtesy of the trade” and virtually all scholars of 19<sup>th</sup> century American publishing discuss it, as did Plant in his 1934 article. It is also generally noted that there was a group of publishers, which can be described as the competitive fringe (although without a connotation of insignificance), that did not adhere to trade courtesy.

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<sup>17</sup> Winship makes clear that almost all the foreign works published by Ticknor and Fields during the period of his analysis were British. On page 66, for example, he states “almost all of the firm’s foreign works were by British authors.”

It is not entirely clear when trade courtesy began in the U.S. It appears to have begun in a small way in the third and fourth decades of the 19<sup>th</sup> century and then became a more standard feature by the middle of the century.<sup>18</sup> Ironically, at the turn of the 19<sup>th</sup> century a large majority of books published by American publishers were British, during which time there appears to have been almost no payment to British authors. As the British authors' share of American books decreased during the century, the likelihood of British authors getting paid by American publishers increased, until the U.S. changed its copyright law in 1891, allowing British authors to receive copyright if they published their books in the U.S.<sup>19</sup>

Trade courtesy is sometimes held out to be a form of "order without law" or as an informal system of "norms" that have the effect of instituting property rights over creative works that are not legally protected by copyright, occasionally known as "synthetic copyright" (Kahn, 2004). A benevolent view of trade courtesy would point out that it allowed British authors to be compensated for their efforts, helping to promote the creation of those works. And, like copyright, it prevented publishers from printing upon one another. If copyright was beneficial, would not trade courtesy be socially beneficial as well?

There are reasons to be skeptical of this claim. For one thing, American publishers were not likely to expend efforts that merely benefitted foreign authors and the reading public. In fact, there is another, less benevolent and more realistic view that can be taken of trade courtesy.

Copyright does not restrict competition between publishers to acquire various creative works. But trade courtesy did. Once a British author was associated with an American publisher, that author was to remain with that publisher forever, even if the author wished to switch publishers, unless the original publisher transferred the courtesy to another publisher.<sup>20</sup>

This aspect of trade courtesy is inconsistent with its interpretation as a benevolent mechanism to help British authors. Reducing competition between publishers to gain access to the work of successful British authors has the effect of reducing the payments to those authors. Trade courtesy agreements seem to have characteristics of a cartel, although it takes the form of a quasi-monopsony in this case.<sup>21</sup>

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<sup>18</sup> Spoo reports (his footnote 78, quoting from Henry Holt, the creator of the eponymous publishing house), that courtesy of the trade "grew up between, say, 1850 and 1876." But Groves reports that it began in the 1820s and 1830s. It is thought that American trade courtesy was an offshoot of a form of trade courtesy that existed among Irish publishers of English book before Ireland adopted English copyright law in 1801.

<sup>19</sup> Kahn reports that the American share of best-sellers grew during the century, but was fairly evenly split between American and English authors from the 1850s to the 1880s.

<sup>20</sup> Groves reports on a well-known example of this when, in 1855, T&F had become the authorized American publishers of the British poet Robert Browning. Browning wanted his wife, Elizabeth Barrett Browning, to also have her works published by T&F although C. S. Francis & Co. had previously published Mrs. Browning's works. T&F tried, in 1856, to purchase the courtesy "right" to Mrs. Browning's works, offering \$200, but were rebuffed by C. S. Francis.

<sup>21</sup> The most natural dimension, when thinking about cartels, is to think about price fixing to form a quasi-monopoly. Nevertheless, there are some strong reasons to believe that price fixing would be difficult in the book publishing industry. Although publishers all sold "books," the various titles would often be very poor substitutes for one another, not at all homogeneous in terms of content. Further, books vary greatly in terms of their size, their dependence on illustrations, and the quality of the binding and paper. This lack of uniformity in prices and units would make any sort of agreement on price or quantity difficult, if not impossible, to police.

Refusing to poach each other's foreign authors is an interesting and rational form of cartel behavior, but it may seem hard to accept a claim that the point of trade courtesy was to lower payments to British authors when the alternative appears to have been no payment at all. But that was not the only alternative.

It is useful to categorize possible behavioral "norms" that might exist within the industry, remembering that there often will be much initial uncertainty about sales and profitability for any individual book title and the future lifetime output of an author.

First, we can have all American publishers vying to publish any British book that might be thought likely to cover its publication costs. This is pure or almost perfect competition at work, to which some historians of publishing (e.g., Spoo) apply the familiar terms "ruinous" or "destructive" competition. This condition should lead to very little profits for publishers and virtually no payment to British authors. This is the model so strongly criticized by Plant as being unrealistic.

Second, we can have some enterprising publishers attempt to get a head start on the rest by purchasing access to the book contents before it is publicly available, i.e., purchasing early sheets. Because all other publishers, large and small, can also publish this book after it becomes publicly available, the head start on the market doesn't last long (see footnote 8), limiting the financial advantage from being first. Still, being first should provide some advantage. The problem for American publishers is that competition among them to get the head start will tend to cause a large portion of the small head-start advantage to shift to the British author and not the American publisher.

Third, we can have a weak form of trade courtesy, where leading American publishers agree not to print upon one another, in which case only the competitive fringe pirates the work. This provides for a longer period of exclusive or semi-exclusive printing for the first publisher, increasing the value of being first.<sup>22</sup> The problem for American publishers is that competition for the British authors will still tend to drain profits from the publisher and provide them to the British author instead. There is also little reason for the American publisher to invest in promoting British authors since the author's brand name benefits from the promotion and the author can later capture much of this value by negotiating with other publishers.

Fourth, we can have actual trade courtesy, where the ability of American publishers to compete for British authors is restricted. American publishers can only compete to get the author the first time. Once "signed," the author cannot leave the publisher. As information about a successful British author's lifetime market demand in America becomes clearer, the firm that has that author in its stable doesn't have to worry about renegotiating the contract. This allows the American publisher to invest in the British author. Record companies could only wish for such lifetime contracts with recording artists, and baseball teams look back fondly on the days when they had such contracts with baseball players. This type of trade courtesy clearly benefits American publishers at the expense of British

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<sup>22</sup> Trade courtesy, if it were as strong as actual copyright (i.e., no competitive fringe), would decrease the value of early sheets since it would be unnecessary for the publisher to get a head start, since no one would be following on with the publication of the work.

authors, compared to the third and perhaps the second categorization above, although not the first. Note that American publishers are not paying British authors out of benevolence, particularly when the authors provide early sheets.

Another piece of evidence in favor of this quasi-monopsony explanation of trade courtesy would be its extension to American authors. After all, if leading American firms can agree to reduce payments to foreign authors, they should presumably be able to achieve the same ends with respect to American authors. And indeed, there is evidence that this element of trade courtesy also partially extended to American authors. Groves reports that “it was considered a violation of trade courtesy for a[n American] publisher to approach American authors in order to recruit them away from the firm with which they were already associated, though a firm was free to publish an author’s later work if the author approached it on his or her own.” This aspect of trade courtesy is clearly not in the interest of American authors and fits a more general monopsonist interpretation of trade courtesy.

As is typically the case with cartels, cheating among its members is always a potential problem and courtesy of the trade would sometimes break down. For example, another leading American publisher (GH Putnam), in testimony before the Royal Commission, noted that “the leading houses in the trade respect each other's [trade courtesy] arrangements, although in some cases they quarrel and reprint upon each other.”<sup>23</sup>

According to Groves, trade courtesy tended to fail if the British author was a leading novelist such as Dickens or Scott.<sup>24</sup> This makes sense because the potential revenues from abandoning trade courtesy in order to get even a small piece of the business of best-selling British novelists seems likely to make the benefits of cheating too great for the chains of courtesy to bear.

Returning to the main questions this article is attempting to answer, it is important to remember that we are looking back at this historical episode in order to determine what might happen in our current world if copyright were removed. The collusion represented by trade courtesy would almost surely be found to be illegal in the presence of modern antitrust laws. The American treatment of British authors under trade courtesy, therefore, does not reflect the likely treatment of authors in 21<sup>st</sup> century developed countries that might abandon copyright. Publishers in 19<sup>th</sup> century America were able to engage in trade courtesy because the passage of the Sherman Antitrust act did not occur until 1890.

Therefore, for the purpose of looking to 19<sup>th</sup> century America in order to ascertain how authors without copyright protection might be treated in 21<sup>st</sup> century developed countries, the period in the 19<sup>th</sup> century to examine is when courtesy of the trade did *not* exist, although in order to more

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<sup>23</sup> Paragraph 1858 in the Royal Commission testimony.

<sup>24</sup> Tebbel reports that Dickens was getting as much as \$5000 for advance sheets of a single novel although at least twelve other publishers were concurrently printing his works, some in defiance of trade courtesy. This demonstrates an extreme case of the value of being first-to-market. In 1864, Houghton (still mainly a printer, not yet a publisher) offered a 10% royalty for advance sheets, which Dickens rejected, whereas in 1867, T&F offered 10% (and a lucrative U.S. tour that wound up generating \$100,000 in revenues) which Dickens accepted.

completely understand the payment to British authors, we will look at periods both with and without its existence.

#### IV. Examining the Evidence

There are three specific claims to be investigated. First, we wish to determine the proportion of British authors who received payment from American publishers, so as to be able to judge whether the payment of British authors was rare or common. Second, we wish to determine how much British authors were paid when American publishers paid them. The payment of British authors will be compared to the payment of American authors since the latter were protected by copyright. Third, it is interesting to consider whether British authors were being paid more in the U.S. than in Britain and it is useful in this endeavor to compare the size of the book-reading markets in the two countries in order for comparisons of the relative monetary payments to British and American authors to be put in perspective.

While conducting these analyses, we shall attempt to separately answer these questions for the periods before and after the rules of trade courtesy were adopted by T&F.

##### A. How likely was it for British authors to get paid by American publishers?

Plant stated that “many” British authors were paid by American publishers and they were “regularly” paid lump-sums for advance sheets. The tone of Plant’s article, based on his reading of the evidence put forward in the Royal Commission hearings, makes it easy to conclude that British authors were likely to be well paid by American publishers. Breyer’s readings of the same evidence led him to the same conclusions.

But my examination of the evidence from the Royal Commission hearings indicates that American publishers mainly *did not pay anything* to British authors even though trade courtesy had already been well established at the time of the hearings. For example, the Royal Commission summary report states:

Great Britain is the nation which naturally suffers the most from this policy [Americans failing to provide copyright to British authors]. The works of her authors and artists may be and generally are taken without leave by American publishers, sometimes mutilated, issued at cheap rates to a population of forty millions, perhaps the most active readers in the world, and not seldom in forms objectionable to the feelings of the original author or artist.<sup>25</sup>

Fourteen of the fifteen commissioners signed this report, and the only commissioner to take issue with this claim was Louis Mallet, who not only failed to sign the full report but wrote a substantial dissenting report. Plant and Breyer, inexplicably, never reference the main report’s conclusions about the American payments to British authors, which are contrary to the evidence Plant and Breyer

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<sup>25</sup> Paragraph 238 of the Copyright Commission report, page xxxvii.

present. Instead, each quotes Mallet's dissenting report<sup>26</sup> while focusing on particular testimony seemingly more conducive to the views espoused in their articles. For Plant's purposes, merely showing that a few British authors were paid by American publishers could be sufficient to support a narrow reading of his points (see footnote 6). Unfortunately, the casual reader could be greatly misled by Plant and Breyer's omission of the Royal Commission's overall conclusions.

The Royal Commission report did acknowledge that British authors were *sometimes* paid by American publishers, sometimes even well paid, but apparently these average payments were not thought to be close to the levels made possible by copyright:

We are assured there are cases in which [British] authors reap substantial results from these arrangements [with American publishers], and instances are even known in which an English author's returns from the United States exceed the profits of his British sale, but in the case of a successful book by a new author it would appear that this understanding affords no protection. Even in the case of eminent men, we have no reason to believe that the arrangements possible under the existing conditions are at all equivalent to the returns which they would secure under a copyright convention between Your Majesty and the United States.<sup>27</sup>

The Royal Commission report and testimony is filled with interesting anecdotes and fascinating facts about eminent authors, famous titles, and the publishing industry of the time, but there is no methodical analysis. The evidence from Ticknor and Fields (T&F), on the other hand, provides an organized view of a leading American publisher's treatment of American and British authors, although T&F's treatment of British authors is likely to be considerably better than the typical American publisher and more in line with the treatment provided by other leading firms who had adopted courtesy of the trade.

T&F is noted to have first arranged to pay a British author in the case of Tennyson's *Poems*, in 1842. But this was the firm's last payment to a British author until 1852, when Fields returned from a European trip where he had cultivated contacts with British authors and publishers, including giving Thomas De Quincey a check. Winship tells us that "[a]fter 1852...the firm regularly made payments for foreign works." Thus we could say that T&F began to seriously participate in trade courtesy during 1852. This will allow us to demarcate the data on T&F into a pre-courtesy and post-courtesy component.

T&F paid foreign authors in two different ways: either a royalty on sales revenue, or a lump-sum payment. Table 2 contains details of the form of the payment to foreign authors for books new to T&F (although not necessarily new to the publishing world), during two periods, 1840-1851 and 1852-

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<sup>26</sup> Plant seems to believe that the Commission was biased. He favorably quotes one T.H. Farrer to the effect that many of the Royal Commission *witnesses* were authors, naturally favoring strong copyright. Perhaps Plant considered this a justification to not mention the Royal Commission's conclusions.

<sup>27</sup> Found in paragraph 242, page e3 of the *Report of the Commissioners*.

1859. It is the latter period when the firm was invested in trade courtesy and the former period where it was not.<sup>28</sup>

For the non-courtesy early period, no British authors were paid, but one. In the later trade courtesy period, the authors of a majority (77 out of 138) of new foreign works were not paid.<sup>29</sup> Thus, even after its adoption of trade courtesy, T&F continued to avoid paying for many new British works.

1840-1851 (pre-courtesy)		1852-1859 (post courtesy)	
No Payment	31	No Payment	77
Royalty	0	Royalty	10
Lump-Sum	1	Lump-Sum	51
From Tables 3.8 and 5.1 in Winship			

Focusing on the trade courtesy period, over 80% of the titles that were paid received payment in the form of lump-sums, as opposed to royalties. By contrast, American authors, protected by copyright, were paid almost exclusively by royalty.<sup>30</sup> Royalties imply that an author continue to get paid for works going into a second or third printing. Lump-sum payments imply a one-time payment.<sup>31</sup> This distinction plays an important role when looking at the size of the payments under trade courtesy.

## B. How much were British authors paid under Trade Courtesy?

The second question of interest is how much American publishers paid British authors relative to American authors. The answer to this question is obvious for the period prior to 1852, when no British authors (with the exception of Tennyson) were paid for their works. Table 2, however, reveals that during the period 1852-1859, after T&F adopted trade courtesy, the British authors of 61 works first published by T&F were paid by American publishers.

Section II of this paper contained a quote from an 1856 article in *American Publishers' Circular and Literary Gazette* describing T&F's standing in the publishing world and also mentioning that T&F paid English authors. That article also stated that "Mr. Fields [the F in T&F] assured us that English authors were paid by the firm of which he is a member the same percentage which it allowed to American

<sup>28</sup> Because these are "new" foreign works, the measured share of published works with payments in a year is higher than it would be if all foreign works published in that year were included. That is because those works that originally had a payment for advance sheets, will often have printings in later years and no payments will be made for those later printings.

<sup>29</sup> Winship points out that 25 of the new works receiving no payment were publications of a series of books by a single best-selling British author (Walter Scott) that had already been published by other American publishers. Thus the share of new foreign books with zero payment might be thought to be overestimated in Table 2.

<sup>30</sup> Winship reports on page 133 that "with few exceptions" payments to American authors were royalty payments.

<sup>31</sup> According to Tryon and Charvat, T&F promised George Lewes, a translator of Goethe, more of an advance if his book sold better than it had to that point. There is no evidence that it did or that T&F paid more. I am also not aware of the T&F cost books showing any second lump-sum payments for any book.

writers.” According to Winship (p. 136), the financial records show that the *royalties* that T&F paid to British authors “in every case” amounted to 10%.

The most common royalty rate for American authors was also 10%,<sup>32</sup> although in some cases it was slightly lower or significantly higher, and the rate did not necessarily stay constant across printings, although it usually did.<sup>33</sup> Thus the 10% rate paid to British authors is very close to the amount that the firm paid to its American authors.<sup>34</sup> So Mr. Fields’ quoted statement matches the financial records of T&F for its British authors paid by royalty.

But T&F’s financial records contradict Mr. Field’s quoted statement for most British books published by T&F. As Table 2 made clear, only a small minority (less than 10%) of T&F’s newly published British works were paid by royalty during 1852-59, and these T&F royalty based British works comprised less than 20% of all British works receiving payment by T&F. The main form of payment consisted of lump-sums for early sheets.

It is unclear how the choice of royalty or lump-sum payment was made. The few British books paid by royalty were generally unremarkable in terms of sales,<sup>35</sup> and had average sales very similar to the British books that had no author payment at all (\$3117 versus \$3041).<sup>36</sup> The books with lump-sum payments for early sheets sold better than the other categories (average revenues of \$4440). I presume, but do not know, that the authors paid by royalty provided early sheets (and that the lack of early sheets is what distinguishes paid books from unpaid books, except for eminent authors). There is nothing in the financial records that would indicate whether British authors receiving royalty payments also provided early sheets.<sup>37</sup> The titles with lump-sum payments are denoted in T&F’s financial books with the term “early sheets,” with the payment amount listed on the same line, so there is no ambiguity for those titles.

What do the T&F data tell us about whether the type of payment affected the size of the payment? Using the data from Tryon and Charvat, I have taken all British titles published by T&F during 1852-1856 and noted the lump-sum payments to authors for advance sheets.<sup>38</sup> This allows the calculation

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<sup>32</sup> Winship reports this on page 134.

<sup>33</sup> Longfellow was paid a 20% royalty rate for *Song of Hiawatha* in 1855, but that rate had dropped to 15% in 1857.

<sup>34</sup> On page 134 Winship reports several American royalty rates that tend to be in the vicinity of 10% except when the author provided his own stereotype plates, in which case the royalties tended to double. Nevertheless, certain favored American authors sometimes received 15% or more.

<sup>35</sup> The one exception is the case of Charles Reade (the tenth most popular author overall and fifth most popular British author, according to Table 3.5 in Winship), who was offered a *royalty* on advance sheets after he complained about not being paid by T&F on its first two publications of his books. Reade was very aggressive with T&F, trying to be heavily involved with the marketing and sales of his books.

<sup>36</sup> These statistics are based on my analysis of the Tryon and Charvat data described in the next paragraph.

<sup>37</sup> But we know from correspondence discussed in Tryon and Charvat that Charles Reade provided early sheets while earning royalties. Robert Browning, in correspondence with Fields, was offered a 10% royalty on sales or a \$150 lump-sum for one volume of poetry. He wound up accepting a \$300 lump-sum for two volumes (p 337, Tryon & Charvat) but his decision to forgo the royalty did not hurt him since the first printing was 80% of his total sales and his final implicit royalty rate was 11.6%.

<sup>38</sup> I did not include the years 1857 or 1858 because I wanted to capture the possible future printings of works in order to contrast the implicit “royalty” rate upon the initial publication with the final implicit rate, or at least later rate, that included

of an implicit “royalty” rate for each book, defined as the lump-sum payment relative to revenues<sup>39</sup> generated by the work through the end of the data in 1858. These implicit rates are somewhat too high, first, because a portion of these lump-sum payments sometimes include the value of engravings for books with illustrations<sup>40</sup> and second, because some of these works could have continued to generate revenues if additional printings took place after 1858.

With these caveats in mind, the implicit royalty rates for works paid with lump-sums for early sheets are found in Table 3. The implicit rates show considerable variation, particularly the rates associated with the initial printing, with the range varying from 1.3% up to 33.3%. The average implicit royalty upon initial publication is 10.2%, very close to the 10% value that royalty-based authors received, but when later printings are included the implicit rate drops by slightly more than half, to 5%. It seems clear that the average payment to authors from lump-sum payments was inferior to that from royalties, particularly since, for a majority of books, the lump-sum on the first printing paid less than a 10% royalty would have paid.

<b>Implicit Rates</b>	<b>Initial Printing</b>	<b>All Printings</b>
> =15%	4	0
10%-15%	5	3
5%-10%	9	5
<5%	5	15
<b>Mean</b>	<b>10.2%</b>	<b>5.0%</b>
<b>Mean Weighted by Revenues</b>	<b>8.6%</b>	<b>4.7%</b>
<b>Maximum Value</b>	<b>33.3%</b>	<b>14.8%</b>
<b>Minimum Value</b>	<b>1.3%</b>	<b>1.3%</b>
Data are from Tryon and Charvat; Implicit royalty calculated as lump-sum payment divided by sales revenues; All printings through 1858 only; Revenues calculated as the product of sales price and quantity printed.		

Besides the instances of royalty and lump-sum payments based on early sheets, there are a few authors who were paid lump-sums although they did not provide advance sheets. These tended to be eminent authors. De Quincey, for example, who was T&F’s seventh most popular author (fourth most popular British author),<sup>41</sup> received \$350 from T&F although his works generated almost \$60,000 in revenues

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additional printings. If I had included 1857 or 1858, it would not have been possible to capture printings that occurs one or two years after the initial publication since the data contained in Tryon and Charvat end in 1858.

<sup>39</sup> Revenue is calculated as the number of books printed multiplied by the “sells” price.

<sup>40</sup> Six of the titles are illustrated children’s books by Mayne Reid, and the lump-sum payments include the purchase of engravings. Four of those books have initial implicit rates over 20%, although the final implicit rates for those four books range from 2.5% to 14.8%.

<sup>41</sup> Table 3.4 in Winship ranks authors by total quantity of books sold during 1840-59, while listing their overall quantity sold. I use a book selling price of \$0.75 for De Quincey and \$1 for Tennyson, based upon the typical selling prices found in Tryon and Charvat for those authors.

for T&F, implying an implicit rate of slightly more than one half of one percent.<sup>42</sup> Tennyson, who was the sixth most popular author, generated approximately \$70,000 in revenues and his total of six payments from T&F amounted to about one percent of revenues.<sup>43</sup> Nevertheless, Tennyson thought that he was exceptionally well treated by T&F. He was possibly influenced by the first payment he received which amounted to approximately 10% of the revenue from the first printing of that work (*Poems*), although his payment turned out to be about 0.7% of sales when all the printings (through 1859) are included.<sup>44</sup> Charles Reade (the tenth most popular author), upon his agreeing to provide advance sheets on later books for a 10% royalty, was offered lump-sums that amounted to about 2% of sales, after-the-fact, on two books T&F had already published.

The difference in implicit royalty rates between these eminent authors without sheets, and more typical authors with sheets, averages about 4% of sales revenues. We can take this amount to be an average market value of early sheets, which measures the value of being first, under trade courtesy, although the value of being first appears to be much lower under competition given that there is little evidence of payments being made for early sheets.

These values are of particular interest given some of the discussion provided in testimony to the Royal Commission about relative average payments of British authors by British and American publishers (if one assumes that the two markets are equivalent). I refer to a claim repeatedly made by a pro-copyright Commission member (the novelist Anthony Trollope) about the relative payments made to English authors by English and American publishers.<sup>45</sup>

Here is a representative exchange between the questioner Trollope and a British publisher, John Murray III:

1306. *As a rule do you think that the price that a successful [British] author can get from America amounts to 25 per cent of what he could get in England?*—There, again, I cannot say; I have no experience; I have never made any calculations on the point.

1307. *You would not, perhaps, be surprised to hear that in the case of many popular authors it amounts to about 10 per cent?*—I should not be surprised.

The basis for Trollope's claim that *successful* British authors received from American publishers about ten percent of what they received from the British publishers is unclear (although as a successful

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<sup>42</sup> According to Tebbel, during the 1852 European trip, Field went to De Quincey's house and paid him \$250 for publishing 3000 copies of his collected works, an action that was warmly greeted in British literary circles. There is a record of only one other payment of \$100 (Winship, 137) in 1855.

<sup>43</sup> Information on the payments to Tennyson is found on page 137 of Winship and information on his total quantity sold is found in Winship's Table 3.4.

<sup>44</sup> Tebbel reports (p. 395) that Tennyson's agent thought that the 1842 payment of \$150 was too low, but "Tennyson thought much better of this offer than his American agent. Fifty years later he was still lauding Ticknor for making it, and he never gave his work to any other house." In the one case where Tennyson sent advance sheets (*Maud*, in 1855) Tennyson received 4.3% when later printings are counted.

<sup>45</sup> This shift from comparing the treatment of British authors and American authors in America to comparing British authors' payments in America and Britain is reasonable if the typical payments by British publishers to British authors is assumed to be somewhat similar to the typical payments by American publishers to American authors. As we will see shortly, the American market was larger but not so much so as to make such a comparison meaningless.

novelist he would have had some personal experience)<sup>46</sup> but the numbers do not appear to be unreasonable given the payments T&F made to some of the successful British authors, particularly those who did not provide advance sheets.

Overall, the evidence appears to support a view that under trade courtesy, T&F treated a small minority of British authors, not protected by copyright, as well as American authors covered by copyright. But most British authors were not treated so well. Many were not paid at all, others who provided valuable early sheets were paid less than half they would have received under copyright, and successful and eminent authors who did not provide advance sheets received merely nominal amounts.

I was able to calculate an overall average payment to British authors during this period from 1852-56. The average implicit rate for the 54 new T&F publications is 3.5%. Given the various biases tending to overstate the calculation of implicit rates, it seems fair to conclude that under trade courtesy, the average British book earned for its author about one third of what American authors earned. Further, this treatment under trade courtesy was much better than the treatment of British authors prior to the existence of trade courtesy, when the average British author received essentially nothing.

### C. British Author payments in Britain and the U.S

One of the claims that critics of copyright focus on is that British authors, although not protected by copyright, were sometimes paid more by American publishers than by publishers in Britain where they were protected by copyright. As already noted, the Royal Commission report accepted this claim.

This claim is little more than a cute debating point, however, since it is largely irrelevant to the question of whether copyright had an important effect on the revenues generated for the typical or average author. After all, even if a few British authors were paid more by American publishers than by British publishers, these cases could merely be outliers to a more general result that publishers typically paid authors very poorly when there was no copyright protection,

There are various reasons that might cause an occasional British author to get paid more from American publishers than from British publishers, even if average American payments to British authors were much lower than payments from British publishers. The simplest possibility would be that a particular British author's work might be much more popular in America than in Britain.<sup>47</sup>

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<sup>46</sup> Mott (p. 135), however, notes an apparent conflict between Trollope's claims of paltry payments by American publishers to British authors and the claim of the American publisher J. Henry Harper of having paid Trollope 700 pounds for advance sheets of *Sir Harry Hotspur* although Trollope had reported in his *Autobiography* that he received only 750 pounds from his British publisher for that title. One possibility is that Harper confused dollars with pounds since at that time the exchange rate was about five dollars per British pound. Another possibility is that this was an exception to Trollope's normal experience with American publishers.

<sup>47</sup> A second reason could be that a British work paid by royalty in the U.S. outperforms expectations made when British publishers underestimated a book's success when negotiating the lump-sum payment for the book (Winship claims on page 139 that British publishers frequently purchased the copyright from British authors with a lump-sum upfront payment and MacGarvie and Moser also report that British publishers used lump-sums to pay seasoned authors). A third reason would be that British publishers needed to cover the losses from the many books that were flops whereas American publishers, working as a cartel, could pick and choose only the successful British authors and books. This would tend to make American publishing of British books more profitable, ceteris paribus, and allow a larger payment to British authors.

Nevertheless, since this claim of higher American payments has some prominence in the literature, it seems worth investigating for that reason alone.

It also important to note that the U.S. became a larger market than the UK during the mid-1800s. One Royal Commission witness (politician/businessman Robert Andrew Macfie) provided numbers as to the populations in the two countries:

2774. (Chairman.) *Are there any further observations which you wish to make?—...The 42 millions in the United States are much more readers than the 32 millions in this country. Our 32 millions are happily increasing yearly, but the 42 millions are increasing more rapidly....*

It seems quite clear that the U.S. had a larger population with a higher percentage of book purchasers at the time the Royal Commission was holding its hearings although the differences in population were not so large as to make simple comparisons meaningless.

We have already noted that a small number of T&F's British authors were paid the same rate as American authors under trade courtesy. Others were paid a rate perhaps half as much. Given the fact that the U.S. market was larger, it would be very surprising if none of the British authors were to receive a larger absolute payment in the U.S. than in Britain..

What is surprising is how little evidence there was that British authors actually received more money from the U.S. market. Plant supported his claim of larger American payment(s) by referencing the Royal Commission testimony of Herbert Spencer and concluding "that his receipts from sales in America (where he had no copyright to keep up prices) were apparently greater than from those in England."<sup>48</sup> I cannot find support for Plant's conclusion. Spencer states, with regard to *rates*, that his American publisher "pay[s] me as well as American authors are paid"<sup>49</sup> which comports with the results we have found for some of T&F's British authors.

One instance in the Royal Commission evidence contained a direct reference to the claim that some American publisher(s) paid more (seemingly in monetary amounts, not rates) to some British authors when a member of the commission (John Edward Jenkins, a fiction writer and politician) asked some questions to the British publisher Murray:

1282. *Are you aware that there are authors in England who have received more from their American publishers than from their English publishers?—No, I was not.*

1283. *Do you know that a novelist, for instance, got more for his novels from Americans than he would have got in England?—I am not aware of that.*<sup>50</sup>

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<sup>48</sup> Found on page 188 of Plant.

<sup>49</sup> Question 5269, page 287 of the Royal Commission testimony. Spencer stated that he was paid the same very high royalty rate as American authors in the "Kings International Series" of books and this was mentioned several times in the Commission report.

<sup>50</sup> Found on page 62 of the Minutes of Evidence.

But even here, the greater payment by American publishers seems to be treated as a rather unusual event.

In conclusion, there seems to be some evidence, ephemeral with regard to specifics, that some English authors were paid more by American publishers than by their English publishers. But this is not surprising. And evidence of this sort is largely irrelevant to the underlying question of whether copyright has an important positive impact on the payments made to authors because these payments took place under the regime of trade courtesy. There is no evidence, however, of a British author without copyright protection receiving more in a competitive U.S. publishing market, than in Britain.

## V. Conclusion

The treatment of British authors by American publishers in the 19<sup>th</sup> century, when those British authors were paid even though they had no American property rights over their works, appears to be shocking to someone taking the textbook model of perfect competition as a good descriptor of 19<sup>th</sup> century American publishing. Some economists have used this empirical observation to correctly point out that copyright law is not necessary to provide some reward to some authors of creative works. But many of these economic analyses have gone too far, appearing to claim that the historical evidence supports a general conclusion that under competitive markets, authors can get paid almost as much, or even more, whether or not they hold a property right (copyright) over their works.

The results in this paper discredit the historical claim that American treatment of British authors in the 19<sup>th</sup> century was almost as good as it would have been if British authors had had copyright protection. More importantly, it also discredits the claim that the treatment of authors would not deteriorate much if copyright protection were removed today.

Instead, the more complete historical record indicates that most British authors who were paid by American publishers were only paid because there was a cartel of sorts, known as trade courtesy, that enhanced the value of early access to British works. But even with trade courtesy, most British authors were either not paid at all or paid considerably less than they would have been had copyright existed for their works.

What has not been noted in prior examinations of American publisher's 19<sup>th</sup> century treatment of British authors, is that trade courtesy would be prosecuted by modern governments as an antitrust violation. Therefore, from a policy perspective, what counts is the treatment of British authors when trade courtesy did not exist. The historical record indicates that without trade courtesy, British authors were essentially unpaid by American publishers. That is the result that is most relevant to a debate over the modern impacts of copyright. The results of the 19<sup>th</sup> century imply that without copyright, most current authors would not be paid at all.

Finally, none of this should be surprising. Without the ownership rights that copyright provides, the ability of creators to extract payments from publishers should be severely limited. In a competitive market, we should expect to see much larger payments for items (e.g., book manuscripts) that convey

ownership rights than for items that do not convey ownership rights. The alternative claim, although intriguing, is really based on wishful thinking and an incomplete examination of the historical record.

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