

## Copyright and the Circulation of Geographical Knowledge in 18<sup>th</sup> Century Britain

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It is often observed that the new, digital, technologies of the 21<sup>st</sup> century have transformed our understanding of, and relationship with, space.<sup>1</sup> Yet it is important to recall that the 18<sup>th</sup> century was a similarly transformative period. New technologies and techniques relating to transport, navigation, measurement and communication were stimulated by the demands of trade, the military and the empire and made travel safer as well as more efficient. A spirit of geographical inquiry formed an essential aspect of Enlightenment ideology, and saw an ever-growing number of exploratory expeditions – to the South Pacific, through North America and India – with objectives astronomical, biological and ethnographic complementing military and trade strategy.<sup>2</sup> Even at home in Britain exploration could occur, as Boswell and Johnson’s tours of Scotland demonstrated.<sup>3</sup> The knowledge created by these voyages was made available through travel narratives, printed itineraries and maps to an audience fascinated by the romanticism of such accounts and the scientific achievements they demonstrated, as well as the possibilities they offered of increased mobility on the part of the general public.

Investigating and understanding the specific ways and processes by which knowledge circulates in society has become a project of historians in fields such as the history of science, the history of the book and the history of the map.<sup>4</sup> Attention is paid to the spaces in which knowledge is produced, the material forms it takes and the people and institutions involved.<sup>5</sup> There has been scholarly analysis of how the publication process shaped the content of travel accounts.<sup>6</sup> Matthew Edney has called for maps to be studied as processes, such that attention is paid not just to the ways that maps construct the world through selection and ideology, but also to the material conditions in which they were made.<sup>7</sup> While there is a considerable amount of excellent work now taking up this call, very little attention has been paid to the role of law in creating maps and other printed forms of geographical knowledge, and its effect on the circulation of that knowledge.

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<sup>1</sup> The author thanks H. Tomás Gómez-Arostegui, Laurence Worms and Ashley Baynton-Williams. See, for example, contributions in Rob Kitchin, Tracey P. Lauriault and Matthew W. Wilson, *Understanding Spatial Media* (Los Angeles: Sage Publications, 2017).

<sup>2</sup> See, for example, Maragarette Lincoln, *Science and exploration in the Pacific: European voyages to the southern oceans in the eighteenth century* (Woodbridge: Boydell & Brewer, 1998).

<sup>3</sup> Pat Rogers, *Johnson and Boswell in Scotland: A Journey to the Hebrides* (Yale: Yale University Press, 1993).

<sup>4</sup> See, for example, Robert Darnton, “‘What is the History of Books?’ Revisited,” *Modern Intellectual History* 4 (2007): 495-508; Matthew Edney, “Academic Cartography, Internal Map History, and the Critical Study of Mapping Processes,” *Imago Mundi* 66 (2014): 83–106; Martin Bruckner, *The Social Life of Maps in America, 1750 – 1860* (Chapel Hill: Omohundro Institute and University of North Carolina Press, 2017).

<sup>5</sup> Dorinda Outram, “New Spaces in Natural History” *Cultures of Natural History*, eds. Nicholas Jardine *et al.* (Cambridge: Cambridge University Press, 1996): 249-265.

<sup>6</sup> See, for example, Felix Driver, “Missionary Travels: Livingstone, Africa and the Book,” *Scottish Geographical Journal* 3.4 (2013): 164-178; Ian MacLaren “Explorers and Travelers,” *History in Africa* 30 (2003): 213-22.

<sup>7</sup> Matthew H. Edney, “Academic Cartography, Internal Map History, and the Critical Study of Mapping Processes,” *Imago Mundi* 66 (2014): 83–106.

This chapter bridges this gap through an examination of how copyright law applied to print forms of geographical knowledge in the eighteenth century. Copyright law is central to the story of geographical knowledge circulation because copyright's statutory origins lie in an Act which proclaimed its purpose to be 'the encouragement of learning', while the monopolistic proprietary rights created by that Act are frequently deployed to restrict dissemination of knowledge.<sup>8</sup> This chapter investigates this tension in the context of the eighteenth century map, print and book trades. It considers the introduction of statutes that sought to prevent the unauthorised copying of books and maps, and litigation that ensued: six cases relating to maps, three cases relating to written itineraries, and one case relating to a travel narrative. These cases provide a rich source of information about the trade practices of 18<sup>th</sup> century London mapmakers and publishers of geographic information and their involvement with the law. This chapter examines these cases in order to uncover what they can tell us about the changing strategies employed to protect investment in geographical information and its graphic representation in the 18<sup>th</sup> century. It also considers how the changing legal environment impacted upon their business practices, the content of the maps they produced and the circulation of geographical knowledge. Furthermore, it highlights the importance of personal relationships – both rivalrous and cooperative – and the ways that these affect how, and whether, the law is used to resolve disputes.

The chapter argues that the introduction of copyright law had a positive impact on the circulation of geographical knowledge, as it assisted in establishing more stable economic conditions for the print and book trades, and even more so in the case of the always more precarious map trade. Moreover, early applications of the statute by the courts were largely, although not uniformly, generous towards those who both copied and improved, thereby limiting the potentially repressive effects of the proprietary right in question. In this way, the chapter also sheds light on the complex doctrinal development of copyright limitations, such as the US defence of fair use, and the UK exception of fair dealing.

### **1. Copying and Copyright in the Map Trade**

It may be surprising for those of us accustomed to reliance on maps updated by live-streamed data to learn that the new discoveries of the navigators, and the increasingly accurate calculations of surveyors in the eighteenth century, were not immediately incorporated into paper maps despite their growing market and popularity. Indeed, at the start of that century many mapmakers of the period were content to reproduce and sell old, out of date, and copied maps, puffing them as new and accurate. As Laurence Worms has noted, the state of affairs can be summed up by a withering attack made by Herman Moll on his mapmaking colleagues, which he placed on one of his own maps in 1711:

Among all the Cheats that the World are dayly abused with, none have lately been more Scandalous than that of Maps, some times new ones are put out by Ignorant Pretenders, some times mean and imperfect foreign Maps are copied and published by them as their own and having no judgment or knowledge of what is good or had,

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<sup>8</sup> An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned 1710 (8 Anne c.21) (Statute of Anne).

correct or incorrect, they basely impose on the Publick with pompous titles, & pretend they are Countenanced and assisted by those who either never saw or despise their wretched Performances.<sup>9</sup>

Yet, as Worms goes on to explain, Moll's comments were aimed not so much at the trade in general, but at two particular 'ignorant pretenders': Charles Price and John Senex, relative newcomers to the map trade, who had recently produced a competing map of the same region.<sup>10</sup> Worms argues that this was not simply a local dispute between rival mapsellers, but part of the broader intellectual challenge posed by Enlightenment philosophies and methodologies. The battle pitted appeals to tradition, to hierarchy, to authority, to classical learning and religious orthodoxy against the emergence of an empirical and scientific method, a commitment to the furtherance of knowledge and the empowering nature of learning. Moll belonged to the past, the old ways of mapmaking; Senex and Price were a new breed, seeking out new scientific approaches and mathematical accuracy.<sup>11</sup>

Nevertheless, the economic threat posed by these newcomers was real. As Yolande Hodson has noted, until around 1760 the map trade was 'characterised by indigence'.<sup>12</sup> Mapmaking was a high risk activity, requiring investment in paper, copper plates and labour even without the enormous expense of original surveys. There were very real incentives to copy maps already in existence. It is therefore interesting to note that Moll made his accusation in 1711, the year after the Statute of Anne was passed. This statute protected books against unauthorised publication of copies – it would therefore have applied to books that contained maps.<sup>13</sup> However, it would not have applied to maps. Mapmakers did seek to protect the exclusivity of their productions using royal patents and privileges. On other occasions, maps were entered in the Stationers' Register. Although, prior to the passing of the Statute of Anne, it was necessary to be a member of the Stationers' Company (and most mapmakers were not), it seems not to have been difficult to come to an arrangement with someone who was.<sup>14</sup>

One hundred years after the passing of the Statute of Anne, the map trade had transformed from a trade reliant on the copying and refurbishment of old copper plates issued under new titles and with generally entirely spurious claims to being 'new and improved', to one actively (not just rhetorically) involved in acquiring new information and economically and philosophically invested in its accuracy and currency. More significant in this

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<sup>9</sup> Herman Moll, *A New and Accurate Map of Spain and Portugal* (London, 1711), quoted by Laurence Worms, "The Maturing of British Commercial Cartography: William Faden (1749-1836) and the Map Trade," *The Cartographic Journal* 41 (2004): 5–11.

<sup>10</sup> Worms, "The Maturing of British Commercial Cartography," 6.

<sup>11</sup> Worms, "The Maturing of British Commercial Cartography," 6-7.

<sup>12</sup> Yolande Hodson, "Maps, charts and atlases in Britain," *The Cambridge History of the Book in Britain, Vol V, 1695-1830*, eds. Michael F. Suarez, S.J. and Michael L. Turner (Cambridge: Cambridge University Press, 2009) 762.

<sup>13</sup> An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned 1710 (8 Anne c.21) (Statute of Anne)

<sup>14</sup> Laurence Worms, "The London Map Trade to 1640" *The History of Cartography: Cartography in the European Renaissance, Vol 3, part 2*, ed. David Woodward (Chicago: University of Chicago Press, 2007) 1714-5.

transformation than the Statute of Anne were the Engravings Acts that were modelled on it. In 1735, Parliament passed the first Engravings Act, commonly known as Hogarth's Act.<sup>15</sup> In its title, the Act proclaimed itself "An Act for the Encouragement of the Arts of designing, engraving and etching historical and other Prints" and in its preamble, the Act claimed to respond to the problem created by printsellers and others who had "frequently taken the liberty" of copying, engraving and publishing prints without consent. It went on to provide that "every Person who shall invent and design, engrave, etch or work in *Mezzotinto* or *Chiaro Oscuro*, or from his own Works and Invention shall cause to be designed, engraved, etched or worked in *Mezzotinto* or *Chiaro Oscuro*" would have the sole right of printing such works for a term of 14 years, commencing from the day of first publishing.<sup>16</sup>

The problem with this Act, as far as maps were concerned, was that it appeared to be limited to those people who "invented and designed" their engravings, in other words, to those like Hogarth (and almost solely Hogarth) who produced artistic engravings to their own designs. A case brought to the Court of Chancery by Elizabeth Blackwell in 1738 against a number of London printsellers who were engraving and selling unauthorised copies of her botanical prints, clarified that the statute could apply to things copied from nature.<sup>17</sup> Lord Hardwicke LC explicitly referred to John Pine's map of the City of London as something that should fall within the Act.<sup>18</sup> However, a subsequent case, brought by leading mapmaker and engraver Thomas Jefferys against Richard Baldwin, the proprietor of the London Magazine, found that the print in question (of the vessels of the Society of British Herring Fishery) did not fall within the statute because Jefferys had procured another person to do the engraving.<sup>19</sup> This approach would have affected mapsellers who did not also do their own engraving.<sup>20</sup> In a third case, brought by the engraver Robert Edge Pine, a jury found in Pine's favour but the question of whether engravings of painted portraits could also be protected was left unresolved.<sup>21</sup>

These matters were clarified in a second engravings Act, passed in 1767.<sup>22</sup> With the preamble stating that the earlier Act had proved ineffectual for the purposes of encouragement of the arts of designing, engraving and etching historical and other prints, the

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<sup>15</sup> An Act for the encouragement of the Arts of designing, engraving and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the Time therein mentioned 1735 (8 Geo II c 13) (Engravings Act 1735).

<sup>16</sup> Engravings Act 1735, s.1.

<sup>17</sup> *Blackwell v Harper* (1740) 2 Atk 93; Barn C 210.

<sup>18</sup> 2 Atk 93, 95.

<sup>19</sup> *Jefferys v Baldwin* (1753) Amb 164.

<sup>20</sup> Interestingly, Jefferys was one of the few mapsellers who was also an engraver, but on this occasion he had not done the engraving in question. As Mary Pedley notes, maps were collaborative productions and rarely the work of even a single engraver as tasks would be split between masters, assistants and apprentices, with some engraving outlines, some etching hachures, others doing topographic details, lettering etc. Mary Sponberg Pedley, *The Commerce of Cartography* (Chicago: Chicago University Press, 2005) 45.

<sup>21</sup> *Pine v Withy* (1764) *Lloyd's Evening Post* 23-25 July 1764.

<sup>22</sup> An Act to amend and render more effectual an Act made in the eighth Year of the Reign of King George the Second, for Encouragement of the Arts of Designing, Engraving and Etching, Historical and other Prints; and for vesting in, and securing to Jane Hogarth, Widow, the Property in certain Prints 1767 (7 Geo III c 38) (Engravings Act 1767).

wording of the rights created was subtly altered. This Act conferred its benefit and protection upon:

Every Person and Persons who shall invent or design, engrave, etch or work in *Mezzotinto* or *Chiaro Oscuro*, or, from his own Work, Design or Invention, shall cause or procure to be designed, engraved, etched or worked in *Mezzotinto* or *Chiaro Oscuro*, any Historical Print or Prints, or any Print or Prints of any Portrait, Conversation, Landscape, or Architecture, Map, Chart or Plan, or any other Print or Prints whatsoever.<sup>23</sup>

This change of wording operated to extend the protection of the Act to those who *procured* an engraving to be made. It thus created a right in favour of artists who might want to commission engravings from their paintings (a right that was routinely assigned to the owner of the painting<sup>24</sup>) and, importantly for present purposes, mapsellers who engaged engravers. As well as clarifying that the statute would apply to a much broader range of prints, it increased the term of protection from fourteen to twenty-eight years and provided that anyone bringing an action under the statute could recover full costs of the suit. Only one suit was brought under this Act (discussed below) and it too soon perceived as ineffective, and a third engravings Act was passed in 1777.<sup>25</sup> This Act increased the available remedies to include damages (the earlier Acts having only provided for penalties) as well as allowing a plaintiff to recover double costs of suit. The increase in damages seems to have increased the perception as to the Acts' usefulness; as is discussed below, several more cases were quickly brought under it.

Whether there was any role played by a perceived need to give specific encouragement to the makers and publishers of maps, charts and plans, in the passing of these statutes is hard to pin down. Three of the six artists lobbying alongside Hogarth for the Engravings Act 1735 were involved in map engraving, namely John Pine, George Vertue and Gerard Vandergucht. The 1767 Act was driven by the Society of Artists of Great Britain, and one of the Society's Directors was Edward Rooker, who had engraved John Gwynn's *A plan of the city of London after the Great Fire in the year of our Lord 1666*.<sup>26</sup> However, which, if any, of these men were behind the addition of the words 'maps, charts and plans' in the 1767 Act is not known.

While it remains unclear whether the passing of the Engravings Acts represented a deliberate strategy on the part of lawmakers to encourage the production of geographic information, there were other, extra-legal, moves afoot to encourage investment in geographic information during this period. One such initiative was the Society of Arts' decision to offer premiums of 100 pounds for any original county survey on the scale of one

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<sup>23</sup> Engravings Act 1767, s.1.

<sup>24</sup> See Elena Cooper, *Art and Modern Copyright* (Cambridge: Cambridge University Press, 2018) 116-7.

<sup>25</sup> An Act for more effectually securing the property of prints to inventors and engravers, by enabling them to sue for and recover penalties in certain cases 1777 (17 Geo III c 57) (Engravings Act 1777).

<sup>26</sup> Laurence Worms and Ashley Baynton-Williams, *British Map Engravers* (London: Rare Book Society, 2011) 567.

inch to one mile.<sup>27</sup> Although offered irregularly, the premiums do seem to have had some effect as a stimulus to improved mapmaking in this particular field.<sup>28</sup> Perhaps the most famous campaign to incentivise the improvement of geographic knowledge during this period was the prizes offered to those who could come up with the best method for finding longitude at sea.<sup>29</sup> While not an explicit mapping endeavour, it clearly had flow on effects for mapmaking and the search for accuracy. Moreover, the Longitude Act of 1765 gave the Longitude Commissioners the exclusive right to print Nautical Almanacs and other useful Lunar Tables “any Law, Statute, exclusive Privilege, private Charter, or other Custom, to the contrary thereof notwithstanding”.<sup>30</sup>

The inclusion of maps, charts and plans within copyright statutes was not explicitly framed as forming an element of this broader movement to encourage the production and dissemination of new and increasingly precise geographic knowledge. In reality, it seems the inclusion of maps within copyright more likely occurred because they fell within the category of ‘engraving’; it was their method of production and final format that qualified them for protection against copying. Moreover, as will be demonstrated in the discussion surrounding map litigation below, a second relevant factor would be that maps tended to find their way onto the market largely through the same channels as did artistic prints and so the same kinds of actors were affected. Nevertheless, while the initial rationale for including maps within the Engravings Act 1767 statute may have been purely commercial, there was an effect over time on the production and circulation of geographic knowledge. To explore this, we now turn to an examination of the cases brought under the statutes that came before the courts.

## 2. Litigation under the Engravings Acts: the Map Cases

In February 1770, three years after the passing of the Engravings Act 1767, Thomas Jefferys brought a bill of complaint in the Court of Chancery against the printseller Carington Bowles.<sup>31</sup> Jefferys was Geographer to George III and the leading mapmaker of his day. As noted in the previous section, he had already tested the Engravings Act once, in relation to a print,<sup>32</sup> and was now prepared to do so with a map. It might seem unsurprising that the first to make use of the statute in relation to maps was a leader of the trade, but it is worth noting that Jefferys was far from wealthy. Indeed, he had been declared bankrupt four years earlier, and

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<sup>27</sup> J.B. Harley, “The Society of Arts and the Surveys of English Counties 1759-1809,” *Journal of the Royal Society of Arts* (1963): 43–47.

<sup>28</sup> Harley, “The Society of Arts and the Surveys of English Counties” 43–47.

<sup>29</sup> An Act for providing a Publick Reward for such Person or Persons as shall Discover the Longitude at Sea 1714 (12 Anne c.15).

<sup>30</sup> An Act for explain and rendering more effectual Two Acts made in the Twelfth Year of the Reign of Queen Anne, intituled, An Act for providing a publick Reward for such Person or Persons as shall discover the Longitude at Sea; and the other in the Twenty sixth Year of the Reign of King George the Second, intituled, An Act to render more effectual an Act made in the Twelfth Year of the Reign of Her late Majesty Queen Anne, intituled An Act for providing a publick Reward for such Person or Persons as shall discover the Longitude at Seawith regard to the making Experiments of Proposals made for discovering Longitude and to enlarge the number of Commissioners for putting in Execution the said Act 1765 (15 Geo III c.20)

<sup>31</sup> *Jefferys v Bowles* (1770) C12/1318/18; (1770) Dic 429. For a detailed discussion of this case and its implications, see Isabella Alexander and Cristina S. Martinez, “A Game Map: Object of Copyright and Form of Authority in Eighteenth-Century Britain” *Imago Mundi*, forthcoming 2020.

<sup>32</sup> *Jefferys v Baldwin* (1752) C12/1903/7; (1753) Amb 164.

was only able to continue in his trade through the efforts and assistance of the map and printseller Robert Sayer, and perhaps others.<sup>33</sup> Jefferys was also one of the mapmakers who had made the heaviest investment in the county surveys, pursuing the Society of Arts prizes referred to above.<sup>34</sup> As noted above, the upfront costs for mapmakers were already high, even without original surveys, and mapmakers had long looked to external sources, such as subscription schemes, to defray these early expenses.<sup>35</sup>

Yet the work he chose for his Chancery action was not a map valuable for its accuracy, nor was it produced using new geographic knowledge or recent surveys. Rather, it was a ‘novelty map’ – a map game, in fact (see figure 1). [Insert figure 1 near here] In 1768, Jefferys and Sayer had published “The Royal Geographical Pastime of the Complete Tour of Europe”. This was the first of 3 map games, the second being based on a map of England and Wales and the third on a map of Europe, and both were published in 1770. Also in that year, Bowles had published a map game entitled “The Royal Geographical Amusement or the European Traveller Designed from the Grand Tour by Dr Nugent” (see figure 2). [Insert figure 2 near here]

Despite his very straitened financial circumstances, Jefferys was prepared to invest in this case. He engaged Robert Bicknell and Alexander Wedderburn as counsel, both of whom had already appeared in several cases involving literary property and Wedderburn (later Lord Loughborough) would 4 years later to argue for the common law copyright in *Donaldson v Becket*. In his Bill of Complaint, Jefferys specifically relied upon the 1735 and 1767 Engravings Acts, stating that he had “well hoped that he should have fully Enjoyed and Reaped the Sole Benefit of the Labour and Industry as aforesaid Pursuant to and Compliant with the said Act of Parliament”.<sup>36</sup>

In his Answer, Bowles confessed and avoided – although he had indeed published such a game, he alleged that he had copied the map from one of his own stock, that he had purchased the rights to the game from one John Jefferys (no relation to Thomas) and that the game did not fall within the scope of the Acts because only the map was an engraving, while the notes and rules were on letterpress. Finally, he asserted that Jefferys could not claim the Acts’ protection because he was not the original inventor of the game but simply its engraver.<sup>37</sup> On 17 March 1770, the matter was referred to a Master to examine the copper plates and see if they were the same, but after that the case peters out.<sup>38</sup> Jefferys died in November of the following year, leaving only 20 pounds and his debts to his wife and children.<sup>39</sup>

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<sup>33</sup> J.B. Harley, “The Bankruptcy of Thomas Jefferys: An Episode in the Economic History of Eighteenth Century Map-Making,” *Imago Mundi* 20 (1966): 27–48.

<sup>34</sup> Harley, “The Bankruptcy of Thomas Jefferys,” 27–48.

<sup>35</sup> See, for example, Sarah L. Clapp, “The Subscription Enterprises of John Ogilby and Richard Blome,” *Modern Philology* 30.4 (1993):365-379.

<sup>36</sup> C12/1318/18 m1 (15 Feb 1770).

<sup>37</sup> C12/1318/18 m2 (7 Mar 1770).

<sup>38</sup> C33/433 f267v (17 March 1770).

<sup>39</sup> Harley, “The Bankruptcy of Thomas Jefferys” 28.

The map in this case might have been a novelty or ‘curious map’, but the choice of this map to launch the first test case is not without significance. The 18<sup>th</sup> century saw the map (and print trade) begin to respond to the growing emphasis on geography and mapping in children’s education, as Enlightenment values seeped into (or trickled down) to attitudes towards education and childhood. John Spilsbury, an apprentice to Thomas Jefferys, was the first to produce dissected maps (jigsaw puzzles) but it was Bowles who produced the first educational map game in which the map itself was the playing board. This map game was published in 1759 and had been designed, as noted in the litigation above, by John Jefferys.<sup>40</sup> Thomas Jefferys seems to have indeed copied this idea 9 years later, although using maps from his own stock of copper plate maps. This kind of product was crucial to efforts to widen the market for maps and shore up the precarious financial position of mapmakers, particularly because they would have been relatively cheap to produce in that they required no new surveys and relatively infrequent updating. If copyright could be used to protect the game against competitors that would have been a significant victory for Jefferys.

Ten years later, a second case was brought to Chancery under the Engravings Act 1767. This time Carington Bowles was the plaintiff. He brought his bill of complaint against Robert Sayer, the mapmaker and printseller who had purchased the majority of Jefferys’ stock upon his death, and Sayer’s new business partner John Bennett.<sup>41</sup> This case involved a dispute that had arisen over a joint venture between the parties. Bowles alleged that he had entered into a partnership agreement with Sayer relating to printing from four large copper plates depicting a map of Scotland (see figure 3). [Insert figure 3 near here] It had been agreed that if either party sold off all their prints, they would purchase prints from the other before printing any new copies. However, according to Bowles, Sayer had sold all his copies and then arranged for new copies to be printed, with some small variations, without informing Sayer, and then sold the new impressions at a price below that which Bowles and Sayer and originally agreed upon.<sup>42</sup> Sayer responded by accepting that he had printed additional copies, but claiming that this was in retaliation for Bowles having pirated Sayer’s map of Ireland in the past. He also asserted that the map in question could not be protected by the 1767 Act, as it had been published before the Act came into force.<sup>43</sup>

This dispute arose from a fairly typical commercial arrangement made between members of the print and map trades, in which the ownership of copper plates was shared, as was the outlay for printing, composition and engraving. The high risk nature of the trade and its small profit margins made such arrangements essential. But at the same time the intense rivalry for a relatively small market meant it was also inevitable that some relationships would break down. The new law of copyright gave mapmakers another tool to mediate their relationships and regulate their trade. However, cooperation and extra-legal solutions remained important – in this case, the initial bill was lodged in June 1780 but by the

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<sup>40</sup> Jill Shefrin, “‘Make It a Pleasure and Not a Task’: Educational Games for Children in Georgian England,” *The Princeton University Library Chronicle* 60 (1999): 251–75.

<sup>41</sup> *Bowles v Sayer* (1780) C12/1656/12.

<sup>42</sup> C12/1656/12, m1, 2 (12 Jan 1780).

<sup>43</sup> C12/1656/12, m3, 4 (29 Jun 1780).



following May it was recorded that the parties had ‘accommodated’ their differences and the plaintiff’s bill was dismissed without costs.<sup>44</sup>

The map itself, however, is also significant. The map in question was likely based on James Dorrett’s map of Scotland of 1750, which included new information from surveys undertaken at the expense of the Duke of Argyll, Dorrett’s employer.<sup>45</sup> This four-sheet map was used by a number of later mapmakers, both English and Scottish.<sup>46</sup> It is possible that the map also drew on information acquired from Roy’s Military Survey, underway in Scotland from 1747.<sup>47</sup> This major undertaking laid the foundations for the Ordnance Survey of England and Wales and the new era of state-sponsored, triangulated exactitude it heralded.<sup>48</sup> This map therefore sits at this turning point, a blend of the old era of copying with small adjustments, and the new era of original surveys and new partnerships.

The litigation likewise straddles the pre and post-copyright ways of doing business. Sayer’s reference to Bowles’ copying of his map of Ireland indicates that, while copying may have been endemic, it was still resented by mapmakers and led to a certain level of tit-for-tat behaviour. Copyright law brought a new element into the equation, offering a new tool to regulate trade behaviour beyond custom and retaliation. Sayer’s insistence that the map in question could not be covered by the statute because it had been created before the statute was passed suggests he had been relying on the old ways of doing business and this new tactic caught him unawares. However, in the end it seems commercial exigency rather than copyright law determined the outcome. Sayer and Bowles were involved in many such arrangements, with each other as well as third parties. Competition and cooperation were still too closely entangled, and the precarious financial position of the map trade too great, to risk putting these important relationships through the zero-sum game of a copyright determination.

The next three cases to be brought under the Engravings Acts were linked in several ways: each of them involved a specific kind of map – the sea chart – and each of them involved the same defendant: John Hamilton Moore.<sup>49</sup> Moore was a particularly colourful character, who taught navigation, sold nautical instruments, and published sea charts. He made strong friends and enemies, and three of the latter brought copyright cases against him. A second significant element of these cases as the forum of litigation: these actions were brought in the King’s Bench, probably because of the potential of an award of damages available under the 1777 Act.<sup>50</sup> Furthermore, each of them proceeded to a conclusion. In the first two cases, Moore successfully defended the claims against him, but in the third case, he lost to his former employee William Heather. While fewer of the legal records in these cases

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<sup>44</sup> C33/455 f497. (26 May 1781).

<sup>45</sup> Donald G. Moir, *The Early Maps of Scotland to 1850* (Edinburgh: Royal Scottish Geographical Society, 1973) 92.

<sup>46</sup> Moir, *The Early Maps of Scotland* 92

<sup>47</sup> Moir, *The Early Maps of Scotland* 92

<sup>48</sup> See Rachel Hewitt, *Map of a Nation: A Biography of the Ordnance Survey* (London: Granta, 2011).

<sup>49</sup> For a more detailed examination of these cases, see Isabella Alexander, “*Sayer v Moore* (1785),” *Landmark Cases in Intellectual Property Law*, ed. Jose Bellido (North America: Hart Publishing, 2017).

<sup>50</sup> Engravings Act 1777.

have survived, more of the oral argument has been preserved in pamphlets and publications produced by the parties themselves. This means that it is possible to see both litigants and courts framing their arguments in terms that draw on Enlightenment reasoning and express concerns for the progress of geographical knowledge and its dissemination.

In the first of these three cases, we once again see a previous defendant turned plaintiff. In 1785, Robert Sayer and his partner John Bennett brought a suit in the Court of the King's Bench against John Hamilton Moore.<sup>51</sup> Seeking damages in the enormous sum of 10,000 pounds, Sayer complained that Moore had copied certain charts of North America, some of the many such charts he had purchased from Jefferys.<sup>52</sup> Sayer produced several witnesses, including two engravers; one, the respected cartographer Delarochette, attested that he had engraved the charts for Sayer; the other, Winterfelt, alleged that he had been engaged by Moore to copy the charts. Notwithstanding this overwhelming evidence of copying, Sayer was unsuccessful in this case. Supported by witnesses including a naval ship's master, Admiral Campbell FRS, the Governor of Newfoundland, and renowned astronomer William Wales FRS, Moore argued that his charts were a considerable improvement over those of Sayer and corrected many dangerous inaccuracies.

Summing up the case to the jury, Lord Mansfield, proclaimed:

The rule of decision in this case is a matter of great consequence to the country. In deciding we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.<sup>53</sup>

Four years later, in 1789, Moore was again forced to defend his chart publishing practices, when another suit was brought against him, by another rival David Steel.<sup>54</sup> Steel was seeking damages of 3000 pounds for the copying of a chart of the East Coast of England.<sup>55</sup> Once again Moore produced expert naval witnesses who testified to the superiority of his charts over Steel's. While the jury indicated they would have found for Moore, Steel's counsel agreed to be non-suited (which required Steel to pay Moore's costs). Lord Kenyon was said

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<sup>51</sup> *Sayer v Moore* (1785) 1 East 361n. Note that Bennett's involvement in the case, and in the partnership, is likely to have been nominal. He had been diagnosed as insane in 1781 and in 1784 Sayer had taken legal action to remove him from the partnership. Susanna Fisher, *The Makers of Blueback Charts: a History of Imray, Laurie, Norie and Wilson* (Ithaca: Regatta Press, 2001) 47.

<sup>52</sup> The map in question was either "A New and Correct Chart of North America from Cape Cod to the Havannah" (London: J H Moore, 1784) or "A New and Correct Chart of North America from Belleisle Strait to Florida" (London: J H Moore, 1784). R. A. Skelton considers it to be the latter in "Copyright and Piracy in Eighteenth Century Chart Publication," *The Mariner's Mirror* 46 (1960) 207, 208

<sup>53</sup> *Sayer v Moore* 1 East 361n, 361n.

<sup>54</sup> *Steel v Moore* (1789) reported in *The Sunday Gazette* and republished by Moore: 'Extract from the Sunday Gazette of the 8<sup>th</sup> March 1789' in John Hamilton Moore, *The New Practical Navigator* (London: J H Moore, 1793).

<sup>55</sup> John Chandler, *A Chart of the East Coast of England from Lowestoft to Scarborough, engraved by TJ Woodman* (London: David Steel, 1782).

(admittedly by Moore) to have “declared he heartily concurred with the Jury and expressed his indignation that such erroneous charts as Mr Steel’s should be published.”<sup>56</sup>

The third case against Moore was brought in 1797 by his former employee William Heather. Heather and Moore seem to have fallen out in 1794, when Moore brought an action for debt recovery against Heather.<sup>57</sup> In 1797, Heather and his partner William Williams brought an action in Chancery against Moore for copying a chart of the coasts of Spain, France and Portugal.<sup>58</sup> The case was moved to the King’s Bench and was heard in March 1798 by Lord Kenyon and a special jury of merchants.<sup>59</sup> This time it was Heather who was successful. Using Moore’s own tactic against him (and even producing one of Moore’s own witnesses in previous cases), Heather argued that it was his chart that was the improvement over Moore’s. Thomas Erskine, a high profile leader of the bar, was Heather’s counsel and he alleged that Moore had “through his negligence omitted islands, shoals and rocks by wholesale, which omissions rendered his Chart very dangerous, and would often prove fatal to the lives of Mariners”.<sup>60</sup>

He proclaimed that if Moore’s inaccurate charts were not found to be infringing

the wisdom of the legislature would be defeated, a stop would be put to the enlargement of human knowledge, and to the future discoveries of men of science, to all works of invention and improvement whatever; and it would be totally impossible hereafter, ever to place any dependence on a Sea Chart, a thing of the utmost importance in carrying on the vast trade of this commercial country.<sup>61</sup>

Persuaded by the plaintiffs’ case, Lord Kenyon instructed the jury to find in their favour, which it did.

Arguments relating to the quality and accuracy of sea charts resonated with courts tasked with finding copyright infringement because of the generally agreed poor quality of the charts available and the urgent need for a maritime nation almost constantly at war to improve navigation. Moore himself had observed, in numerous editions of his treatise *Practical Navigator*, that it was “a general Complaint among Seamen, that few Sea Charts are found correct.”<sup>62</sup> Subsequent litigants also adopted this narrative, as the 1797 dispute between William Faden and John Stockdale illustrates. Caught copying Faden’s map of St Domingo Island to accompany Bryan Edwards’ *An Historical Survey of the French Colony in the Island of St Domingo*, Stockdale made the claim that, on the one hand, Faden’s map was “a very erroneous and incomplete map” and, on the other, that any improvements he had made

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<sup>56</sup> *Felix Farley’s Bristol Journal* (Bristol, England) 21 March 1789, p. 2.

<sup>57</sup> C12/206/24.

<sup>58</sup> C12/225/16 m1 (21 March 1797), C33/496 ff 261 (27 March 1797), 372 (17 May 1797), C33/497 f 439 (23 June 1797).

<sup>59</sup> *Heather v Moore* (1798) *Express and Evening Chronicle*, 1–3 March 1798, Issue 537; ‘Trial of John Hamilton Moore for Pirating a Chart. Sittings after Term, March 1798, before Lord Kenyon and a Special Jury of Merchants’ (London, Plummer, 1798).

<sup>60</sup> Trial of John Hamilton Moore for Pirating a Chart’, p. 3.

<sup>61</sup> Trial of John Hamilton Moore for Pirating a Chart’, p. 3

<sup>62</sup> John Hamilton Moore, *The Practical Navigator, and Seaman’s New Daily Assistant*, 6th edn (London: J H Moore, 1781) 243.

were not the result of his own survey but simply derived from copying other maps and so he “did not by such means become the Sole Proprietor thereof.”<sup>63</sup>

Copyright law can therefore be seen as one of the new tools available to mapmakers interested in investing in accuracy but otherwise exposed to having their market undermined by free-riders. By giving protection to maps that were derived from existing maps, but not extending that protection to those who both copied *and* improved, this new legal tool could encourage the right kinds of mapmaking activity as well as protecting existing investment.

### 3. Litigation under the Statute of Anne

#### a. The Road Book Cases

Maps were not the only, nor perhaps the most useful, way of presenting geographic information in the 18<sup>th</sup> century. Those travelling around Britain for business, or increasingly for pleasure, were more likely to desire a road book. A road book was a written itinerary, setting out the direct roads and cross roads of Great Britain with the cities, towns and villages one might find along them and the various distances between them. Road books had been in use since the 16<sup>th</sup> century, but as both roads and transport improved, their demand increased. By the late 18<sup>th</sup> century, the most popular of these was *Paterson's Roads*, a work written by Daniel Paterson, former assistant to the Quartermaster General, and published by the bookseller Thomas Carnan.<sup>64</sup> First published in 1771, the book ran to four further editions over the next decade.

In 1785, however, this popular title was the subject of copyright litigation and the defendant was, once again, Carington Bowles.<sup>65</sup> The cause of the litigation seems to have been Paterson ending his arrangement with Carnan and entering into a new agreement with Bowles. In 1785, Bowles published *Paterson's British Itinerary*,<sup>66</sup> a work in two volumes, the first of which was a written itinerary and the second of which contained a series of strip maps, of the kind made popular by Ogilby's *Britannia* one hundred years earlier.<sup>67</sup> The case raised two legal issues: first, did the copyright Paterson had assigned to Carnan revert to him, allowing him to make an assignment to Bowles: second, if it did not, was the book Bowles published an infringement of that published by Carnan?<sup>68</sup> Interpreting the Statute of Anne, the Court held that the second term of the assignment had also passed to Carnan, thus he held copyright in *Paterson's Roads*.<sup>69</sup> The next question was more difficult to resolve. Carnan

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<sup>63</sup> *Faden v Stockdale* (1797) C12/672/12 m2.

<sup>64</sup> Daniel Paterson, *A New and Accurate Description of All the Direct and Principal Cross Roads in Great Britain* (London: T. Carnan, 1771).

<sup>65</sup> For a detailed discussion of the road book cases, see Isabella Alexander, “The Legal Journey of Paterson's Roads,” *Imago Mundi* 67 (2014): 12-31.

<sup>66</sup> Daniel Paterson, *Paterson's British Itinerary, Being a New and Accurate Delineation and Description of the Direct and Principal Cross Roads of Great Britain* (London: Carington Bowles, 1785).

<sup>67</sup> Herbert G. Fordham, *John Ogilby (1600-1676) His Britannia, and the British Itineraries of the Eighteenth Century* (London: Oxford University Press, 1925); John Ogilby, *Britannia*, volume the first: or, an illustration of the Kingdom of England and Dominion of Wales (London: J. Ogilby, 1675).

<sup>68</sup> *Carnan v Bowles* (1786) 2 Bro CC 80.

<sup>69</sup> Lionel Bently and Jane C. Ginsburg, “‘The Sole Right ... Shall Return to the Authors’: Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary US Copyright,” *Berkeley Technology Law Journal* 25 (2010): 1475-1599.

argued that the books were identical and that Paterson, and his publisher Bowles, had copied from *Paterson's Roads*. Bowles argued that while two such books inevitably would be very similar, his work was different because it also contained maps.<sup>70</sup> The Lord Chancellor referred the case to a Master to compare the two works on two occasions.<sup>71</sup> Each time, the Master reported that the works were different. The Lord Chancellor appeared dissatisfied with the report on each occasion, and eventually referred it a third time, but before the Master could deliver that report Carnan passed away and the case appears to have died with him.

This was not, however, the end of the legal disputes over *Paterson's Roads*. In either 1793 or 1794, John Cary entered into an agreement to make a survey of the roads of England and Wales upon the order of the Postmaster General, Lord Walsingham. The agreement was with Thomas Hasker, Superintendent of the Mail Coaches, and the object was to settle the many disputes that arose over the prices charged by the mail coach contractors, because they were calculated by mileage.<sup>72</sup> The Post Office agreed that Cary should be paid 9d per mile for his surveying, and would receive the exclusive right to publish the result of his survey. Cary was one of those mapmakers Lawrence Worms called the “new breed” – a new generation of mapmakers willing to invest in new surveys and increased accuracy. The agreement with the Post Office offered a valuable opportunity in this respect, and in 1798 he began to sell the results of his survey under the title *Cary's New Itinerary*.<sup>73</sup> He was immediately accused of having copied the “plan and design” of *Paterson's Roads* by Francis Newbery, stepbrother of Thomas Carnan, who had inherited the copyright in *Paterson's Roads*. But rather than bringing legal action, Newbery determined he would retaliate, by copying from Cary.<sup>74</sup> In response, Cary brought a complaint against him in Chancery, also joining his printers and publishers, cartographer and engraver William Faden and the prominent booksellers Thomas Longman and Owen Rees.<sup>75</sup>

Failing to receive an injunction in Chancery, Cary moved his case to the Court of the King's Bench.<sup>76</sup> The evidence of copying was overwhelming, with one of Newbery's compositors testifying that he had cut pieces out of Cary's book, copied and pasted them into Newbery's books, and interspersed the pieces with text to hide the copying.<sup>77</sup> The jury found in favour of Cary, but Lord Kenyon CJ awarded only nominal damages of 1s, in recognition of Cary's own copying.<sup>78</sup> There seems to have been little judicial appetite for clamping down

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<sup>70</sup> *Carnan v Bowles* (1786) 2 Bro CC 80.

<sup>71</sup> C33/463 f.696r-f.696v (23 July 1785); C38/728 (29 May 1786); C33/467 f.23v (24 November 1786); C38/736 (19 May 1787); C33/467 f617v-618r (19 July 1787).

<sup>72</sup> *Cary v Longman* (1800) 3 Esp 273, 273; 170 ER 613, 613. See also the affidavit of John Cary: C31/294, 18 November 1799 (PRO). Donald Hodson, *County Atlases of the British Isles Published after 1703: Atlases Published 1764–1789 and Their Subsequent Editions Volume 3* (Welwyn : Tewin Press, 1997) 181.

<sup>73</sup> John Cary, *Cary's New Itinerary; or, an Accurate Delineation of the Great Roads, Both Direct and Cross, throughout England and Wales; with Many of the Principal Roads in Scotland* (London: John Cary, 1798).

<sup>74</sup> Daniel Paterson, *A New and Accurate Description of All the Principal Cross Roads in England and Wales, and Part of the Roads of Scotland* (London: Longman and Rees, 1803) vi.

<sup>75</sup> C12/256/9m1, 14 November 1799.

<sup>76</sup> *Cary v Faden* (1799) 5 Ves Jr 24; John Cary, *Cary's New Itinerary: Or, an Accurate Delineation of the Great Roads, Both Direct and Cross, throughout England and Wales; with Many of the Principal Roads in Scotland* 2<sup>nd</sup> ed (London: John Cary, 1802) 862

<sup>77</sup> Report bound into *Cary's New Itinerary* 865, 866.

<sup>78</sup> *Cary v Longman* (1800) 3 Esp 273, 275; 170 ER 613, 614.

hard on those engaged in copying geographical information. But just as interesting is what happened then outside the courts.

Newbery's next strategy was to write to the Secretary to the Post Office, Francis Freeling, who happened to be his son-in-law. Newbery asked that he be given the same assistance as that given to Cary –namely, that requests be sent to the Post Office's surveyors and Postmasters to supply him with local information on such things as turnpikes, milestones, rivers crossings and so on. The Postmasters-General were happy to comply with this request.<sup>79</sup> They were not, however, prepared to supply Newbery with a copy of Cary's actual survey. Newbery claimed that he wished to use the survey only to ascertain the position of the milestones, which Cary had not used to mark distance but which Newbery believed the public preferred. Freeling sought legal advice on the point from a barrister, John Leach (who had incidentally acted for Newbery in 1799). Leach advised that because Cary had 'expressly reserved the copyright in the Survey, it appears that the Post Office is only entitled to the use of it for their particular information and that they cannot authorise Mr Newbery to avail himself of it in any manner in his intended publication.'<sup>80</sup> Freeling also sought advice from the Attorney-General, Sir Edward Law, who took a similar approach, advising that Freeling could not supply the survey to be used "in any manner which may deprive [Cary] of the Benefit of the exclusive publication of his admeasurement and survey".<sup>81</sup>

This refusal to allow Newbery to use the survey simply to ascertain information indicates a growing proprietary attitude towards geographical information and something of a reining back of earlier judicial latitude towards those who both copied and improved. However, the courts were still prepared to recognise some limits to this property, as can be seen in the final road book case, *Cary v Kearsley*.<sup>82</sup> This case arose in 1802, when John Cary brought an action in the King's Bench against George Kearsley in respect of his recently published book, *Kearsley's Traveller's Entertaining Guide through Great Britain*.<sup>83</sup> Cary alleged that Kearsley had copied from *Cary's New Itinerary* and the case was heard by Edward Law, now Lord Ellenborough CJ. The Chief Justice drew a distinction between two different types of copying:

A man may fairly adopt part of the work of another, he may so make use of another's labours for the promotion of science and the benefit of the public, but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may call the *animus furandi*?... while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science.<sup>84</sup>

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<sup>79</sup> Freeling to Postmasters-General, 14 May 1801, POST 10/286.

<sup>80</sup> Notes made on 'Case', 27 June 1801, POST 10/286 (emphasis in original).

<sup>81</sup> Sir Edward Law, 'Copy Attorney-General's Opinion', 10 August 1801, POST 10/286.

<sup>82</sup> *Cary v Kearsley* (1802) 4 Esp 168; 170 ER 679.

<sup>83</sup> George Kearsley, *Kearsley's Traveller's Entertaining Guide through Great Britain; or, a Description of the Great and Principal Cross-Roads* (London: G. Kearsley, 1801).

<sup>84</sup> *Cary v Kearsley* (1802) 4 Esp 168, 170.

The difference in attitude can perhaps be explained by the fact that Kearsley's book was not a direct competitor to Cary's, being more of a guidebook. Alongside the lists of roads and distances, it included short descriptions of sites of interest, the names of local landowners, historical facts and anecdotes. Lord Ellenborough instructed the jury to decide whether Kearsley was "colourable" copying, "with a view to steal the copy-right of the plaintiff", or "fairly done with a view of compiling a useful book".<sup>85</sup> "Colourable copying" was a common term used in copyright litigation at the time, and simply meant copying that the copier sought to disguise. For Lord Ellenborough, intention was clearly a crucial factor and he distinguished someone with *animus furandi*, or intention to steal, from someone motivated by a more proper desire to expand knowledge. When the question was posed in these terms, Cary's counsel consented to be non-suited.<sup>86</sup>

### b. The travel narrative: Cook's Voyages

The geographical works discussed so far in this chapter reached different audiences. Where the sea charts and road books were aimed at largely travellers (by ship and road respectively), others had different markets. The map games were targeted at children and recreational users, the map of St Domingo served to educate those with an interest in current events, and the map of Scotland could be used as a decorative wall map or part of an atlas. These latter maps in particular were therefore chiefly consumer goods, tapping into the growing interest in geography and foreign exploration. Also forming part of this eighteenth century taste for the foreign and exotic was the growing market for travel narratives, in particular tales of the South Seas.<sup>87</sup> When Captain Cook returned from his first voyage in 1771, the Admiralty engaged the writer John Hawkesworth to produce an official account.<sup>88</sup> Hawkesworth was offered the astronomical sum of 6,000 pounds by the publisher William Strahan, using the diaries of the ships' members which the Admiralty had ordered to be surrendered.<sup>89</sup> Despite this order, some diaries did find their way into the hands of publishers, and Hawkesworth brought a suit in Chancery against Stanfield Parkinson, who had sought to publish the diary of his brother, one of Joseph Banks' draftsmen. The suit was not successful and Parkinson's diary was published two days after Hawkesworth's *Voyages*.<sup>90</sup>

Although the 2000 copies of the first edition of the *Voyages* sold out, it was not a literary success. Cook himself was "mortified", particularly by the "nautical blunders" made by Hawkesworth.<sup>91</sup> Nevertheless, it proved popular enough to be copied. In 1773, Strahan

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<sup>85</sup> *Cary v Kearsley* (1802) 4 Esp 168, 171.

<sup>86</sup> A judgment of nonsuit was given where it appeared that there was insufficient evidence to establish a cause of action and terminated a lawsuit.

<sup>87</sup> See Neil Rennie, *Far-Fetched Facts: The Literature of Travel and the Idea of the South Seas* (Oxford: Clarendon Press, 1998); Shef Rogers, "Enlarging the prospects of happiness: travel reading and travel writing," *The History of The Book in Britain, Vol V, 1695-1830*, ed. Michael F. Suarez *et al.* (Cambridge: Cambridge University Press, 2009) 781-790.

<sup>88</sup> John Hawkesworth, *An Account of the Voyages Undertaken by order of his present Majesty for Making Discoveries in the Southern Hemisphere, 3 Volumes* (London: Strahan and Cadell, 1773).

<sup>89</sup> Mark Leeming, "Hawkesworth's Voyages: The First 'Australian' Copyright Litigation," *Australian Journal of Legal History* 9.2 (2005) 160.

<sup>90</sup> Leeming, "Hawkesworth's Voyages" 160-165.

<sup>91</sup> J C Beaglehole, *The Life of Captain James Cook* (London: Adam and Charles Black, 1974) 439.

sought an injunction against the bookseller Francis Newbery (already referred to above in relation to road books). Newbery's book was a compilation, in 48 weekly parts, of all of the English circumnavigators, including parts of Hawkesworth's *Voyages*, as well as Parkinson's account.<sup>92</sup> Alexander Wedderburn, the Solicitor-General (and later Lord Loughborough LC), was acting for Strahan. As noted above, Wedderburn had acted in numerous copyright cases, including for Thomas Jefferys as already noted above, and most recently on behalf of Thomas Becket in the celebrated decision of *Donaldson v Becket*.<sup>93</sup> He argued that Newbery was in breach of the Statute of Anne. Newbery retained Edward Thurlow, who had acted on the opposing side in *Donaldson v Becket*. He argued that Newbery was not in breach of the Statute because his book was an abridgment, and abridgments had been held by the courts to be permissible under the Act.<sup>94</sup> The matter was referred to a Master in Chancery, who found that the book was a bona fide abridgment. However, Lord Chancellor Apsley continued the injunction while he consulted with William Blackstone.<sup>95</sup>

Blackstone apparently convinced Apsley LC that:

an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work.<sup>96</sup>

The book Newbery produced fell within this definition and so it was not an infringement. This approach to abridgments was not new or specifically adapted for travel narratives, earlier cases had applied such an approach. However, the doctrine was particularly appropriate for Hawkesworth's *Voyages*, which seemed to be crying out for abridgment. Horace Walpole, for example, commented:

I have almost waded through Dr Hawkesworth's three volumes of the voyages in the South Seas. The entertaining matters would not fill half a volume; and at best it is but an account of the fishermen on the coasts of 40 islands.<sup>97</sup>

This was not, however, the end of the litigation over published accounts of Cook's voyages. In 1784, George Nicol sought injunctions against a number of booksellers for publishing the account of Cook's final voyage, *A Voyage to the Pacific Ocean*, the first two volumes of which were edited by John Douglas from Cook's journal, with additions from the journal of

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<sup>92</sup> *An historical account of all the voyages round the world performed by English navigators : including those lately undertaken by order of His present Majesty : the whole faithfully extracted from the journals of the voyagers : Drake, undertaken in 1577-80, Cavendish, 1586-88, Cowley, 1683-86, Dampier, 1689-96, Cooke, 1708-11, Rogers, 1708-11, Clipperton and Shelvocke, 1719-22, Anson, undertaken in 1740-44, Byron, 1764-66, Wallis, 1766-68, Carteret, 1766-69, and Cook, 1768-71* (London: F. Newbery, 1773-8). See Leeming, "Hawkesworth's Voyages" 170.

<sup>93</sup> *Donaldson v Becket* (1774) 2 Bro PC 129.

<sup>94</sup> For development of this line of authority, see Isabella Alexander, *Copyright and the Public Interest in the Nineteenth Century* (Oxford: Hart Publishing, 2010) 165-174.

<sup>95</sup> *Strahan v Newbery* (1774) Lofft 775. Leeming, "Hawkesworth's Voyages" p. 171.

<sup>96</sup> (1774) Lofft 775, 775.

<sup>97</sup> Walpole to Rev Mason, cited in Leeming, "Hawkesworth's Voyages" 166.



Anderson, Cook's surgeon, and a third volume written by Captain James King.<sup>98</sup> Nicol first sought an injunction against George Kearsley and later that year against the booksellers John Stockdale, James Scatcherd, Isaac Whitaker, John Fielding and John Hardy.<sup>99</sup> In the latter case, the defendants countered that Nicol had failed to meet the market demand for the work, and that the price charged by Nicol was unreasonable, in light of the fact that the work was intended for the public benefit and not the private profit of Nicol.<sup>100</sup>

The problem for Nicol lay in the involvement of the Admiralty. Cook's widow had asked Lord Sandwich whether the book of Cook's last voyage might be able to confer some benefit upon her and her family, to which Lord Sandwich agreed.<sup>101</sup> It was subsequently decided that the profits would be shared between Mrs Cook and her family, as well as the heirs of King and legal representatives of Clark (whose voyages were also narrated in the book).<sup>102</sup> Lord Thurlow held that if this charitable purpose had appeared in the bill he would have found that property in the work had vested in Nicol (either for himself or held in trust for others). However, as it did not appear in the bill, Lord Thurlow LC dissolved the injunction on the basis that Nicol had not established any right to the work because he had been employed by the Lords of the Admiralty to print and publish the work, and any profits arising from it were at the Lords' disposal.<sup>103</sup> Interestingly, Lord Thurlow also noted that his initial impression had been that the Crown had intended the work to be a gift to the public.<sup>104</sup>

The litigation that arose over Cook's Voyages illustrates again the tension between private rights and public interest in the context of circulating geographical knowledge, as well as highlighting the attempts by courts to develop copyright law in a way that could achieve a satisfactory balance between the two. This conflict became particularly acute when public money was involved in creating the knowledge in question. Here it lay in the involvement of the Admiralty, while earlier we saw it arise in relation to the involvement of the Post Office.

#### 4. Conclusion

Looking at the circulation of different forms of geographical knowledge through the lens of copyright disputes sheds new light on the interactions between individuals, trade practices and social institutions. Copyright offered new ways to regulate the market for such information and also provided encouragement to invest in more risky activities, such as carrying out surveys. This encouragement was state sanctioned but continued to devolve primary responsibility for creating and circulating geographical knowledge to the market

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<sup>98</sup>James Cook, *A Voyage to the Pacific Ocean undertaken by the Common of his Majesty for making Discoveries in the Northern Hemisphere performed under the directions of Captains Cook Clark and Gore in his Majesty's Ships the Resolution and Discovery in the Years 1776, 1777, 1778, 1779 and 1780* (London:G Nicol, 1784).

<sup>99</sup>*Nichols v Kearsly* (1784) Dickens 645; C12/135/18 (1784); *Nicol v Stockdale, Scatcherd, Whitaker, Fielding and Hardy* (1784) C12/132/23; 3 Swans 687.

<sup>100</sup> C12/132/23 m2 (Answer) 19 January 1785.

<sup>101</sup> Beaglehole, *The Life of Captain James Cook* 691.

<sup>102</sup> Beaglehole, *The Life of Captain James Cook* 691.

<sup>103</sup> *Nicol v Stockdale and Others* (1785) 3 Swans 687; *Nichols v Kearsley* (15 Jan 1785) Georgetown Law Library, MS Notes of Cases in Chancery and Exchequer 1780-1788, pp. 324-5.

<sup>104</sup> *Nicol v Stockdale and Others* (1785) 3 Swans 687; *Nichols v Kearsley* (15 Jan 1785) Georgetown Law Library, MS Notes of Cases in Chancery and Exchequer 1780-1788, pp. 324-5

itself. The fact that mapmakers and booksellers were prepared to incur the cost of litigation demonstrates the growing importance of maps and geographical knowledge in different parts of society, ranging from children's education to navigators, and from stagecoach operators to armchair adventurers. Examining the legal cases also allows us to discern Enlightenment concerns for observation, measurement and scientific progress, and recognition of the public interest in dissemination of knowledge being shared by the courts and expressed in the development of copyright law. Finally, these cases are significant in laying the foundations for the doctrine of fair use, as developed in the United States, or fair dealing as developed in the British and Commonwealth legal tradition. By recognising the importance of allowing some copying to take place as long as improvements were also made, these cases assisted in expressing the Enlightenment concern for the circulation of scientifically-based geographical knowledge as an element of copyright law and using the concept of fairness. Although this development was not linear or straightforward, it is important that it be recognised as a foundational facet of copyright law.