WITHOUT COPYRIGHTS

PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN

ROBERT SPOO

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CONTENTS

1

THE AMERICAN PUBLIC DOMAIN AND THE COURTESY OF THE TRADE IN THE NINETEENTH CENTURY

[A] literary pirate is not only not an outlaw; he is protected by the law. He is the product of law.
—The Publishers' Weekly (1882)[1]

[Trade courtesy] was a brief realization of the ideals of philosophical anarchism—self-regulation without law.
—Henry Holt (1908)[2]

In 1891, at the age of thirty-nine, Thomas Bird Mosher of Portland, Maine, began a career of fine book publishing. The small volumes he lovingly designed in his shop on Exchange Street were tasteful and elegant, printed on fine paper, stamped with a dolphin-and-anchor device borrowed from Aldus Manutius, and surprisingly affordable. Books in his Old World Series

The dispute in the pages of *The Critic* rang the changes on the piracy question as it had been debated over the previous six decades. Positions had become polarized, and moralized. By the 1880s, the anti-piracy camp viewed reprinters like Mosher as "gentlemen of the road," lining their pockets at the expense of helpless European authors. The pro-reprinting contingent disagreed, hailing Mosher as a "kind of 'literary Johnny Appleseed,' disseminating to a mass audience the seeds of literary appreciation and cultural revival."[13] Anyway, his supporters insisted, Mosher was only exercising his legal rights under American law.

The anti-pirates rejected these apologetics as grossly insensitive to the moral rights of authors. Surely, they reasoned, an ethical obligation to honor writers' creative labors trumped mere legal opportunism. Scrambling for the high ground, the pro-reprinters countered that no appeal to moral rights could justify an enforced scarcity of letters. British authors and publishers had only themselves to blame if they issued appealing books in small print runs at high prices. Mosher and his brethren were doing nothing more than lawfully serving the "impecunious republic of booklovers";[14] ordinary Americans had a right to cheap, good books. The anti-pirates, immune to the romance of dissemination, replied that an author deserves some remuneration for creative effort; Mosher may have offered honoraria, but he did so insolently and only after he had raked in profits from his furtive enterprise. These entrenched positions, set forth so colorfully in the Lang–Mosher dispute, typified the decades-long controversy over the practice of unauthorized though lawful reprinting of European authors in the United States.

Thomas Bird Mosher was a transitional figure in American publishing. He plied his reprint trade during a period of enormous change in American copyright law and in the publishing industry. The year in which he commenced operations, 1891, was the same year in which the U.S. Congress enacted the Chace International Copyright Act. The Chace Act made copyright protection available, for the first time, to non-U.S. authors, though on stringent conditions that often defeated their efforts to obtain rights, and in the service of a policy that openly protected the interests of American typesetters and platemakers. As of 1923, the year of Mosher's death, subsequent legislation—the 1909 copyright act—continued to erect obstacles for foreign authors and preserved many of the protectionist features of the 1891 act. The controversy over literary piracy had declined from its

Figure 1.1 Thomas Bird Mosher, the Pirate of Portland, 1901. (*Courtesy Philip R. Bishop, Thomas Bird Mosher Collection*)

pre-1900 intensity, but it had not entirely subsided. Certain transatlantic writers—notably and vociferously, Ezra Pound—protested U.S. copyright law and policy and denounced the license it continued to give to unauthorized reprinting in the United States. By 1926, James Joyce and T. S. Eliot, who had recently achieved fame with *Ulysses* and *The Waste Land*, respectively, were complaining that their writings were being pirated by the New York magazine publisher Samuel Roth. Roth, a devout practitioner of what had been called the Mosher Method, responded to their charges with a brazenness and panache worthy of the Pirate of Portland himself. I will explore the modernist encounter with literary piracy, and Roth's central role in it, in later chapters.

Mosher, despite his self-contented buccaneering, occasionally paid for his booty—and not just with the kind of post hoc honorarium he offered to Andrew Lang. Mosher gave one of his favorite authors, the Scottish writer William Sharp ("Fiona MacLeod"), $32 outright for the reprinting of *By Sundown Shores: Studies in Spirituality* (1902) and $100 for *The Divine Adventure* (1903)—both previously published in London. He paid $50 for Edward McCurdy's collection of essays on Italy and medieval themes, *Roses of Paestum* (1912), first issued in London in 1900. Instead of a flat payment,

Mosher sometimes offered a royalty on copies sold. For example, he gave a ten percent royalty to George William Russell ("A.E.") for a 1904 reprinting of his *Homeward: Songs by the Way*, originally published in Dublin in 1894.[15] All of these works probably lacked copyright protection in the United States, despite the conditional protections extended to foreign books under the 1891 Chace Act.

But why would Mosher pay, even occasionally, for what U.S. copyright law gave him for free? The answer lies, in part, in the professional mores of nineteenth-century American publishers. Up to 1891, and even after, prominent publishers attempted to repair the defects of America's isolationist copyright law by practicing an informal, norms-based system of self-regulation they called the courtesy of the trade, or trade courtesy. Trade courtesy was a voluntary, extralegal system in which many of the larger publishing houses behaved as if rights in foreign works existed and could be enforced against a publisher who reprinted without authorization. In obedience to courtesy, publishers assumed a virtue they lacked under the governing law. By paying foreign authors or their publishers a sum—token or substantial, as circumstances permitted—for synthetic rights to reprint authorized editions, publishers mimicked the salient features of copyright law, making a show of respectability and fairness to authors and avoiding ruinous competition among themselves for unprotected books. Trade courtesy was good business as well as good manners.

Mosher's occasional payments of lump sums and royalties to his European authors show that he recognized the principles of courtesy. Yet he observed these principles fitfully and idiosyncratically for the simple reason that he could take or leave them. His operation was too small and specialized to offer competition to, or to invite reprisal from, the major houses that depended on courtesy to get along with each other. And by 1900, the courtesy system had receded from the American publishing scene as a visibly active form of self-regulation. It did not vanish, however. Throughout the first half of the twentieth century it persisted as a publishing ethic and an occasional informal remedy, just as long as American copyright law failed to offer uniform and complete protection to non-U.S. authors. Most important for the present study, trade courtesy was seized upon and adapted by Joyce and his representatives as a strategy for combating the piracies of Samuel Roth and, later, for securing informal, extralegal protection for *Ulysses* in the United States. The story of courtesy's role in the history of *Ulysses* and in

literary modernism generally will be told in later chapters of this book. The present chapter traces the nineteenth-century backgrounds of the modernist encounter with U.S. copyright law: the law's creation of an aggressive public domain, the rise of legalized piracy of unprotected foreign works, and the courtesy of the trade.

Legal and Moral Piracy: The 1790 Copyright Act and After

As inhabitants of the digital age, we usually think of the word *pirate* as naming the violator of a formal, legally enforceable right—a copyright, a patent, a trade secret. The specter of widespread and promiscuous piracy has hovered behind much of the febrile property talk and eager lawmaking of recent years. Starting from the premise that digital technology, if left unchecked, would destroy incentives to produce and distribute intellectual property, Congress enacted the Digital Millennium Copyright Act of 1998, which provided expansive protections for copy-prevention technologies and copyright management information. The Senate Judiciary Committee summarized the prevailing dread: "Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy."[16] The phrase "massive piracy" has emotional force in excess of its denotative capacity. Applied, as it often is today, to unauthorized file sharing by countless anonymous or pseudonymous users in decentralized peer-to-peer networks,[17] the phrase conjures up conspiratorial intent to break the law—a gigantic, orchestrated music heist—when in fact the very nature of decentralized file sharing scatters concerted intent and *mens rea* over the vast reaches of the World Wide Web. This is why the music and movie industries have focused much of their litigation efforts on the purveyors of peer-to-peer technologies and services: Napster, Aimster, Grokster, Kazaa, LimeWire, BitTorrent, and, of course, The Pirate Bay. Piracy, in the digital era, as in the past, must have a local habitation and a name, and the pirate is almost invariably thought of as a wicked lawbreaker, a violator of legislated or common law rights.

The concept of the pirate as a foe of the formal copyright law is not new.[18] As long ago as 1936, Judge Learned Hand, writing for a panel of the U.S. Court

of Appeals for the Second Circuit, rejected the idea that a work could not be infringing just because portions of it owed nothing to the infringed work. In holding that Metro-Goldwyn's film *Letty Lynton* infringed a copyrighted play entitled *Dishonored Lady*, Judge Hand famously wrote, "[I]t is enough that substantial parts [of the play] were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate."[19] Here, Judge Hand used the verb "to pirate" in a sense familiar to contemporary ears: to trespass upon a statutory copyright. That meaning has a long history stretching back to the nineteenth century and before. In 1839, Supreme Court Justice Joseph Story, sitting on the U.S. Circuit Court of Massachusetts, concluded in *Gray v. Russell* that the defendants had infringed the copyright in a revised edition of an old Latin grammar. Likening the modified grammar to an improved map that enjoys copyright protection by virtue of the skill and labor that have gone into updating public domain materials, Justice Story observed that it would be "downright piracy" to copy the whole of the revised map.[20] Copyright piracy could occur in a variety of forms, added Story. For example, "if in one of the large encyclopaedias of the present day, the whole or a large portion of a scientific treatise of another author ... should be incorporated, it would be just as much a piracy upon the copyright, as if it were published in a single volume." Like Judge Hand, Justice Story was using "piracy" in its familiar modern sense: the invasion of an enforceable, state-supplied legal right.

Throughout the nineteenth century, however, running alongside this sense of *piracy* was another meaning of the word: the unauthorized copying of works that were *not* protected by copyright in the United States. This seemingly paradoxical usage was mostly reserved for impugning American reprinters who took advantage of Congress's refusal to grant copyright protection to foreign authors. It is this meaning that Andrew Lang intended when he questioned Thomas Bird Mosher's honor for "pirating" his translation of *Aucassin et Nicolete*. Joining forces with Lang in the pages of *The Academy*, the English poet and critic Lionel Johnson leveled the additional charge that Mosher had "perpetrated a triple piracy" two years earlier when he issued an unauthorized reprint of one of Johnson's essays together with Robert Bridges' sonnet sequence *The Growth of Love* under the "emblem and imprint" used by Bridges' Oxford publisher.[21] It was no consolation that Mosher professed admiration for the essay. "I would beg Mr. Mosher to cease paying sugared compliments to his victims," Johnson wrote. "If a footpad steal my watch, I am not consoled by his approval of its merits."[22] This

doubly false analogy—comparing the lawful use of an intangible work to the unlawful taking of tangible property—was typical of the rhetoric of outraged authorship in this period. As Catherine Seville has shown, the moralistic use of such terms as *pirate* and *footpad* to describe the lawful reprinting of unprotected literature became increasingly intense as the nineteenth century wore on and the call for congressional action to protect foreign authors grew more strident.[23]

Pirate, footpad, gentleman of the road—all were epithets that, when accurately employed, condemned actual criminal activity on land or the high seas. The theft of a watch was, and still is, a crime against property. Highway robbery was defined as a crime against the person as well as against property because typically it involved harm or a threat of imminent harm to the victim. Yet the Pirate of Portland had committed no such offenses and had infringed no copyrights in reprinting Johnson's essay and Bridges' sonnet sequence. The works he published in his Old World and English Reprint series lay squarely in the American public domain, and not by some quirk of legislative negligence. Congress had intended that they be there.

The express lack of protection for foreign authors' works had been inscribed into the law as early as the first federal copyright act of 1790: "[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting, or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States."[24] This provision, which Meredith L. McGill has called an "extraordinary license [for] the unrestricted republication of foreign texts,"[25] was as unequivocal as it was expansive. No map, chart, or book produced by a non-U.S. citizen or nonresident was protected by copyright within the United States, and the act forbade any contrary construction of its language. Quite simply, Americans were permitted, even encouraged, to import, reprint, publish, or sell foreign works without the permission of their authors or publishers. The law did nothing less than immunize acts that, if committed on U.S. soil against American authors enjoying copyright protection, could have resulted in damages and fines along with forfeiture and destruction of infringing copies.[26]

Over the course of the nineteenth century, Congress enhanced the rights and remedies of American authors but continued to withhold protection from foreign authors. (U.S. patent law, in contrast, was friendlier to

foreign inventors.)[27] A revision of the copyright law in 1831 sharpened the text of the 1790 act to stress that no copyright protection existed for any person not "a citizen of the United States nor resident within the jurisdiction thereof."[28] A major revision of 1870 repeated the language of the previous acts and expanded the legal disability of foreign authors to include any "dramatic or musical composition, print, cut, engraving, or photograph."[29] Here the law stood until the passage of the Chace Act of 1891, which at last extended copyright protection, conditionally, to foreign authors, as discussed below.

During the nineteenth century, accusations of piracy of foreign works often carried a double and shifting valence. On one level, critics might be assailing the particular American publisher responsible for an unauthorized reprint, as Andrew Lang and Lionel Johnson were in protesting the activities of Mosher. On another level, critics might be attacking Congress or the nation itself for failing to protect foreign authors. Protests sometimes blurred the target, making it unclear whether the inertia of politicians or the moral failing of businessmen was more to blame. The ambivalence can be seen in an 1888 essay by the publisher Henry Holt, who, on the one hand, pointed to "the overwhelming competition of foreign stolen goods which our laws encourage" and, on the other, blamed "pirate" publishers who sought to excuse their conduct "because their proceedings are within the law."[30] Some critics distinguished more sharply between legislative and individual responsibility. Though a strong advocate of copyright protection for foreign authors, Samuel Clemens conceded in testimony before a U.S. Senate committee on patents in 1886 that it was wrong to accuse American reprinters of dishonesty:

> I do consider that those persons who are called "pirates" ... were made pirate by the collusion of the United States Government.... Congress, if anybody, is to blame for their action. It is not dishonesty. They have that right, and they have been working under that right a long time, publishing what is called "pirated books." They have invested their money in that way, and they did it in the confidence that they would be supported and no injustice done them.[31]

Clemens recognized, pragmatically, that the American publishing industry had grown up under conditions created by the copyright law

and that a dramatic change in the law would undoubtedly upset settled expectations.

Like Clemens, British commentators sometimes took the position that American publishers should not be assailed for simply acting in conformity with the law of the land. The London publisher Grant Richards, charmed by Mosher's attractive and scholarly reprints, wrote,

> It is difficult to see why the word "pirate" should be used in any opprobrious sense, since all that he did was to avail himself of his legal rights. Besides, much of what Mosher printed was "chosen from scarce editions and from sources not generally known," while at all times he used material that was, according to the law of his country, within the public domain.[32]

The English writer Richard Le Gallienne went even further and declared that it seemed to him "mere childishness ... to complain if some one exercises his undoubted legal right of taking a fancy to [an uncopyrighted work]. Actually, I rejoice no little that so much exquisite literature would seem to have been thus left unprotected."[33] In essence, Richards and Le Gallienne, like Clemens, were insisting on the disambiguation of the term *pirate*, refusing to impute ethical impropriety where no criminal or civil liability could be charged. The American copyright authority Eaton S. Drone summed up these exonerating distinctions in his 1879 treatise:

> In the law of copyright, piracy is the use of literary property in violation of the legal rights of the owner.... [I]t is not piracy to take without authority either a part or the whole of what another has written, if neither a statute nor the common law is thereby violated.... Hence, there may be an unauthorized appropriation of literary property which is neither piracy nor plagiarism, as the republication in the United States of the work of a foreign author. This is not piracy, because no law is violated; and, without misrepresentation as to authorship, it is not plagiarism.[34]

Many American reprinters could not accurately be called pirates or plagiarists. Yet those who persisted in railing against pirate reprinters swept away such distinctions in their indignation. The rhetoric of piracy in the nineteenth century was burdened with the outrage of these moralists, and the system of trade courtesy added further lexical freight, as shown below.

Lawful American Book Piracy in the Nineteenth Century

Throughout the nineteenth century, protests against so-called Yankee pirates issued from both sides of the Atlantic.[35] By the 1830s, the practice of reprinting British books and periodicals without permission had become widespread in the American book trade. A decade earlier, the recently founded Harper publishing house in New York was already competing with the Carey firm of Philadelphia for *Guy Mannering, Kenilworth, The Pirate,* and other popular novels by Sir Walter Scott.[36] The Harper editions of Scott's unprotected novels sold in America for a fraction of the price charged in Britain and gained a wider readership than they enjoyed abroad.[37] The reprinting of British titles was both a business and a game, an exuberant scramble to exploit a large and utterly free resource.[38] Over the years, many popular British writers were seized upon—Tennyson, Thackeray, the Brownings, George Eliot, Thomas Carlyle, Edward Bulwer-Lytton, and Wilkie Collins, to name just a few.

Charles Dickens was a fiercely contested prize. Hundreds of thousands of pirated copies of his works circulated in the United States.[39] In the frenzied competition for new English fiction among the weekly and daily periodicals of the 1830s and 1840s, firms like Harpers that regarded themselves as Dickens's authorized publishers retaliated by issuing his novels in unbound parts at twelve-and-a-half cents and six cents.[40] In 1842, the year of his first American tour, Dickens denounced the "scoundrel-booksellers" who "grow rich [in the United States] from publishing books, the authors of which do not reap one farthing from their issue," along with the "vile, blackguard, and detestable newspaper[s]" that also reprinted British writings without authorization or remuneration.[41] Writing to Dickens in the same year, Thomas Carlyle adopted decalogic tones to express his disgust with American pirates: "That thou belongest to a different 'Nation' and canst steal without being certainly hanged for it, gives thee no permission to steal. Thou shalt not in any wise steal at all! So it is written down for Nations and for Men, in the Law Book of the Maker of this Universe."[42]

Carlyle was not the only author to appeal to God's law for the confounding of rascally reprinters. Later in the century, the American poet James Russell Lowell put his frustration with book piracy into a single uncompromising

quatrain, which became the motto of the American Copyright League and the chant of advocates of international copyright:

> In vain we call old notions fudge,
> And bend our conscience to our dealing;
> The Ten Commandments will not budge,
> And stealing will continue stealing.[43]

Even Walt Whitman, usually a lyrical advocate of the interests of American multitudes, lamented his compatriots' exploitation of British authors:

> Do not our publishers fatten quicker and deeper? (helping themselves, under shelter of a delusive and sneaking law, or rather absence of law, to most of their forage, poetical, pictorial, historical, romantic, even comic, without money and without price—and fiercely resisting the timidest proposal to pay for it.)[44]

Like Henry Holt, Whitman trained his criticism on two targets, the "delusive and sneaking law" and the publishers that gorged themselves on free literary "forage," without deciding which was the more culpable.

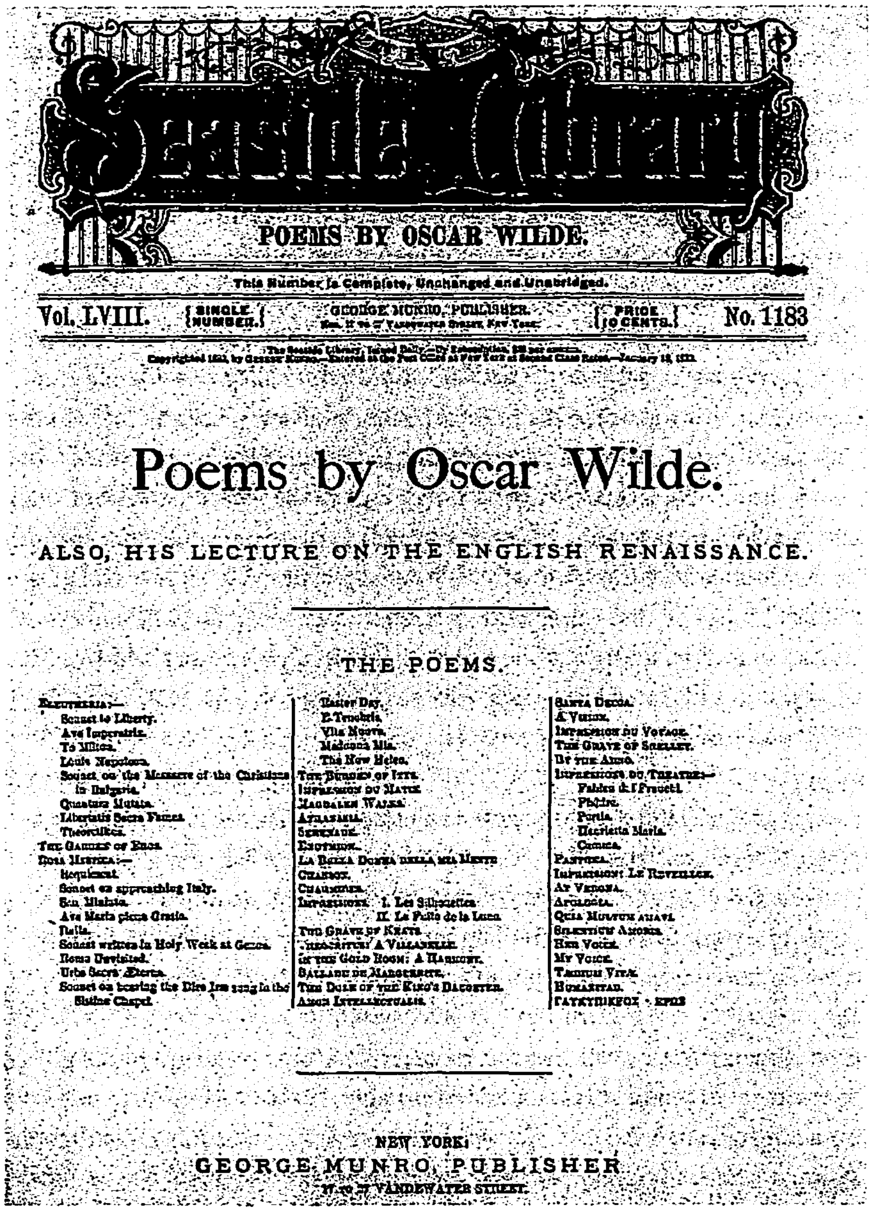
In the latter part of the nineteenth century, American publishers continued to be aggressive in reprinting popular British authors without authorization and often without payment. In the fierce competition for foreign titles in the 1880s, which led to the overproduction of cheap paper-covered books and a ruinous glutting of the market, Robert Louis Stevenson's uncopyrighted works were widely reproduced, as were Mrs. Humphry Ward's *Robert Elsmere* and Rider Haggard's *Cleopatra*, the latter appearing in ten different editions.[45] When Holt published an authorized edition of *The Mayor of Casterbridge* in 1886, he assured Thomas Hardy that although the market was overrun with pirates, "[w]e will do the best we can with it in these distressing times when it seems next to impossible to do anything with anything."[46] Alexander Grosset brought out a string of unprotected works by Rudyard Kipling in 1899, including *Barrack Room Ballads, Departmental Ditties, and Other Ballads and Verses*; *The Light That Failed*; *The City of Dreadful Night*; *Child Stories*; *The Vampire*; and several of his popular poems done up as booklets selling for fifteen cents a copy. As

Grosset's partner George T. Dunlap later explained, the young firm justified this spate of titles on the seemingly paradoxical ground that these already uncopyrighted works had become a kind of "public property... having been reprinted indiscriminately by about everyone else in the business."[47]

Oscar Wilde learned that he was the victim of American pirates while on his famous lecture tour of the United States in 1882. A 10 cent edition of his *Poems*, printed together with his lecture on the English Renaissance, had appeared in a pamphlet in George P. Munro's Seaside Library. Imitations of Munro's edition quickly appeared. Wilde complained to the American press that "in all your [railroad] cars I find newsmen selling my poems—stolen! I never can resist the impulse to read out a lesson on the heinousness of the offense." What concerned him most was that the piracies were eroding attendance at his lectures: "'The English Renaissance' is printed in the 'Sea Side,'" he lamented, "so people think they know it and stay away."[48] Yet the piracies also helped to spread Wilde's fame. He earned thousands of dollars as his share of the tour receipts.[49]

W. B. Yeats, too, was pirated during his lecture tour of America in 1903–4. Mosher, who reprinted Yeats's *The Land of Heart's Desire* through several unauthorized editions, issued a 1903 text of the play in his Lyric Garland Series, for which he claimed to have had Yeats's consent. The success of the Irish author's tour, which netted him over three thousand dollars, had been helped by the circulation of his play, though he apparently received no ex gratia payment from Mosher.[50] Others pirated Yeats as well, at least through 1926: Walter H. Baker, The Thomas Y. Crowell Co., The Little Leather Library Corp. of New York, and The Shrewsbury Publishing Co.[51]

Literary piracy in nineteenth-century America was a complex activity intimately bound up with legitimate publishing and the copyright law. As one commentator put it in 1882, piracy was "the product of law."[52] Respectable houses and pirate firms were not always distinguishable. Just as the U.S. copyright acts of 1790, 1831, and 1870 openly encouraged the unauthorized reprinting of foreign authors, so reprinting was an enabling condition of much legitimate publishing in the United States. Not only did the low overhead of reprinting underwrite publishers' more expensive, authorized undertakings; promiscuous freebooting allowed many startup firms to acquire lists and capital that propelled them to power and respectability. The profits from reprinting Kipling helped build the financial foundation of Grosset & Dunlap.[53] The Harper firm, which came to dominate the American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Theoretikos.
The Garden of Eros.
Rosa Mystica:—
Requiescat.
Sonnet on approaching Italy.
San Miniato.
Ave Maria plena Gratia.
Italia.
Sonnet written in Holy Week at Genoa.
Rome Unvisited.
Urbs Sacra Æterna.
Sonnet on hearing the Dies Iræ sung in the Sistine Chapel.
Easter Day.
E Tenebris.
Vita Nuova.
Madonna Mia.
The New Helen.
The Burden of Itys.
Impression du Matin.
Magdalen Walks.
Athanasia.
Serenade.
Endymion.
La Bella Donna della mia Mente.
Chanson.
Charmides.
Impressions. I. Les Silhouettes.
II. La Fuite de la Lune.
The Grave of Keats.
Theocritus: A Villanelle.
In the Gold Room: A Harmony.
Ballade de Marguerite.
The Dole of the King's Daughter.
Amor Intellectualis.
Santa Decca.
A Vision.
Impression du Voyage.
The Grave of Shelley.
By the Arno.
Impressions de Théatre:—
Fabien dei Franchi.
Phèdre.
Portia.
Henrietta Maria.
Camma.
Panthea.
Impression: Le Reveillon.
At Verona.
Apologia.
Quia Multum Amavi.
Silentium Amoris.
Her Voice.
My Voice.
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ΓΛΥΚΥΠΙΚΡΟΣ ΕΡΩΣ

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Figure 1.2 Pirate reprint of Wilde's *Poems*, New York, Seaside Library, 1882. *(Courtesy Merlin Holland)*

publishing scene, was well known for its early piratical aggressions, selling British reprints at much lower prices than in England, where lending libraries depressed sales and raised prices.[54] As McGill has shown, a decentralized

reprint industry in the antebellum years reflected the republican ideals of cultural diffusion and widespread learning, fostering a depersonalized print culture at the expense of individual authors' rights.[55] Legislators built piracy into the copyright law as a way of accommodating the democratic values of "ready access to literature, information, education, and other conduits for achieving equality of opportunity."[56]

Much later in the century, the energetic New York publisher John W. Lovell, who had openly defied trade courtesy and become known as "Book-A-Day Lovell" for the millions of inexpensive copies he issued each year, formed a "book trust" of cheap reprinters, called the United States Book Co., with the objective of establishing uniform prices and discounts and stabilizing the chaotic competition in cheap foreign reprints.[57] The Lovell book trust thus sought to accomplish by overt cartel behavior what trade courtesy had achieved through less formal methods. Indeed, so destructive had the competition in cheap reprints become during the 1880s that Lovell and others briefly tried to carry on a kind of trade courtesy among themselves, paying honoraria to foreign authors and royalties on copyrighted American works. Although the book trust was short-lived, *The Publishers' Weekly* wrote,

> From a "predatory" beginning—in this respect not much unlike many who consider themselves their betters—the Lovells have gradually worked their way up from indifferently-made to better-made novels; from pirated work to books published by arrangement with foreign authors and publishers, and to American copyright literature.[58]

Once established, Lovell—in this respect like Mosher—adopted the graces of the courtesy publishers, entering into agreements with foreign authors, obtaining advance sheets, and paying honoraria. Lovell's uninhibited publication of cheap books in his salad days, called piracy by established publishers, had laid the foundation for his later prosperity and ambitions.

Piracy was more than an enabling condition of legitimate publishing, however; it was also a necessary condition of American literary culture in the nineteenth century. Throughout much of the century, the United States was a net importer of works of fiction, and British books were eagerly sought by an increasingly literate populace.[59] Publishers and book manufacturers depended on a flow of production that might be impeded "unless there was

a reservoir of English works to draw upon when the American streams ran dry."[60] According to David Saunders, the Harper firm's first catalogue contained 234 titles of which ninety percent were English reprints, "the same pattern being true for Wiley and for Putnam."[61] Prior to the Civil War, approximately fifty percent of all fiction best sellers in America were unauthorized foreign works.[62] The Report of the 1876–78 Royal British Commission on Copyrights observed, "[T]he original works published in America are, as yet, less numerous than those published in Great Britain. This naturally affords a temptation to the Americans to take advantage of the works of the older country, and at the same time tends to diminish the inducement to publish original works."[63] The commission was especially concerned that American publishers were able to issue British books "at cheap rates to a population of forty millions, perhaps the most active readers in the world."[64]

The cheap libraries launched by American publishers in the 1880s give an idea of the dominance of British fiction in the United States only a few years before Congress enacted international copyright reform. Brander Matthews, a strong proponent of copyright protection for foreign authors, reported that of the fifty-four numbers of Harper & Brothers' Franklin Square Library published in 1886, only one was by an American author. Forty-six of the fifty-three foreign-authored numbers were works of fiction. Of the sixty-two numbers issued in Harper's Handy Series in the same year, fifty-eight were by foreign authors, and fifty-two of these were fiction.[65] Volumes in these series sold for twenty or twenty-five cents each.[66] Observing that books published in the United States on other subjects, such as law, science, and theology, were mostly authored by Americans and were therefore protected by copyright, Matthews concluded that passage of a reform bill would "remove the premium of cheapness which now serves to make the American public take imported novels instead of native wares" and would reduce the "well-nigh exclusive diet of English fiction full of the feudal ideas and superstitions and survivals of which we have been striving for a century to rid ourselves."[67] During the late 1880s, the popularity of foreign novels noticeably declined, and the number of copyrighted American books spiked, due in part to a change in popular taste and to the poor quality of foreign reprints.[68] But even after Congress added international copyright protections in 1891, fiction by foreign authors remained a powerful presence. In 1895, foreign authors still accounted for eight of the top ten best sellers in the United States, though this changed by 1910, when nine of the top ten were authored by Americans.[69]

The Cultural Commons and the Public Goods Problem

The 1790 copyright act was captioned "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."[70] The statute's grant of federal copyrights aimed to stimulate American authorship, while its creation of a copyright vacuum for foreign authors no less clearly benefited American publishers, printers, and book manufacturers, together with readers who could purchase foreign works at a fraction of the original cost. Both of these congressional fiats—the giving and the withholding of copyright protection—encouraged learning in the United States, the first by offering a stimulus to creativity, the second by providing incentives and windfalls to the reprint trade. These two faces of copyright law were defining features of the American public domain from its inception.

Although meanings of the term vary, the public domain may be defined, for present purposes, as the common pool of works that are not protected by copyright in a given country, either because they were created before the advent of copyright laws or because the copyrights they once enjoyed have naturally expired or because they have prematurely forfeited or do not qualify for copyright protection. The 1790 act and subsequent acts of Congress primarily drew upon two of these approaches for creating the American public domain. The first was to grant to American authors copyrights that would eventually expire. Under the 1790 act, federal copyrights in works by U.S. citizens and residents endured for a maximum of twenty-eight years from the recording of the work's title in a district court.[71] (Later enactments increased this term.) The second approach was expressly to deny copyrights to foreign-authored works from their inception; these works lacked copyright protection whether they were "written, printed, or published."[72] Thus, the American public domain was, from the beginning, a two-tiered resource consisting largely of expired copyrights and withheld copyrights.

Economists and legal scholars refer to intangible, infinitely reproducible things, such as works of authorship, as public goods. Other examples of public goods are air, fireworks, lighthouses, and national defense; as with authors' writings, the benefits offered by these things can be shared by many persons without being depleted. By their nature, public goods are

nonexcludable and nonrivalrous—that is, they cannot be fenced off in the manner of private property, and one person's consumption of a public good does not prevent a second person from consuming the same good. Paul A. Samuelson classically defined public goods as "*collective consumption goods* ... which all enjoy in common in the sense that each individual's consumption of such a good leads to no subtraction from any other individual's consumption of that good."[73] Wendy J. Gordon has noted that intangible works of authorship are public goods that are "susceptible to freeriding, and thus difficult to produce in a normal competitive market."[74] A public goods problem arises when free riding becomes so prevalent that the producer of the good loses the incentive to continue to produce it—a consequence that economists refer to as a type of market failure. In recent years, the recording industry has frequently raised the specter of market failure by warning that if unlawful online file sharing continues unchecked, musicians and record companies will simply cease creating and recording music; they will have no incentive to continue producing what they cannot control. Intellectual property laws can be viewed as attempts to prevent market failure by placing an invisible legal fence around the intrinsically open and unbounded public good of authorship.[75]

To the extent that nineteenth-century authors may be said to have produced public goods, unauthorized reprinting of their writings may be viewed as a vast free rider problem (or an easy rider problem, since reprinting involved printing costs and other overhead). But if reprinters free rode so heavily on foreign authors, why did those authors continue to write and publish? In part because the copyright laws of their own countries solved free rider problems for their publishing markets, allowing them to capture the domestic benefits of their labors. Although free or easy riding was rampant in the United States, foreign authors could live with those losses. They might hope for ex gratia payments from American publishers and complain bitterly about scoundrel reprinters, but American piracies did not undermine their incentives to create so long as they could look to their own markets for remuneration. Such an arrangement was irresistible to American publishers: they had access to a free, valuable, and continuously replenished resource that no amount of exploitation could noticeably deplete. The American public domain was parasitic in this regard; it annexed a vast free resource of foreign innovation without running the risk of losing that resource through

failure to incentivize it. With respect to the creation of foreign works, the public domain was not haunted by the public goods problem.

But publishers, too, are producers; like authors, they require economic incentives to go on producing. Why would a publishing firm in New York invest in advance sheets of a Dickens novel when a firm across town or in Philadelphia could free or easy ride by bringing out a competing edition within a few days? The publishing industry faced this public goods problem throughout the nineteenth century; reprinting spawned reprinting, and publishers had no more legal recourse against each other than foreign authors had against them. Why, then, did the threat of uncontrolled reprinting not result in widespread market failure within the American publishing industry and the early abandonment of foreign literature as a profitable good?

This question was of critical importance to publishers. What the commons gave them, the commons might easily take away by eroding their incentives to go to the expense of reprinting foreign works. Competing editions of the same uncopyrighted work might result in ruinous price-cutting that would drive revenues down below the point at which a reasonable profit could be extracted. Unrestrained predatory pricing of cheap reprints threatened to tear the American publishing industry apart in the 1840s, and it resulted in a sharp decline in the reprinting of foreign works in the late 1880s.[76] How could publishers regulate this resource so as to make it a paying commons? The answer, intricately and ingeniously evolved over the nineteenth century, was the courtesy of the trade.

Regulating the Cultural Commons: The Law of Courtesy

Looking back over forty years of American publishing, Henry Holt in 1893 laconically defined the courtesy of the trade as the duty "[n]ot to jump another publisher's claim."[77] A few years earlier, he had been more expansive. "[T]here grew up," he wrote, "between, say, 1850 and 1876, the unwritten law ... of 'trade courtesy.' It not only prevented ruinous competition between American publishers, but also secured to foreign authors most of their rights."[78] Trade courtesy, in its fully developed form, thus had a horizontal and a vertical axis. By requiring participating publishers to respect the claim of the first publisher to announce its intention to reprint

a foreign title, courtesy horizontally regulated what might otherwise have disintegrated into destructive competition for the new foreign work. Holt acknowledged that this aspect of the courtesy system was "simply the result of an enlightened self-interest."[79] Vertically, the system ordered relations between American publishers and foreign authors by encouraging payments to the authors or their publishers. Again, self-interest was at work. Payments helped cement relationships with foreign authors and signaled to other publishers that the paying firm was a responsible member of the trade. What is most immediately striking about trade courtesy is that it was an unwritten law, an entirely voluntary system of informal norms that mimicked the basic features and purposes of copyright law. Courtesy evolved a complex set of exclusive rights, rules for securing those rights, and sanctions for violating them. These synthetic rights helped to regulate the American public domain and stabilize the book market during much of the nineteenth century.

Holt praised trade courtesy as a system that grew to possess "the essential features of an International Copyright Law," despite the "gaps and defects" that were typical of "all usages, and for that matter ... all laws."[80] A few years earlier, the Harper firm had acknowledged that courtesy "has enabled American publishers to grant to foreign authors many of the benefits which would accrue to them under the operation of a copyright treaty."[81] In 1855, the Board of Music Trade of the United States of America, which had been established to bring order to the volatile American market for sheet music, organized a form of courtesy by which music publishers agreed to refrain from reprinting uncopyrighted music that had previously been issued by a participating publisher. This practice, observed the *New-York Musical Review and Gazette*, "is supposed to place copyright, or American compositions, on an equal business footing with non-copyright, or foreign compositions, inasmuch as the latter will hereafter have but one publisher instead of half a dozen or more, as formerly."[82] Trade courtesy encouraged participants to treat publishers' prior claims to foreign works as a kind of virtual property, on the basis of which firms could invest in the production of books and music, make contracts with authors and with each other, and transfer "rights" in the works to which they held courtesy title. The practice bridged the protection gap created by U.S. copyright law, but no American court ever treated these norms as actual legal entitlements. A court in 1865 noted that the system

> confessedly rests upon no common law of the country, recognized and administered by judicial tribunals. If it has any foundation at all, it stands on the mere will, or ... the "courtesy" of the trade.... It can, therefore, hardly be called property at all—certainly not in any sense known to the law.[83]

Yet within the charmed circle of participants, the courtesy claim of one publisher, if properly secured, was recognized as a kind of property. Some scholars trace the origins of American trade courtesy to the self-regulating practices of Irish publishers prior to the extension of English copyright law to Ireland in 1801.[84] Similar norms-based observances are known to have existed in Scotland in the eighteenth and early nineteenth centuries before English works were protected by copyright there.[85] Even in England, regulated cartels, referred to as printing congers, arose to protect publishers' vested interests in uncopyrighted works by Shakespeare, Henry Fielding, Samuel Johnson, and other authors.[86] After the enactment of the Statute of Anne in 1709, which conferred limited statutory terms of copyright, some English publishers continued to trade and hold shares in perpetual common law copyrights, as if these had never been abolished by Parliament's enactment.[87] Other publishers were permitted, by courtesy, to ignore the expiration of a work's copyright after its statutory term and to continue to print the book as their exclusive property.[88] Well into the nineteenth century a few English publishers observed a kind of courtesy with respect to books by American authors, though the system was not as cohesive and efficient as its American counterpart, and American books that had been paid for by one English publisher were, "in a large number of cases, promptly reissued in cheaper rival editions by other houses."[89] A common feature of all these extralegal practices is that they took place within close-knit communities that shared economic interests.

Scholars in various disciplines have noted that informal, norms-based conservation of common resources has succeeded best within relatively small, cohesive groups.[90] Notable examples include the norms and sanctions that have evolved within the community of Maine lobstermen—particularly the lobstermen of Matinicus Island, twenty miles off Maine—to preserve customary trapping boundaries. Local customs and practices, not law, have fixed the areas where lobster traps may be employed as well as the number of traps that may be set. Lobstermen's informal rules range from cutting

trap lines on traps set by unauthorized outsiders to notching the tails of egg-bearing female lobsters in order to conserve the lobster population.[91]

Today, as in nineteenth-century America, informal norms operate within certain defined communities to fill lacunae within intellectual property laws. For example, the lack of copyright protection for chefs' recipes and preparations has given rise to a collection of social norms within the culinary industry. These informal rules are uniform and strictly observed: a chef must not copy another chef's recipe exactly; if a chef reveals a secret recipe to a colleague, that colleague must not pass the secret on to others without permission; and chefs must give credit to the developers of significant recipes or techniques.[92] Stand-up comedy is another area in which scholarship has unearthed a community governed by informal rules. Here, social norms—including rules for establishing the priority of gags, prohibitions on copying premises and punch-lines, and shaming sanctions for violators—have taken the place of formal, enforceable laws.[93] Fashion design is yet another industry that has evolved an informal, norms-based system of entitlements and sanctions.[94]

In each of these industries—culinary art, stand-up comedy, and fashion design—the absence or inadequacy of legal protections has stimulated a close-knit community to establish a framework of informal rules and punishments that allows the community to police itself and to manage an essentially free, common-pool resource of intangible, easily copied creations. This is precisely what American publishers did in the nineteenth century when they developed the consensual system of trade courtesy. The community of participating publishers was a small, cohesive one. Although estimates vary, the extant correspondence of Charles Scribner's Sons reveals that at least nine major publishing firms, in addition to Scribner's, observed the principles of courtesy during the 1870s: J. B. Lippincott & Co., J. R. Osgood & Co., D. Appleton & Co., Roberts Brothers, G. P. Putnam's Sons, Harper & Brothers, Macmillan & Co., E. P. Dutton & Co., and Henry Holt & Co.[95] Although other publishing houses dabbled in courtesy—Mosher, for example, employed some of its rules, as did certain cheap reprint houses during the chaotic competition of the 1880s—some firms did not. Novice publishers and small firms had strong incentives to resist the gentlemanly code and to reprint freely as a way of establishing book lists, and courtesy failed to gain a foothold in the aggressive cheap paper-book trade of the 1870s and 1880s.

The practice of courtesy is a vivid example of what Robert C. Ellickson has called "order without law," a system of folkways peculiar to a close-knit group or community in which informal norms have come to take the place of formal legal rules. Ellickson has argued that "[m]uch of the glue of a society comes not from law enforcement ... but rather from the informal enforcement of social mores by acquaintances, bystanders, trading partners, and others."[96] In rewarding conformity and punishing deviancy, American publishers employed the carrots and sticks of Ellickson's taxonomy of remedial norms. As "unofficial enforcers," they used "punishments such as negative gossip and ostracism to discipline malefactors and bounties such as esteem and enhanced trading opportunities to reward the worthy."[97] Ellickson grounds his conclusions in an empirical study of the norms used for dealing with animal trespass in rural Shasta County, California; "trespass conflicts," writes Ellickson, "are generally resolved not 'in the shadow of the law' but, rather, *beyond* that shadow. Most rural residents are consciously committed to an overarching norm of cooperation among neighbors."[98] Other scholars have explored the informal norms operating, for example, in the American cotton industry, the grain and feed industry, and the diamond trade in New York.[99]

Of course, the publishing world in the nineteenth century, though cohesive enough to evolve an extralegal code of conduct, was more heterogeneous and volatile than the close-knit rural community of Ellickson's study. And, unlike his resourceful cattlemen who employ flexible social mores as an alternative to unwieldy or unfamiliar legal remedies, American publishers did not have the luxury of choosing between informal norms and legal entitlements, since the foreign authors whom they reprinted enjoyed no legal entitlements at all in the United States. These publishers were confronted instead with a starker choice between informal self-regulation and no regulation at all. The choice was not between order with law and order without law, but, more fundamentally, between order and chaos. Anticipating Ellickson by eighty years, Henry Holt, a proud chronicler of courtesy, described it as "a brief realization of the ideals of philosophical anarchism—self-regulation without law."[100] Operating beyond the shadow of the law—indeed, in its absence—publishers sought to avert destructive competition by evolving informal modes of cooperating to manage a free, unprotected resource. With striking though intermittent success over the decades, the elaborate rules of courtesy staved off a public goods problem and a ruinous overuse of the commons of foreign works.

Trade Courtesy: Entitlements

In its simplest outlines, the courtesy of the trade granted an informal exclusive right of publication to the first American publisher to announce plans to issue an uncopyrighted foreign book. Participating houses recognized this right and refrained from what they called "printing on" the announcing firm. Later, in order to ensure official notice, publishers agreed among themselves that the announcement had to be made in some recognized medium, and the *New York Commercial Advertiser* became the primary organ for "in press" announcements. *The Publishers' Weekly, The Weekly Trade Circular,* and other organs reprinted the *Commercial Advertiser's* announcements of forthcoming foreign books. Eager publishers began to exploit this notice mechanism, however, by announcing any title that seemed promising, whether it was actually in hand or only contemplated. To remedy such "courtesy creep,"[101] which was leading to simultaneous announcements and confusion over priority, the rule emerged that the announcing firm, to secure its rights, must actually have purchased advance sheets of the foreign edition for use as setting copy or have entered into an agreement with the author for permission to reprint. "If a publisher had the advance sheets in his possession, such right or claim overrode a simple announcement."[102] By supplementing its announcement with the purchase of advance sheets or an author's contract, the publisher perfected its otherwise bare title to the foreign work.

The rules of courtesy recognized fastidious distinctions. The mere purchase of copies of a foreign edition did not secure an exclusive right to the American market; there was a difference between setting up an edition from advance sheets and importing books from abroad.[103] A firm looked more like a distributor than a publisher when it simply purchased premanufactured copies. No Locke-like property entitlements could be claimed by those who performed no real labor in the commons.[104] The perfection of courtesy rights did not always require the purchase of advance sheets, but some affirmative act beyond mere announcement had to be performed.

Only when an American publisher decided to take the risk of publishing a new or unknown foreign author was it permissible to rely on announcement alone; in such cases, other houses respected the publisher's willingness to try its luck with an uncertain prospect. Books by "new and uncertain authors," explained Holt, "are a field for experiment, and if a publisher concluded that one was worth experimenting with, though not worth paying for in advance

of experiment, the rights from first announcement were intended to secure him the fruits of his experiment, if successful."[105] Here, risk and adventure played the role that honoraria and author agreements ordinarily played in securing courtesy title. A further advantage was that the experimenting firm might obtain a right to the author's future books.[106] Simultaneous announcements in such cases were settled by arrangement between the competing houses.

Trade courtesy also developed a kind of option system, based on what the trade referred to as the rule of association. Once an American publisher reprinted a foreign title and paid its author, it was generally understood that the author was associated with that house, which could then expect to have the first refusal of the author's next effort. For example, after William D. Ticknor built a claim to Tennyson's *Poems* in 1842, other publishers respected the Boston firm's right to publish Tennyson's later works.[107] Houses that observed trade courtesy usually resisted the temptation to interfere with other houses' associations. Ticknor & Fields, the authorized American publisher of Robert Browning, would gladly have added Elizabeth Barrett Browning to its list but recognized the superior claim of her New York publisher, C. S. Francis & Co. Reluctant to meddle with a prior claim, Ticknor & Fields wryly remarked to Robert Browning, "We are a funny set of christians over the waves."[108] Joseph Henry Harper recalled publishers' punctilio in matters of association: "An offer received by a publisher from an author already identified with another house was by courtesy first submitted to the house which had already published the author's works, and publishers abstained from entering into competition for books which were recognized as the special province of another house."[109] There were additional refinements. For example, if a publisher reprinted the work of an untried author as an experiment, the publisher would have the refusal of the author's later books only if it made satisfactory payment to the author for the first publication.[110]

With variations, the foregoing rules evolved over time into a coherent and elaborate system of informal property norms. Holt noted the system's law-like imbrication of rules and subrules: "Trade courtesy is as full of exceptions as the law itself. It has grown up as a mass of decisions in particular cases, just as the common law has."[111] Fully developed, courtesy provided bright-line rules for securing title to foreign works by announcement; a method for recording claims in a recognized public medium, so

that disputes over priority could be settled objectively; a basis for making payments to foreign authors or their publishers; and further rules for associating an author with a house by obtaining an option on his or her future work. As publishers recognized, this system imitated the broad features of copyright law: acquisition of exclusive publishing rights, registration of rights with a public authority, and payment of outright sums or royalties to copyright owners.

Publishers sometimes paid handsome, even extraordinary, sums for advance sheets of popular books. As early as the 1820s and 1830s, the Philadelphia firm of Carey & Lea was making payments to Sir Walter Scott or his publisher.[112] Scott received £75 for advance sheets of each of the Waverley novels and £300 for his *Life of Napoleon Bonaparte.*[113] In 1835, Harper & Brothers paid Bulwer-Lytton for early proofs "at the rate of £50 per volume of a new English novel, or £150 for the usual 'three decker.'"[114] In 1849, the Harpers brought out Thomas Babington Macaulay's famous *History of England, from the Accession of James II* after announcing the book and paying his English publisher £200 for first proofs.[115] The Harpers paid Charles Dickens £360 for *Bleak House,* £250 for *Little Dorrit,* £1,000 each for *A Tale of Two Cities* and *Our Mutual Friend,* £1,250 for *Great Expectations,* and £2,000 for the never-finished *Mystery of Edwin Drood.*[116] Until fierce competition from cheap reprints made it difficult to pay honoraria in the 1880s, the Appleton firm paid the Welsh author Rhoda Broughton a thousand dollars for each of her novels.[117] Writing to the Scottish novelist Mrs. Oliphant in 1873, the Harpers described the courtesy practice of purchasing advance sheets from foreign authors or their agents or publishers:

> In the absence of an international copyright, it is the custom for an English author, or his agent in London, to send early sheets to some American publisher, fixing a price therefor, and by a law of courtesy the American publisher who has issued the previous works of an author is entitled to the first consideration of that author's new book. If such publisher cannot arrange satisfactorily and upon reasonable terms for the book, obviously he cannot object to its offer to some of his neighbors. In many cases when the English authors send us early sheets of their books, and for some reason we fail to use them, we endeavor to sell them on the author's account to other American houses.[118]

The Harpers here touched on a further way in which courtesy approximated principles of copyright law: a publisher, once it had acquired courtesy title, enjoyed the power to transfer it.

Publishers frequently issued announcements that skillfully combined in press notices with advertising, thereby addressing fellow publishers and book buyers at the same time. In 1841, the publishers of the New York periodical *The New World* had "the pleasure to announce that they have purchased at great expense, the advance proof-sheets of the new Swedish novel by Frederika Bremer, translated by Mary Howitt, entitled The Home: or, Family Cares and Family Joys."[119] *Harper's New Monthly Magazine* in 1855 printed a notice stating that "Harper and Brothers have in press and will publish, from advance sheets," works by Sir Walter Scott, Anne Marsh-Caldwell, James Silk Buckingham, and Lady Holland.[120] In 1872, a prominent notice for Harper's Periodicals in the Boston monthly *The Literary World* stated that the firm had "secured the plates and advance sheets of '*London: A Pilgrimage*,' by Gustave Doré and Blanchard Jerrold, a new and magnificent series of illustrations from the pencil of the great French artist."[121] In 1880, *The Literary News* announced that a "new novel by Rhoda Broughton, entitled 'Second Thoughts, will be published by D. Appleton and Co. from advance sheets."[122] Publishers were at pains to stress that they paid their foreign authors, as in 1882 when J. B. Lippincott & Co. wrote the editors of *The Critic* that

> when what are known as the "trade courtesy rules" (still in force with all reputable publishers, but ignored by the "pirates") gave the authorized American publisher some protection in his ventures, we were enabled to pay large sums for the advance sheets of foreign books. For instance, we paid Ouida £300 for each of her novels, and we have paid as much for some of Geo. MacDonald's books, and of Bulwer's.[123]

Publishers in their advertisements and notices often emphasized the sum they had paid foreign authors. The mention of advance sheets or payment secured a publisher's courtesy title and signaled to other houses and to the public that the publisher was a reliable, rule-abiding firm.

Instead of paying up-front sums for advance sheets, publishing houses sometimes paid post hoc honoraria to authors whose books had made a success. Such after-the-fact gratuities were occasionally rejected, as when Lang rebuffed Mosher's suggestion of a "solatium." In other cases, authors

welcomed honoraria as better than nothing. In 1836, the Carey firm of Philadelphia reprinted *Pickwick Papers* in an edition of fifteen hundred copies, sold at forty-five cents per volume. Two years later, the firm sent Dickens £50 in acknowledgment of the book's success.[124] George Haven Putnam observed, "[T]he author with no legal rights was thankful to get ten pounds when he could not get fifty and was very ready in receiving fifty to give a full quittance of any claim on the general proceeds."[125] Of course, the only so-called claim a foreign author might have was on the conscience and respectability of the reprinter. Legal claim there was none.

Later in the century, instead of honoraria for successful sales or initial payments for advance sheets, publishers began to offer foreign authors royalties on copies sold.[126] Sometimes authors would receive a smaller initial sum followed by a royalty on sales. If sales were insufficient to cover the publisher's costs, it was considered ethical to pay no royalty at all.[127] In 1867, the Boston publisher James T. Fields made Charles Dickens the unusual offer of a ten percent royalty on books and an arranged speaking tour if the celebrated author would make the firm his authorized American publisher.[128] Holt published numerous editions of Thomas Hardy's works in the 1870s and 1880s—several in the Leisure Hour Series—and paid ten percent royalties until widespread piracies made reprinting Hardy unprofitable.[129] In the 1870s, the Appleton firm arranged for royalty payments for the writings of the English novelist Charlotte M. Yonge. Again, courtesy imitated the formal copyright law: royalties were the usual form of payment to authors who controlled the exclusive rights conferred by copyright.

One of the benefits of association was that a firm could boast of being the authorized publisher of a foreign author. Such a relationship conferred respectability on the firm, lifting it up out of the mass of mere pirates and indicating to other publishers and to the purchasing public that the firm enjoyed the prestige of honorable dealings. Publishers frequently included letters or statements of authorization in their editions of foreign authors' works. A letter by Robert Browning appeared in Ticknor & Fields' edition of his *Dramatis Personae*, published in 1864. "I take advantage," he wrote, "of the opportunity of publication in the United States of my Poems, for printing which you have liberally remunerated me, to express my earnest desire that the power of publishing in America this and every subsequent work of mine may rest exclusively with your house."[130] In a single sentence, Browning assured readers that he had been paid by Ticknor & Fields and

that he favored that house as the one with which he wished to be associated in the United States.

Ticknor & Fields' editions of Thomas De Quincey's writings reproduced a letter in which De Quincey authorized publication "exclusively" and acknowledged that the publisher had "made me a participator in the pecuniary profits of the American edition, without solicitation or the shadow of any expectation on my part, without any legal claim that I could plead, or equitable warrant in established usage, solely and merely upon your own spontaneous motion."[131] Similarly, in its 1891 edition of Rudyard Kipling's *Mine Own People*, the United States Book Co. included a facsimile letter in which the author affirmed that the edition "has my authority" and that he owed "to the courtesy of my American publishers that I have had the opportunity of myself preparing the present book."[132] The courtesy tradition of the authorization letter was a crucial component of Bennett Cerf's strategy for publishing James Joyce's *Ulysses* in America in the 1930s, as later chapters will show.

Trade Courtesy: Punishments

Henry Holt, the most eloquent and persistent defender of trade courtesy, thought of it as a golden age of American publishing. The publishers who practiced courtesy, he averred, were inherently honest. For him, courtesy was less a system that publishers had forged for regulating their own cupidity than an expression of honor among better businessmen. None of the major publishers—Putnam, Appleton, Harper, Scribner—"would go for another's author any more than for his watch; or, if he had got entangled with another's author through some periodical or other outside right, would no more hold on to him than to the watch if the guard had got caught on a button."[133] With more ambivalence, Holt described nineteenth-century American publishing as "perhaps the greatest paradox in human experience.... At one end, its principal material was not protected by law, and the business lived to a large extent on what was morally, if not legally, thievery; while at the other end, there was honor among thieves, in the respect they paid each other's property."[134] Holt's paradox operated on several levels: American copyright law made pirates of honest men, so they banded together to act honorably according to voluntary norms of fairness that took the place of law. The

"principal material" available to these businesses was a commons decreed by statute, yet it was a commons that publishers agreed to divide up and recognize as "each other's property." Here, thieves who were only acting as the law had bidden agreed to acknowledge property rights in a free resource. This unusual enclosure movement succeeded for much of the century in averting a crisis of the cultural commons.

Holt may have believed that courtesy was an embodiment of business virtue, but the courtesy system itself did not share the assumption that publishers, left to their own devices, would be good. Instead, along with rules for acquiring and maintaining exclusive rights, trade courtesy evolved a series of carefully calibrated penalties for transgressors. If informal exclusive rights to foreign titles were the carrots of the system, escalating sanctions were the sticks. These sanctions included, in order of increasing severity, mild remonstrance, angry protest, public shaming, refusal to deal, predatory pricing, and outright retaliation.

A gentlemanly rebuke, often expressed as a simple urbane inquiry, was the first step in enforcing exclusive courtesy rights. Holt and his associate Joseph Vogelius were quick to assert priority of claims. When the Harpers announced plans to reprint Hippolyte Taine's *On Intelligence* in 1870, Holt wrote the firm, "Doesn't the fact that we have published several of his books entitle us to that if we want it?"[135] The Harpers agreed to withdraw, acknowledging the rule of association whereby a publisher that had issued an author's earlier work was entitled to his or her later books. Four years later, Holt calmly objected when the Harpers planned to publish *The Return of the Native*, reminding Joseph Harper that Holt had been Hardy's authorized publisher in America. Harper again relented, and Holt later remarked that Harper had done "what the notions of honor then prevalent among publishers of standing required."[136]

Mild remonstrance became angry protest when a threat to courtesy persisted. A heated dispute arose between the Harper and Scribner firms in 1881 over James Anthony Froude's edition of Thomas Carlyle's *Reminiscences*. The Harpers claimed an arrangement with the late Carlyle himself; Scribner's insisted that Froude was its author and that, as Carlyle's executor, he had authorized the Scribner firm to publish the work. After bitter exchanges, the two houses issued their respective editions and then took to the trade journals.[137] The Harpers placed a full-page notice in *The Publishers' Weekly*, listing the works by Carlyle that they published and detailing the history of

their dealings with Carlyle for *Reminiscences*. The Harpers reminded readers of the courtesy of the trade:

> The trade usage is familiar, and accepted by all the leading publishers of the country. It concedes to the house which has issued the works of an English author, either by agreement with him or with his English publishers, the option of republishing, upon mutually satisfactory terms, the subsequent works of the same author as they appear.[138]

The Scribner firm's reprinting of *Reminiscences*, charged the Harpers, "is a violation of our claim." Scribner's responded the following week with its own full-page notice in *The Publishers' Weekly*, pointing to arrangements with Froude and Carlyle's niece and noting that the firm had received advance sheets from Froude and had duly announced that the volume was in press. Invoking trade courtesy by name, Scribner's concluded, "The public will choose between this edition, put forth by the clearly expressed authority of Mr. Carlyle's executor, and a reprint from our sheets under a claim to which he has distinctly refused his acknowledgment."[139]

These public accusations were examples of a further courtesy sanction. Because private remonstrance had failed, the two houses resorted to the more severe punishment of public shaming, trading charges that their courtesy claims had been violated. The Boston firm of Roberts Brothers had used the same tactic a year earlier when John W. Lovell of New York brought out an edition of the poems of Jean Ingelow, an English writer who had been associated with Roberts Brothers for years. The Boston firm promptly took out advertisements to "Booksellers throughout the United States," reminding them that Roberts Brothers had been publishing Ingelow's poems ever since announcing the volume as in press in 1863 and that she had "received from us her copyright [that is, her royalty payment] semi-annually, precisely the same as though she were legally entitled to it." Not until now had anyone in "the entire fraternity of American Book Publishers" tried to "interfere." Roberts Brothers implored booksellers not to "sanction a moral wrong by vending this unauthorized version" but, rather, to "show their admiration for this beloved authoress by favoring only the Author's Editions, issued by her own publishers."[140] By broadcasting its disgust, Roberts Brothers had subjected the transgressor Lovell—whom they never needed to name in the notice—to public shaming.

A common form of shaming was to denounce an unauthorized publisher as a pirate. At the trial of a libel action brought by the publisher Isaac K. Funk against *The New York Evening Post* for having charged him with pirating the uncopyrighted *Encyclopedia Britannica*, Holt testified that "in the trade the words 'pirate' and 'thief' are freely applied to those who reprint books already equitably in the hands of other publishers, and that the effect of such reprinting by Dr. Funk was 'not favorable' to his reputation in the trade."[141] George Haven Putnam testified at the same proceeding that words like pirate had "been applied to appropriations of works of foreign authors, and were used by authors like Lowell and Stedman as well as publishers."[142] In charging the jury, the judge explained that if the *Post* had used "pirate" and "theft" in a "special sense"—that is, a sense current among practitioners of courtesy—then the jury could find that the *Post* had printed a "just criticism" and render a verdict for nominal damages.[143]

As the judge's instructions and the testimony of Holt and Putnam show, the word *pirate* had acquired a specialized meaning in the American publishing business. Instead of referring to a publisher who simply reprinted a foreign work without authorization, it signified deviancy from the norms of courtesy—specifically, the act of reprinting books "already equitably in the hands of other publishers." If the *Post* used "pirate" in this "special sense," then the newspaper was doing nothing more than joining publishers of good standing in publicly shaming a violator of the courtesy rules. Scholars of social norms refer to this kind of communal reprimand as "coordinated punishment" or "multilateral costly sanctions."[144] Ellickson calls it "negative gossip" and observes that, within close-knit communities bound by informal rules, shaming of this kind "usually works because only the extreme deviants are immune from the general obsession with neighborliness."[145] Practitioners of trade courtesy in the nineteenth century used negative gossip and public shaming to expose deviant pirates and to compel reform, thus contributing a specialized professional sense of "piracy" to the rhetoric of aggrieved authorship in the nineteenth-century. If the offenders would not mend their ways, then communal shaming might at least have the effect of encouraging others—publishers, booksellers, and purchasers—to engage in a further type of sanction: refusal to deal.[146] Multilateral refusal to carry on business with the transgressing firm would force it to conform or to take its chances as a pariah outside the publishing comity. As later chapters will show, the courtesy traditions of negative gossip and public shaming were

seized upon by Joyce, T. S. Eliot, and other modernist figures to address the problem of transatlantic piracy.

Harsher than private protest or public shaming was the sanction of predatory pricing. If a firm "printed on" a publisher with a claim to priority, the latter would sometimes reissue the disputed title at a reduced price in an effort to undersell the pirate. Predatory pricing became common during the cheap book wars of the 1830s and 1840s and again in the 1870s and 1880s. In declining to interfere with C. S. Francis & Co.'s courtesy rights in Elizabeth Barrett Browning's works, Ticknor & Fields ruefully explained to Robert Browning in 1855 that such interference would cause Francis to "print at any rate, and at a cheaper rate, and perhaps set on our other books full chase, & try to injure us in every way."[147] The established houses would sometimes go to great expense to beat the prices of piratical reprinters. To combat the cheap paper-book libraries of the 1870s, Harper & Brothers launched its Franklin Square Library, offering reprints of backlist novels for ten cents a copy.[148] In 1879, Holt wrote that the Harpers "are, at considerable immediate cost to themselves we fear, fighting the pirates with their own weapons."[149] The Harpers and other firms would sometimes intentionally price their books so low that they could not recover their own costs, believing it would serve as a punishment to pirates to learn that their depredations had created a climate in which no one could profit.[150] "We determined," wrote the Harper firm in 1879, "that [the cheap reprinters] should not share our profits, because we intended that there should be no profit for a division. We began to print on ourselves."[151]

The severest punishment of all was reserved for the worst outrages against courtesy. This was the sanction of retaliation, occasionally employed even by publishers of the first rank when their rights were threatened by another house. Retaliation meant printing on a transgressor by issuing one or more of its foreign titles at a competitive price. The aggressive Harper firm often resorted to this form of reprisal, or threats of it. "If a publisher declined to comply with the requirements of trade courtesy," wrote Joseph Henry Harper, "some method would be adopted to discipline the offender—generally by the printing of lower-priced editions of his foreign reprints by his aggrieved competitor."[152] In 1871, the Harpers wrote to W. E. Tunis of Detroit that the courtesy right to George Eliot's *Middlemarch* "belongs to us alike for Canada and the U.S.—the right of both countries having been purchased by us," and that any interference would occasion "severe retaliation."[153] Retaliation

could be devastating. In 1870, Harper & Brothers responded to a breach of courtesy on the part of Fields, Osgood & Co. by issuing an illustrated edition of Tennyson's works. When other publishers piled on by printing rival editions, a thirty-year relationship between Tennyson and the Fields firm was severely eroded.[154] The Harpers' reprisal triggered the very behavior that trade courtesy had been created to avoid.

Lisa Bernstein, in her work on the social norms employed in the American cotton industry, characterizes informal retaliations of this kind as "tit-for-tat strategies" that can often be "costly for the defected-against transactor to impose."[155] The punishment of printing on an offender was often the last resort for respectable houses because it could be so costly. Many firms of good standing avoided it as both distasteful and destructive of business relationships. Courtesy had been evolved to rid the industry of piratical behavior; resurrecting lawless conduct, even to make a point, threatened reputational harm and a return to anarchy. In 1881, despite his quarrel with the Harper firm over Carlyle's *Reminiscences*, Charles Scribner chose not to strike back by reprinting any Harper titles, hoping that "by not descending to blatant piracy he could establish the ethical superiority of his own firm in the minds of British writers."[156]

When a publisher proved to be a hopeless deviant from courtesy, utterly indifferent to the gentlemanly code, the sanctions of negative gossip, predatory pricing, and even retaliation had no effect. During the feverish cheap book competition of the 1870s and 1880s, such renegades became increasingly common, less interested in acquiring respectability and maintaining author associations than in free riding on the successful experiments of other firms. These pirates rarely offered royalties or honoraria to authors, printed in the cheapest formats, and exploited the publicity for which the first publisher had paid.[157] Such firms were often new entrants that had nothing immediately to gain by adhering to courtesy and little to lose by flouting it. The close-knit community of gentlemanly publishers unraveled at the edges when new or opportunistic firms saw a chance to build a list quickly at little cost to themselves.

Trade Courtesy: Settlement and Arbitration

Although courtesy permitted aggrieved publishers to engage in retaliation and other unilateral and multilateral punishments, publishers often resolved

their disputes amicably through informal settlements called adjustments.[158] Adjustments usually took the form of payments of compensation. For example, in 1860, the firm of Rudd & Carleton arranged to publish an English translation of Alexander von Humboldt's correspondence, only to learn that the Appletons had purchased advance sheets of the English edition and were about to issue the book. The Appletons agreed to cede the volume to Rudd & Carleton upon payment of £40—the sum the Appletons had already invested. With monetary adjustments, practitioners of trade courtesy improvised a type of remedy familiar to the law: compensation for a party's justifiable reliance on an apparently available resource or uncontested opportunity.

Adjustments could also be made in kind. Quarrelling publishers sometimes sank their differences by agreeing that one house would issue a regular cloth edition of a disputed title while the other would bring out the same work in an inexpensive paperbound format. If the contested book was one of a series, "the right to the title in question could be balanced against the right to succeeding volumes."[159] Ticknor & Fields and the Harper firm resolved their dispute over Dickens's *The Mystery of Edwin Drood* in kind rather than through monetary compensation: Ticknor & Fields issued the novel in book form, while the Harpers brought it out serially in *Harper's Weekly*.[160] Like monetary adjustments, adjustments in kind imitated formal legal dealings; they were the courtesy equivalent of copyright sublicensing. A copyright owner might grant one sublicense for serial rights, another for hardbound rights, and still another for paperback rights. American publishing houses accomplished this by informally divvying up the market for a disputed foreign title. The extant correspondence of Charles Scribner's Sons from the 1870s contains many references to such amicable adjustments.[161]

The modes of informal dispute-resolution employed by nineteenth-century American publishers resemble the extralegal ways in which sophisticated businesspersons in other industries sometimes agree to solutions that are not required by law. Bernstein has shown that American grain and feed merchants frequently resort to informal mechanisms that permit them to vary the terms of written contracts, sometimes out of "concern for relationships, trust, honor and decency, or fear of nonlegal sanctions such as reputational damage or termination of a beneficial relationship."[162] These practices have strong parallels in the norms-based behavior of nineteenth-century American publishers. The difference is that Bernstein's merchants choose to

sidestep existing contract law in favor of informal terms and commitments, whereas nineteenth-century American publishers were faced with a choice between informal rules and no rules at all.

Finally, when publishers could not resolve disputes on their own, they would sometimes submit them to informal arbitration, "the contention being commonly left to a fellow-publisher for arbitrament."[163] Thus, trade courtesy provided for the resolution of disputes in an arbitral forum presided over by a neutral publisher who would apply courtesy rules or other equitable principles to bring peace to the disputants. In this respect as well, courtesy resembles the forms of private ordering among members of trade associations that Bernstein has studied.

To sum up, the punishments meted out under trade courtesy ranged from private protest to public shaming to predatory pricing to outright retaliation. Each of these sanctions involved a kind of organized self-help, a means of seeking redress within the limits of an informal set of prescriptions. Although courtesy existed to stamp out aggressive, piratical behavior, ultimately an aggrieved publisher could turn pirate, within the rules, when it had no choice but to retaliate on a stubborn house or a confirmed deviant. Settlements—informal rightings of the balance through adjustments in coin or in kind—were the preferred mode of resolving disputes. But when two houses failed to make peace, a third publisher could step in and serve as an arbitrator. This ingenious and elaborate system of rights and remedies ultimately rested on a legal void—the legislated absence of copyrights for foreign authors—and served to mitigate, though not wholly to avert, a public goods problem that threatened to destroy incentives to invest in the dissemination of uncopyrighted works by foreign authors.

The Persistence of Pirates: First-Mover Advantages and the Second Public Domain

At the edges of trade courtesy there were always eager opportunists. Sometimes they were extremely aggressive and numerous, especially during the publishing wars of the 1830s–40s and 1870s–80s when cheap books and inexpensive modes of distribution made the reprinting of unprotected foreign works irresistibly attractive to many firms. Publishers who operated outside of courtesy were frankly referred to as pirates, and their activities

occasioned many colorful epithets during the latter part of the century. Courtesy, or what one commentator called the "gentility of this modified piracy," could "not obscure the lucrative character of the business"; as a result, new houses sprang up, operated by "these cheap Ishmaelites of the trade" who defied the courtesy system.[164] Ishmael, renegade, outlaw—the pirate was a thing apart, an "outside barbarian" whom Henry Holt contrasted with those "men of exceptional character" who reared and dwelled in the respectable house of courtesy.[165] Holt referred to the outsiders as "unscrupulous reprinters of all successful stories, who pay authors nothing and publish in cheap pamphlets without covers."[166] Years earlier, Ticknor & Fields had dubbed pirates "keen-scented rascals, our friends in the *Craft*."[167]

The major houses took considerable financial risks in publishing uncopyrighted foreign works. The inner circle of genteel publishers could be relied upon to observe the principles of courtesy, but the "outside barbarians" had no honor to uphold, no trading partners to impress, and no incentive to accept a code that could bring few immediate, tangible benefits. The major publishers had an additional strength, however; they enjoyed what economists call first-mover advantage. Because of their size and resources, the large houses were able to obtain advance sheets or early proofs of foreign books just ahead of publication abroad. Profits lay in being first to the American market with new titles, and a head start of only a few days could mean the difference between success and failure.[168] While publishers could rely on courtesy to restrain their respectable competitors, first-mover advantage was necessary to steal a march on the cheap Ishmaelites. The combination of courtesy and first-mover advantage was the key to profits.

As early as the 1820s, the Carey firm of Philadelphia was glad to obtain a head start of just two days over piratical competitors. The firm wrote Sir Walter Scott's Edinburgh publisher in 1823,

> We have rec'd *Quentin Durward* most handsomely and have Game completely in our hands this time. In 28 hours after receiving it, we had 1500 copies off or ready to go, and the whole Edition is now nearly distributed. In two days we shall publish it here and in New York, and the Pirates may print it as soon as they please. The opposition Edition will be out in about 48 hours after they have one of our Copies but we shall have complete and entire possession of every market in the Country for a short time.[169]

The "Game" was all about being first to the market. In 1855, Ticknor & Fields urged Robert Browning to send advance copies of a new work "just as early as it is possible to do so that we may have a full months start before our brethren of the trade smell the English copies across the sea."[170] In the 1880s, an authorized publisher's need for precious lead time still generated anxious discussion in the trade journals:

> A publisher who reprints in this country a popular English book, which he secures by paying the author for the sheets, has now, we believe, only about a week's sales from which to derive his profit. At the end of that time the pirate has caught up with him, published the book in a cheap form, and made the authorized edition unprofitable.[171]

An advantage of days or even hours was critical to these ventures. In this respect, nineteenth-century American publishers ran risks similar to those faced today by fashion designers, who likewise lack copyright protection in their creations and are menaced by rapid free riding. Discussing first-mover advantages in the fashion industry, Kal Raustiala and Christopher Sprigman note that in the short interval between the appearance of new fashion designs and the activities of copyists, design originators can "gain the the lion's share of revenues from their designs and will continue to engage in innovation."[172] Similarly, it was the brief period between authorized publication and piracy, supplemented by the protections of courtesy, that allowed Putnam, Holt, Appleton, and other major houses to earn their profits. The large sums paid to such authors as Dickens, Thackeray, Trollope, and George Eliot were "for the privilege of a few days' priority."[173]

Courtesy was a thin barrier against the work of determined pirates. A publisher might enjoy a courtesy-based relationship with a popular foreign author for years, only to lose the association overnight after some incident—a competitor's retaliation, perhaps—triggered a feeding frenzy among the cheap reprint firms. Houses that observed courtesy regarded their foreign titles nervously, as if they were protected by the most fragile of copyrights.[174] As previously noted, the young firm of Grosset & Dunlap justified reprinting Kipling's works without permission on the ground that his books had already appeared in so many unauthorized American editions that they had lost the aura of courtesy protection. The firm regarded itself as "honorable pirates, because to our credit be it said that in no case did we

ever reprint anything that had not become public property by having been reprinted indiscriminately by about everyone else in the business."[175]

It might strike modern legal sensibilities as bizarre for an uncopyrighted work to be described as having become "public property," but it is a redundancy explained by the institution of trade courtesy. Courtesy raised a work up out of the public domain, gave it the status of private property, and caused the market to treat it as a public good clothed with the privileges of legal monopoly. The quasi-copyright enjoyed by such a work exerted a civilizing influence on participating houses and redounded to the benefit of otherwise helpless foreign authors and publishers. Supported by informal courtesy norms, publishers put on respectability, foreign authors expected and received honoraria or royalties, and market failure was averted for the sale of foreign titles. The magic of this informal system might continue undisturbed for years until one day an outside barbarian decided to seize upon some courtesy-protected work and to issue it in a cheap, flimsy edition. The spell broken, other reprint houses would leap in and try their luck with the same title. Suddenly, the artificial order of courtesy was temporarily wrecked by the anarchy of an unregulated commons. The trade now regarded the foreign work as having returned to its fallen condition among the heterogeneous mass of materials in the commons. For adherents of courtesy, this loss of recognized exclusivity was a lapse into a renewed public domain, a second death of protection.

Yet, as Grosset & Dunlap's experience suggests, the free availability of a popular work could benefit new entrants in the publishing trade, even as it injured the vested interests of older houses. Young firms could develop book lists free of costly overhead and the risks of experimenting with new or unknown authors. The public, too, could benefit from aggressive competition for cheap, popular books. The Harpers acknowledged in 1877 that occasional breakdowns in courtesy resulted in advantages to book buyers:

> The American expedient of the "Law of Trade Courtesy" answers very well in most cases, for while it generally respects the arrangements made by a British author with his American publisher, it leaves open a way for reprisals on unfair houses, and the people are benefited occasionally by a free fight, in the course of which, while rival publishers are fighting over some tempting morsel, the reading public devours it.[176]

Here, the Harpers hinted at another way in which courtesy mirrored copyright law: in its creation of monopolies in public goods. The familiar costs of monopoly—increased prices and an artificial scarcity of goods—were experienced under trade courtesy, just as they are in markets controlled by formal laws. These effects did not go unnoticed, and the courtesy of the trade had many detractors.

The Decline of Courtesy: Trusts, Literary Agents, and International Copyright

During the 1870s and 1880s, intense competition among American reprinters of cheap, poorly made foreign books threatened many firms with economic ruin. These pirate houses largely ignored the principles of courtesy and reprinted indiscriminately. During 1886 alone, twenty-six cheap libraries issued more than fifteen hundred different volumes. A large number of these were dime novels; many others were foreign reprints published without regard to courtesy.[177] The next year, paper-covered foreign titles were selling at prices from ten to fifty cents, and profit margins were vanishing. The manufacturing trade needed to be sustained, however, and new high-speed cylinder presses, folding machines, inexpensive paper materials, and low postage rates contributed to the frenzy.[178] "The law of evolution applies to the reprinting business as to everything else," remarked a writer for the *New York Herald* in 1889. "The fittest will survive. And the fittest should survive whether he be a 'pirate' or a 'courtesy of the trade publisher.'"[179] The market was soon glutted with cheap foreign books, and publishers of all stripes began to turn to the prospect of international copyright as a possible solution. At the same time, unrestricted piracy destabilized trade courtesy.[180] Even as the major firms tried to uphold its principles, the courtesy system was repeatedly pulled under by the riptide of competition. The respectable houses roundly blamed the pirate reprinters for the loss of dignity and profits in publishing.

For their part, the cheap reprinters indignantly denied that they were pirates and proclaimed themselves reformers seeking to abolish the privileges enjoyed by the clubby firms that had selfishly adopted the courtesy of the trade. George Munro, an industrious publisher of dime novels and founder of the Seaside Library of inexpensive books, argued that the "cheap

libraries have broken down the Chinese or rather American wall of trade courtesy and privilege" that had been erected solely for the "monopoly of publishers in this country." These haughty book barons, Munro asserted, "dictated terms, and precious low ones too, to the [foreign] authors, on a basis of non-interference among themselves." Munro was claiming, in essence, that courtesy operated horizontally to benefit publishers by artificially maintaining monopoly prices, but did not work vertically to help foreign authors or to make books more affordable for the masses. Munro even hailed the possibility of "international copyright"—that is, American copyright protection for foreign authors—as an impending defeat for the courtesy cabal. "From this time forth," he declared, "we shall have a free field and no favor, and the longest finger takes the largest plum."[181]

Munro and others in the cheap reprint business assailed the gentlemanly club of publishers as a collusive trust or monopoly. The established houses responded by portraying themselves as honorable and decent, in contrast to the lesser breeds without the law of courtesy. Holt named himself, along with "Willie Appleton, Harry Harper, Haven Putnam, [and] Charles Scribner, Jr.," as among the core of courtesy-abiding houses. "[S]ome publishers," he sneered,

> more or less of specialties and sometimes of piracies, who did not know the leading group very well, supposed it to be a sort of trust, protecting each other and sharing all good things among themselves; and that the only way to get into the publishing business was to reprint books already published by these leaders.[182]

Holt always denied the charge that the large publishing houses were a bullying trust and that courtesy was the glue that held it together. There was "no close corporation about it," he once testified in court. "[A]nybody is welcome who will behave himself."[183] But the cheap reprint firms and the new startups disagreed. They spurned a welcome mat that bid them recognize the courtesy claims of the veteran houses even as it withheld the prestige and leverage necessary to enjoy the benefits such a system conferred. These pirates were indiscreet enough to remind the major firms of their own raffish beginnings, and they justified their freebooting methods in the same way that Mosher did his: foreign works were lawfully in the American public domain and were freely available to all; any attempt to claim such works and call it courtesy was simply a game played by the haves, to the detriment of the

have-nots. Unrestrained competition would break down courtesy and benefit the book-reading public by placing "good cheap" editions of important works "within the reach of students, schoolteachers, and others of moderate means."[184] These claims echoed the republican rhetoric that proponents of reprint culture had used to defeat advocates of international copyright in the antebellum period.[185]

Like Munro, John W. Lovell—"Book-A-Day Lovell"—defied the publishing establishment and attacked trade courtesy as a monopoly posing as a piety. He argued that aggressive competition among American publishers for foreign works was the key to keeping prices down and sales brisk. Everything he did, he claimed, was for the masses.[186] Lovell was a master of a populist, anticorporate rhetoric aimed directly at his genteel competitors. With bold sarcasm, he urged the "younger and smaller houses" to "Go in heartily for the 'courtesy of the trade' and—starve. You will find that everything is expected of you and very little given you."[187] The publisher Isaac K. Funk, who was frequently charged with rank piracy, attacked courtesy as a "law" that had not been "framed in the interest of authors or of the public."

> It is a "right of possession" based primarily on the principle, or lack of principle, of first grab. It has proved itself inefficient to protect even the clique of publishers who framed it.... The "law" has proved itself an injustice to authors, a calamity to the public, a miserably clumsy and weak substitute for that law which right and public morality demand—the international copyright law.[188]

Funk painted courtesy as no better than an aggressive grab at the resources of the public domain, a raw claim of first occupancy undignified by the entitlements of Lockean labor in the commons. Genuine copyright protection for foreign authors—though undeniably a legal monopoly—now seemed superior, in the minds of Funk and other agitators for reform, to the cliquish, hidebound monopoly artificially maintained by the prestige houses. Funk, Lovell, and Munro carried the attack to the established firms with an evangelical and egalitarian fervor.

The perception that courtesy was an anticompetitive trust operated by a chosen few undoubtedly contributed to the decline of the informal, norms-based system. Authors themselves sometimes rebelled against the principle of association that required them to cleave to a single publisher

as if "choosing a wife," a simile suggested by Holt to describe "the normal relation of author and publisher [of] mutual confidence and helpfulness."[189] Dickens moved opportunistically from one American publisher to another and in one instance, at least, obtained two contracts for the same book.[190] Holt had been William James's publisher for years, but when Scribner's made an offer for his new volume of essays, *The Will to Believe*, James invited Holt to make a competing offer, saying he would give the book to the highest bidder. Holt remonstrated, whereupon James, shocked to find himself a shuttlecock in the courtesy game, accused Holt of trying to undermine his negotiations with Scribner's.[191] James wound up publishing the book with Longmans, Green & Co., after Houghton refused it. Holt's attempt to preserve the "normal relation" of author and publisher had infuriated James; he recognized the anticompetitive nature of courtesy as an assault on his pocketbook.

Congress enacted the Sherman Antitrust Act in 1890, one year before passage of the Chace International Copyright Act. The Sherman Act prohibited "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" and criminalized the acts of "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce."[192] The law was aimed at monopolies, combinations, and cartels that harmed competition in the marketplace. Horizontal restraints of trade were thought to be especially pernicious and often were deemed violations of the Sherman Act. In 1898, six manufacturers of cast-iron pipe who had conspired to allocate among themselves the right to serve particular customers in certain regions were held to have violated the act.[193] The U.S. Court of Appeals for the Sixth Circuit arrived at this conclusion even though the conspiracy was only a partial restraint of trade and other cast-iron manufacturers had remained outside the cartel. The participating manufacturers had divided up the market and insulated themselves from competition in ways that tended toward monopoly and potentially deprived the public of the advantages flowing from free competition.

The publishing houses that practiced trade courtesy were plainly combining in a horizontal restraint of trade. Instead of splitting the market up into exclusive territories and customers, as the cast-iron cartel did, publishers divided the free cultural commons into exclusively assigned books and authors, each publisher tacitly honoring every other publisher's courtesy

title to a public domain work. This agreement to refrain from poaching on other houses potentially injured foreign authors because there was no competition to better the offer of the first publisher to claim courtesy.[194] This was what economists today call oligopsony, control of the market by a few buyers—in this case, the publishers who purchased foreign authors' permission to publish. "When two publishers are seeking an author," wrote George Haven Putnam, "the proportion of the proceeds offered to the author, goes up."[195] Although Charles Scribner asserted that he knew of "no recognized courtesy rights among publishers which restrict an author from changing his publishers if he desires to do so,"[196] the concerted alignment of publishers against authors' mobility, and the many attested refusals of publishers to treat with any author belonging to another house, suggest that authors were harmed financially by the courtesy cartel.[197] The publishers would have retorted that foreign authors should have been delighted to receive anything for books that were free for the taking in the United States.

There was also a form of oligopoly here, control of the market by a few sellers. Publishers adhering to courtesy effectively agreed to allow fellow publishers to fix the price of public domain works at levels artificially heightened by courteous treatment of authors and also to reduce the supply of copies. Constraints on price and supply occur as a result of ordinary copyright protection, of course, but copyrights are legal monopolies granted by Congress under the authority of the U.S. Constitution; trade courtesy, in contrast, created extralegal monopoly effects, fabricated through publishers' mutual forbearance to compete in free, public goods. Courtesy resembled in certain respects the combination that in the 1930s acted through the Fashion Originators' Guild, an American fashion-design cartel, to limit "style piracy" within the ranks of American garment and textile manufacturers. Like foreign works in the nineteenth century, fashion designs were not protected by copyrights, but the Guild, determined to stamp out piracy, refused to sell garments to retailers who sold pirated fashions, and compelled retailers to sign agreements pledging to forswear the sale of such copies. The Guild registered American designers and their creations and fined members who violated the rules. The U.S. Supreme Court in 1941 held that the Guild's program violated the Sherman Act because it narrowed the outlets for buying and selling textiles and garments, took away the freedom of members, and suppressed competition in the sale of unregistered textiles

and copied designs—all tending to deprive the public of the benefits of free competition.[198]

There are obvious differences between courtesy and the fashion-design cartel, not least in that American publishers did not regularly organize boycotts of booksellers that handled the stock of pirate reprinters, or force booksellers to sign pledges to carry only courtesy-protected books. Yet the horizontal agreement to control competition in uncopyrighted garments, which the Supreme Court deemed illegal per se under the Sherman Act, shares broad features with the tacit agreement of the dozen powerful publishers to eliminate competition among themselves for a foreign author's book and to allow one of their number to dictate the price and supply of copies. The tendency of courtesy to deprive authors and book buyers of the benefits of real competition is clear and after 1890 might have been challenged by the U.S. government or an injured private party. When publishers and booksellers combined, at the turn of the century, to combat massive price-cutting by forming associations to maintain a uniform level for book prices, the New York department store R. H. Macy &Co. sued the American Publishers' Association for antitrust violations. After years of litigation, the U.S. Supreme Court unanimously held in 1913 that the association's net-pricing system violated the Sherman Act. By agreeing to prohibit the sale of books—copyrighted and uncopyrighted—to price-cutting retailers, the publishers and booksellers had colluded to act in restraint of trade.[199]

The nineteenth-century courtesy publishers, like the members of the American Publishers' Association and the Fashion Originators' Guild, conspired to suppress competition in uncopyrighted works. Although trade courtesy was not challenged in the courts, the legal climate at the turn of the century disfavored the kind of horizontal restraint of trade that the major publishing houses pursued as a matter of honor. The openly anticompetitive nature of their arrangements most likely contributed to the decline and seeming disappearance of courtesy in the early years of the twentieth century. The cheap reprint houses had mercilessly assailed the genteel publishers as a trust or monopoly; the antitrust laws condemned horizontal restraints as illegal per se. Trade courtesy withered in this inhospitable climate.

Also contributing to the erosion of courtesy was the rise of the literary agent in the 1870s and 1880s. Agents helped authors to grasp the complexities of copyright and contract law and to exploit increasingly valuable markets for such subsidiary rights as magazine serialization, translation, and

dramatization.[200] These savvy middlemen became especially valuable to British authors who had to deal "with hustling Americans so many miles away" and who often feared that "Blank & Company [were] not paying all they might be made to pay, and that some other house might come down with a better advance."[201] Literary agency was, by definition, inimical to courtesy. British-based agents like A. P. Watt and, later, Albert Curtis Brown and J. B. Pinker, along with their American counterparts, saw it as their duty to foster economically adversarial relationships between authors and publishers and to obtain bids from multiple houses so as to maximize authors' remuneration (and their own percentages). As Mary Ann Gillies has noted, many publishers viewed the agent as "an unwelcome, opportunistic interloper."[202] William Heinemann, President of the Publishers' Association of Great Britain and Ireland, called the agent "a parasite living on our vital forces."[203]

Equally disgusted, Henry Holt described the agent as "a very serious detriment to literature and a leech on the author, sucking blood entirely out of proportion to his later services."[204] Holt complained that agents struck at the heart of the courtesy relationship between authors and publishers, undermining its continuity by their "fine work."[205] American publishers, accustomed to playing an avuncular role with their authors, felt that agents threatened the integrity and stability of this time-honored relationship. In particular, literary agents interfered with the principle of association, whereby foreign authors voluntarily remained with the American publishers that had first claimed them, and made it more difficult for publishers to justify the uncontested honorarium or royalty for which authors without copyrights were expected to be grateful. Agents introduced the friction of market competition into the hermetic paternalism of courtesy.

In addition to the pressures of ruinous competition, antitrust law, and literary agency, dramatic changes in American copyright law had a direct impact on courtesy. In 1891, Congress passed the Chace International Copyright Act, at last granting formal legal protection to foreign authors. The struggle for that reform had gone on for decades. Efforts to establish a reciprocal Anglo-American copyright law had repeatedly met with obstacles. British law made copyright protection available to foreign authors, including Americans, but a comparable privilege did not exist for British authors in the United States.[206] In response to a petition presented by British authors, Senator Henry Clay introduced a bill in Congress in 1837 that would

have recognized British copyrights in the United States. The bill encountered strong opposition from the American book trade, however, and never became law. In 1854, President Franklin Pierce signed an Anglo-American copyright treaty providing for reciprocal recognition of the rights of authors and publishers in the two countries. Once again, stubborn resistance from publishers and booksellers caused the treaty to fall short of ratification by the Senate.[207] Writing in 1880, British poet and essayist Matthew Arnold remarked that the United States had repeatedly "refused to entertain the question of international copyright."[208] A series of Anglo-American copyright bills introduced in Congress between 1886 and 1890 met with the same fate.

When Congress finally granted rights to foreign authors in the Chace Act of 1891, protection came at the price of large concessions to American typesetters and platemakers. Chief among these was the express condition that a foreign (or domestic) book in any language could acquire copyright protection in the United States only if the book was "printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom" and if two copies of the book were deposited in the Copyright Office on or before the date of first publication anywhere else.[209] These provisions were known collectively as the manufacturing clause. Along with the stringent deposit requirement, the clause effectively made first or simultaneous manufacture and publication in the United States a condition of American copyright for any book published abroad.[210] Although resourceful or well-connected foreign authors might be able to satisfy these onerous requirements, many others could not. In place of an absence of copyright protection, Congress had granted foreign authors a form of protection that was openly and avowedly protectionist—conditioned upon compliance with inflexible rules that benefited American typesetters, platemakers, printers, and bookbinders.

The Chace Act was a compromise between advocates of international copyright and the manufacturing trades that feared loss of work if foreign authors were allowed to secure American copyrights unconditionally. If foreign books suddenly received automatic protection, these industries would be forced to compete against copyrighted imports and editions printed from type set overseas and thus would lose the benefits they had enjoyed when foreign works lacked copyright protection altogether. A manufacturing

clause had long seemed expedient to legislators and lobbyists. When in 1837 the manufacturing interests protested that international copyright "would jeopardize an industry employing an estimated 200,000 persons with a capital investment of between $30 and $40 million," Henry Clay introduced a bill that conditioned copyright for British and French authors on American manufacture of their books.[211] In 1884, the Harper firm argued for manufacturing provisions that would require protected foreign books to be printed in the United States, "chiefly in order that they may not be made inconvenient and unobtainable, which would be the case if the base of supplies were so remote as London." The Harpers denied that they were taking a protectionist position: "we would not prohibit the importation of stereotype or electrotype plates."[212] Some publishing houses that had their own printing plants benefited directly from the Chace Act's manufacturing clause; others were hopeful that it "represented a part of a design to bring the manufacture of books for the entire English-speaking world under the control of American firms."[213]

The manufacturing clause was especially hard on foreign authors writing in languages other than English. The difficulty of producing an English translation of a work prior to its publication abroad was insuperable for most authors. George Haven Putnam observed,

> The condition of American manufacture, added to the requirement of simultaneous publication, made it almost impossible to secure American copyright for the books for which it was necessary to produce an English version before the manufacturing could be begun. We had given copyright to Germany, France, and Italy in form, but in fact, the authors of these countries could secure but a trifling possibility of advantage from their American market.[214]

Putnam also complained that the manufacturing clause was unnecessarily doing the protectionist work of a tariff on books. He contrasted American and European approaches to copyright legislation, pointing out that in England, France, and Germany the book manufacturing interests were not heard on the question of copyright but, rather, that these interests "were properly to be considered in the rooms of the tariff committees." Congress, Putnam lamented, had shown itself more ready to listen to the typographical unions and papermakers than to "authors, artists, or composers."[215] As

I show in chapter 3, Ezra Pound recognized that the manufacturing clause and book tariffs were twin protectionist devices that harmed the interests of creators.

* * *

By the dawn of the twentieth century, trade courtesy had become difficult to practice openly. The climate of trust-busting, punctuated by antitrust lawsuits and the clamor of politicians, made the proud collusiveness of the genteel publishers an antiquated and suspect chivalry. Changes in the book trade, moreover, had eroded the basic purpose of courtesy. The vigorous ministrations of literary agents revealed the faithful monogamy of author and publisher to be dispensable in many cases; real competition, commensurate with an expanding literary marketplace, awakened an entrepreneurial spirit in authors. The experience of uncontrolled competition and piracy in the 1880s made courtesy seem fusty and ineffective.

More visibly, the Chace Act, with its new protections for foreign authors, created the perception that the courtesy code was superfluous. Gentlemanly honoraria gave way to up-front sums and backend royalties, paid not ex gratia but as a matter of law. No longer were advance sheets rushed across the ocean in order to steal a few days' march on competitors; such first-to-market strategies belonged to a world in which the cultural commons was augmented daily by unprotected materials from abroad, and the race and the profits were to the swift. Copyright protection for foreign authors now required domestic typesetting and, as a practical matter, domestic printing; simply binding sheets that had been set and printed abroad would not satisfy the manufacturing clause. The pressures generated by the law's manufacturing requirements ensured that authors and publishers would still be racing against time, but the compulsions were now legal ones, not fueled by contests with pirates or subject to a code of honor among statute-created thieves.

Did the statutory commands of the Chace Act improve on the norms-based informality of trade courtesy? Were copyrights for foreigners superior to courtesy relationships? Both gains and losses resulted from passage of the Chace Act. Foreign authors could now look to uniform federal law for protection against piracy instead of to an informal system of self-regulation adhered to by a dozen major publishers, a system subject to occasional breakdowns and always menaced at the edges by pirates. But

copyright law was complex and technical; its machinery was operated by lawyers, its coercions administered by courts. Under the law's frigid rules, a dispute between publishers, or between publisher and author, was no longer adjusted by honorable concessions; deviants were not punished with public shaming or swashbuckling retaliations. The Chace Act was a bureaucratization of honor. Now, complaints were filed and served, motions made, infringements adjudicated, and injunctions and damages ordered. Although American publishers continued to preserve an ideal of fairness in their dealings with foreign authors, the old paternalistic spirit had been diminished and, with it, some of the sense of professional camaraderie and joint pursuit of honorable ends.

Foreign authors may have benefited in still other ways from the former lack of copyright protection in the United States. According to B. Zorina Khan, it can be argued that piracy allowed foreign authors "to reap higher total returns from the expansion of the market" and to enjoy the benefits of network effects and bundled products, such as best sellers and lecture tours.[216] During the 1880s, the cheap reprinter John B. Alden told foreign authors that they should be pleased with unremunerated circulation of their books in the United States because the widespread exposure would help their sales when international copyright finally did come.[217] The chief drawback to the Chace Act, however, was its manufacturing clause. Many foreign authors simply could not comply with its strict requirements. Protectionist and discriminatory, the manufacturing clause, together with other copyright formalities, prevented the United States from joining the Berne Convention for a century after other major nations had signed it in the late 1880s.[218]

But the manufacturing clause did more than create obstacles for foreign authors and opprobrium for American lawmakers in world opinion. It perpetuated, to a significant degree, the commons problem that international copyright had been enacted to solve. For the many foreign authors and publishers who could not satisfy its rigors, the clause played the same role that the affirmative withholding of copyrights had played in earlier statutes. Failure to accomplish book manufacture on U.S. soil deprived these authors of protection, feeding the American public domain with fresh materials that were freely and lawfully available to any publisher, just as all foreign works had been prior to 1891. Legalized piracy had not been banished by the Chace Act; it had merely been limited in scope. Nor did trade courtesy

vanish altogether; it still existed, albeit in less vigorous and exacting forms, as a publishing ethic, a pattern of behavior, and an occasional tool for resolving disputes in the book trade. No longer openly practiced by publishing houses, it nevertheless quietly governed reputable publishers' relations with each other and with foreign authors.

To sum up, when historians ask whether the Chace Act successfully addressed the copyright problems faced by foreign authors, they should not measure its success in a conceptual vacuum. They should not assess the protections and incentives created by the Chace Act against some general notion of market failure, treating foreign copyright protection as the sole, stark alternative to piracy and the public goods problem. Rather, the Chace Act should be measured, at least in part, against the successes (and failures) of trade courtesy, the preexisting system of extralegal norms that had sought to bridge the copyright gap for American publishers and foreign authors. As Dotan Oliar and Christopher Sprigman note, "Intellectual property laws come with costs as well as benefits, and these must be assessed relative to those of non-legal regulation. In some cases social norms may do a reasonably good job of controlling appropriation, but perhaps not in others." They add that "the case for legal intervention is greater if we see significant dissatisfaction with such non-legal background incentives."[219] There was dissatisfaction with trade courtesy, but much satisfaction with it as well. Whether the uniformity costs and compliance burdens that the Chace Act and its statutory successors imposed were offset by the benefits they conferred on publishers and foreign authors is a question that is addressed implicitly throughout this study.

The following chapters tell the story of transatlantic modernism's encounter with U.S. copyright law, lawful piracy, and the American public domain. They also show that courtesy survived well into the twentieth century and that elements of that informal, norms-based system were deftly repurposed by James Joyce, T. S. Eliot, Bennett Cerf, and other modernist figures to combat piracy, to protect and consolidate American markets, and to lay the groundwork for authorial celebrity. The tradition of courtesy, with its shaming sanctions, authorized editions, and ex gratia payments, played a critical role in the production and consumption of modernism in the United States.