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## Sidestepping Copyright: British Fairy Tale Anthologies of the 19th Century

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# SIDESTEPPING COPYRIGHT: BRITISH FAIRY TALE ANTHOLOGIES OF THE 19th CENTURY

Megan Richardson & Andrew T. Kenyon†

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## I. INTRODUCTION

The last decade of the nineteenth century saw a number of British fairy tale anthologies published—the first five of Andrew Lang’s *Rainbow Fairy Books*,<sup>1</sup> Joseph Jacobs’s English, Celtic, and Indian fairy tale collections,<sup>2</sup> and the now lesser known *English Fairy and Other Folk Tales* of Edwin Sidney Hartland.<sup>3</sup> Unlike much, if not most, of the other story-literature of the time, these books did not have authors in any conventional sense. The anthologists styled themselves as “collectors,” “selectors,” or “editors” of the compilations<sup>4</sup> and the material was mainly derived from vestiges of local oral traditions and “chapbooks”—small, roughly printed pamphlets containing simple stories illustrated with woodcuts, without identification of origin except perhaps the printer.<sup>5</sup> In fact, most of the material in the

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1. Lang’s *Rainbow Fairy Books* were published by Longmans, London, in 12 volumes over 21 years, beginning with *THE BLUE FAIRY BOOK* (Andrew Lang ed., Dover Publ’ns, Inc. 1965) (1889) and ending with *THE LILAC FAIRY BOOK* (Andrew Lang ed., 1910).

2. *ENGLISH FAIRY TALES* (Joseph Jacobs ed., E. M. Hale & Co. 1902) (1890); *MORE ENGLISH FAIRY TALES*, (Joseph Jacobs ed., n.d.); *CELTIC FAIRY TALES* (Joseph Jacobs ed., N.Y., G. P. Putnam’s Sons circa 1923) (1892); *MORE CELTIC FAIRY TALES* (Joseph Jacobs ed., Dover Publ’ns 1968) (1894); *INDIAN FAIRY TALES* (Joseph Jacobs ed., G. P. Putnam’s Sons 1968) (1892). All were published by David Nutt in the Strand, London.

3. *ENGLISH FAIRY AND OTHER FOLK TALES*, (Edwin Sidney Hartland ed., Singing Tree Press 1968) (1890).

4. The *Rainbow Fairy Books* were “edited” by Lang. See *THE BLUE FAIRY BOOK*, *supra* note 1; *ENGLISH FAIRY TALES*, *supra* note 2, at v (“collected” by Jacobs); *ENGLISH FAIRY AND OTHER FOLK TALES*, *supra* note 3, (“edited and selected” by Hartland).

5. Those we have seen fit the description. See generally JOHN ASHTON, *CHAPBOOKS OF THE EIGHTEENTH CENTURY* (B. Blom 1966) (1882); VICTOR E. NEUBURG, *THE PENNY HISTORIES 6–7* (1968) (providing a general description of chapbooks);

anthologies came from chapbooks, which, aided by a network of itinerant peddlers, had been circulating throughout the British Isles, and to a lesser extent the colonies, in the eighteenth and nineteenth centuries but had begun to die out towards the end.<sup>6</sup> Sometimes English translations of European fairy tales found their way into the British anthologies, especially in Lang's case (his fairy books including stories from the Brothers Grimm<sup>7</sup> and Perrault<sup>8</sup>). But most of the stories had some British connection and indeed their new anthologising was, at least at the start, designed expressly to reveal and celebrate the customs and values of common people of earlier times.<sup>9</sup>

The story of Dick Whittington is a case in point. The tall tale loosely based on the childhood of Sir Richard Whittington of Gloucester, thrice Mayor of London, was featured in all the anthology series as a particular example of the British folk tale. It was earlier available in oral folklore and various chapbooks,<sup>10</sup> but appears to have become particularly popular after anthologising. The anthologised versions, as the chapbooks before, were similar in their accounts of Whittington's rise from rags to riches, his initial hardships, his integrity, and the moments of immense good fortune that determined his success. There were some fictional aspects. The real Richard Whittington did not begin as an impoverished orphan but as the son of Sir William Whittington, Knight of Gloucester, and it is debatable whether a cat made his fortune.<sup>11</sup> Whatever real information about Whittington's life may have been found in the story at the beginning had been superseded in later retellings. His story was larger than life, a myth, and its moral was "teaching us not to despair of Providence assisting us, but we

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LESLIE SHEPARD, *THE HISTORY OF STREET LITERATURE* (1973) (providing a general overview of the development of story-literature).

6. NEUBURG, *supra* note 5, at 7, 47. As Neuburg observes, "in the eighteenthies, the day of the chapbook was done." *Id.* at 75.

7. For instance, Lang's *The Blue Fairy Book* featured "Hansel and Gretel." *THE BLUE FAIRY BOOK*, *supra* note 1, at 251.

8. Lang's book also contains the classic French fairy tale of "Cinderella." *Id.* at 64.

9. See *ENGLISH FAIRY AND OTHER FOLK TALES*, *supra* note 3, at xxiii-xxiv.

10. See for example (and these are only some of the many Dick Whittington chapbooks that circulated in the eighteenth and nineteenth centuries) *THE HISTORY OF SIR RICHARD WHITTINGTON* (London, William & Cluer Dicey circa 1750); *THE HISTORY OF WHITTINGTON AND HIS CAT* (Hereford, Child n.d.); *WHITTINGTON AND HIS CAT* (London, John Harris circa 1830).

11. As Clouston pointed out in *Popular Tales and Fictions*, fairy tales involving cats were popular and this was likely the reason for the cat's inclusion in Whittington's tale. W.A. CLOUSTON, *POPULAR TALES AND FICTIONS* II 65-78 (Singing Tree Press 1968) (1887). Although, in his careful study into the life of Sir Richard Whittington, Samuel Lysons suggests there may have been some truth to the story. SAMUEL LYSONS, *THE MODEL MERCHANT OF THE MIDDLE AGES: EXEMPLIFIED IN THE STORY OF WHITTINGTON AND HIS CAT* 24-48 (London, Hamilton, Adams, and Co. 1860).

must at the onset learn to assist ourselves,"<sup>12</sup> for "no one knoweth what may be the changes of life."<sup>13</sup>

The twin themes of "respectability" and "providence," common to popular literature of the eighteenth and nineteenth centuries,<sup>14</sup> dominated the discourse. The wealth of popular understandings that developed around Dick Whittington's story exemplifies the folk tale as folk culture. Like *Jack the Giant Killer*, *Robin Hood*, and the now lesser known *Guy, Earl of Warwick*, it began as tale by and for common people, primarily, but with the aid of the anthologies gained a new audience in the middle classes (especially children, to whom they were mainly targeted) attracted by their accounts of heroism and luck.<sup>15</sup> Indeed, as the anthologists eventually came to understand, the tremendous popular success of the fairy-folk tales lay not only in what the stories revealed of the values of those who first devised and heard them but also of those who experienced them over time. Jacobs particularly observed this, referring to the stories as filling imaginations with "bright trains of images."<sup>16</sup>

One question is how in the golden period of fairy tale anthologising the work of the anthologists escaped the complete influence of copyright law with its paradigm of the individually authored work. The answer, it is suggested, lies, in part, in the early anthologists who formed a folklore society, saw themselves as anthropologists of folk culture, and treated copyright as largely irrelevant for the sake of their perception of the common good, and, in part, in the structure of copyright law itself which does not mandate but simply permits proprietary rights to be asserted.

## II. FOLKLORE NORMS

The Folk-Lore Society was formed in 1878, twenty years after publication of Darwin's *Origin of the Species*<sup>17</sup> and at the height of a period marked by fascination with matters historical and scientific.<sup>18</sup> It was a

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12. THE HISTORY OF WHITTINGTON AND HIS CAT, *supra* note 10.

13. WHITTINGTON AND HIS CAT, *supra* note 10.

14. See Raymond Williams, *The Press and Popular Culture: A Historical Perspective*, in *NEWSPAPER HISTORY FROM THE SEVENTEENTH CENTURY TO THE PRESENT DAY* 41, 44–45 (George Boyce et al. eds., 1978).

15. Jacobs remarked in his Preface to *English Fairy Tales* that given their "innocent gaiety," "[t]he only reason, I imagine, why such tales have not hitherto been brought to light, is the lamentable gap between the governing and recording classes and the dumb working classes of this country—dumb to others but eloquent among themselves." *ENGLISH FAIRY TALES*, *supra* note 2, at v, vi.

16. *MORE ENGLISH FAIRY TALES*, *supra* note 2, at vi.

17. As anthropologist Venetia Newall has pointed out, "[t]he appearance of Darwin's theories in the middle of the nineteenth century was one of various factors which stimulated interest in tradition." Venetia J. Newall, *Introduction to FOLKLORE STUDIES IN THE TWENTIETH CENTURY* xv, xx (Venetia J. Newall ed., 1980).

18. See, e.g., SAMUEL LYSONS, *OUR BRITISH ANCESTORS: WHO AND WHAT WERE THEY?* viii (Oxford, John Henry & James Parker 1865).

small society of friends dedicated to "the preservation and publication of Popular Traditions, Legendary Ballads, Local Proverbial Sayings, Superstitions and Old Customs (British and Foreign), and all subjects relating to them."<sup>19</sup>

Andrew Lang and Edwin Hartland were charter members and another, Alfred Nutt, used his family publishing house to publish his friend Joseph Jacobs's, fairy tale collections.<sup>20</sup> Jacobs joined the Society in 1889 and soon after became the editor of its journal, *Folk-Lore* (whose issues contributed some of the anthologised fairy tales). Parallels can be drawn between the Society's goals and the goals of the fairy tale anthologists. Lang observed that "[t]he editor's business is to hunt for collections of these stories" not to set himself up as their author.<sup>21</sup> He also acknowledged the significant help received from his wife Leonora (who provided several of the translations) and other volunteers.<sup>22</sup> Hartland stated emphatically that "real" folklorists strive to "track custom, superstition, tale, or song back to its earliest form . . ." <sup>23</sup> He, as Jacobs and to a lesser extent Lang, gave notes on the origin of the material collected. Jacobs was criticised by other folklorists for rewriting his tales for easier audience consumption but justified the practice as consistent with the way folk tales always developed: that is, he still saw himself as an anthropologist not an author.<sup>24</sup> From all this it can be seen that the folklorists interacted closely, maintaining a true community of their own. They also shared their stories freely with, for instance, similar versions of Dick Whittington's story, all deriving from the same chapbook or chapbooks,

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Scientific investigation has made great progress of late years . . . [and] different sciences are now called in to render mutual aid in enabling us to work out the problem of the history of the human race . . . . Foreign travel, the study of language, the discoveries made by the spade and pickaxe of the antiquary, geology, anatomy, craniology, the collateral history of other nations . . . may be taken as supplying an additional stone to the building up of our historical edifice.

*Id.*

19. Richard M. Dorson, *The Founders of British Folklore*, in *FOLKLORE STUDIES OF THE TWENTIETH CENTURY*, *supra*, note 17, at 7–8. For the Society's goals and founders see 1 *FOLK-LORE REC.* viii–xi (1878) (the Society's journal, later superseded by *Folklore*) viii–ix and RICHARD M. DORSON, *THE BRITISH FOLKLORISTS: A HISTORY* (1968).

20. Nutt was also (briefly) editor of *Folk-Lore* after Joseph Jacobs, and was an author in his own right. See ALFRED NUTT, *STUDIES ON THE LEGEND OF THE HOLY GRAIL* (London, David Nutt 1888).

21. ANDREW LANG, *CRIMSON FAIRY BOOK* vii.

22. Lang regularly acknowledged their contributions in the Prefaces to his fairy books. See, e.g., *THE BLUE FAIRY BOOK*, *supra* note 1, at preface. See also Hartland, *ENGLISH FAIRY AND OTHER FOLK TALES*, *supra* note 3, at xxvi (providing more limited acknowledgments); Jacobs, *ENGLISH FAIRY TALES*, *supra* note 2, at ix–x (acknowledging friends).

23. *ENGLISH FAIRY AND OTHER FOLK TALES*, *supra* note 3, at xxiii.

24. See *MORE ENGLISH FAIRY TALES*, *supra* note 2, at Preface (providing an extended discussion).

appearing in Hartland's *English Folk and Other Fairy Tales*, Lang's *Blue Fairy Book*, and Jacobs's *English Fairy Tales*.<sup>25</sup>

The general impression is of energetic coordination in a joint quest for common knowledge, fuelled by a spirit of enthusiastic amateurism and some not inconsiderable affection for the subject matter itself.<sup>26</sup> And "divine amateurism" it was.<sup>27</sup> It is interesting that in the late Victorian era, said to be dominated by an ethos of money-making, the anthologists appeared not to be motivated especially by the prospect of commercial reward. No doubt it helped if there were other sources of income. Lang was a well-known journalist, essayist, and fairy tale writer in his own right (although by his account he ended his professional life with as little financially as he started).<sup>28</sup> Hartland was a solicitor and public official.<sup>29</sup> Jacobs was unique in being employed primarily as a collector of fairy tales, but he lived modestly, according to his daughter, and had few overheads, doing most of his writing in the British Museum.<sup>30</sup> In any event, he did not stay long as a fairy tale anthologist. In 1900, he left Britain to take up a post as archivist of Jewish manuscripts in Philadelphia, and in the United States he remained the rest of his working life.<sup>31</sup>

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25. See Jacobs's notes to "Dick Whittington" in *ENGLISH FAIRY TALES*, *supra* note 2, at 270–71; *THE BLUE FAIRY BOOK*, *supra* note 1, at preface; *ENGLISH FAIRY AND OTHER FOLK TALES*, *supra* note 3, at 66. The Chapbooks in question were an unspecified one relied on by Hartland (and also drawn on by Jacobs) and another edited by fellow folklorists George Gomme and H. B. Wheatly for the Villon Society in 1886 (which became the basis of Lang's version and was also used in the "cobbled version" of Jacobs).

26. An affection which in Lang's case dated back to childhood (he was an avid reader of chapbooks), as his biographer records. See ROGER LANCELYN GREEN, *ANDREW LANG* 13 (1962). Jacobs also recalled being attracted to fairy tales as a child. See *ENGLISH FAIRY TALES*, *supra* note 2, at 2.

27. "Divine amateur" was Oscar Wilde's description of Lang in 1888. See GREEN, *supra* note 26, at 32.

28. As quoted by Green, he wrote to his brother in 1906 that "my finances would be, after these thirty-five years, where they were when I was twenty-four." GREEN, *supra* note 26, at 72. Green also notes that Lang considered the fairy tale books to be relatively unprofitable (notwithstanding their success), attributing this to their expensive illustrations by H. J. Ford and Jacob Hood, but as a way of recouping their costs, collectors' editions were also issued with an introduction specially written by Lang and these were priced at 26 shillings (rather than the normal 6 shillings). *Id.* at 45.

29. Little appears to be known about Hartland's life, apart from the fact that he was a provincial solicitor based in Gloucester, and at one stage, Mayor of Gloucester; *THE BRITISH FOLKLORISTS*, *supra* note 19, at 239 (providing some detail about Hartland's life).

30. See Mabel Kaplan, *Joseph Jacobs: Writer of Childrens' Literature*, *STORYTELLER.NET*, Nov. 19, 2003, <http://storyteller.net/articles/136> (quoting May Bradshaw Hays, *Memories of My Father, Joseph Jacobs*, *HORN BOOK MAG.*, Dec., 1952, at 385–86).

31. See *id.*

### III. WAIVABLE COPYRIGHT

Only Jacobs spoke explicitly of rights as "waived,"<sup>32</sup> although the same is implicit in Hartland's and Lang's references to being given "kind permission" and "kindly allowed" to republish.<sup>33</sup> Waivers were needed. The possibility of the first to anthologise being entitled to copyright in tales taken from oral tradition or gleaned from disparate chapbook accounts for which any claimable copyright had long expired (and in any event was never maintained)<sup>34</sup> must have been evident in the late nineteenth century.

The British Copyright Act of 1842 simply referred to the "author" of a book as entitled to copyright for his or her life plus seven years (or 42 years from first publication, whichever was longer).<sup>35</sup> And as far as the courts were concerned it was largely accepted that mental labour employed towards a product that may be found valuable by an audience was sufficient for authorship; without the need for considerations "peculiarly literary."<sup>36</sup> In 1900, the House of Lords confirmed this position in *Walter v. Lane*,<sup>37</sup> holding that the labour involved in giving written form to an extempore speech was sufficient for copyright to subsist in the written report. It was observed in argument that "Grimm's Fairy Tales are said to have been taken down by the [b]rothers Grimm from the mouths of peasants," and asked (rhetorically) "[w]as there no copyright there?"<sup>38</sup> The Law Lords agreed. Lord James considered it enough that "considerable training" not coming from "the knowledge of ordinary persons" was exercised.<sup>39</sup> Lord Halsbury LC referred to the "labour of reproducing spoken words into writing or print" as distinguishing an authored work for

32. ENGLISH FAIRY TALES, *supra* note 2, at ix.

33. See ENGLISH FAIRY AND OTHER FOLK TALES, *supra* note 3, at xxv; THE BLUE FAIRY BOOK, *supra* note 1, at preface.

34. As Neuburg notes, copyright law had "little force" when it came to the publishing of chapbooks. NEUBURG, *supra* note 5, at 7.

35. The British Copyright Act, 1842, 5 & 6 Vict., c. 45, § 3.

36. Prince Albert v. Strange, (1849) 64 Eng. Rep. 293, 311 (Ch) (Knight Bruce VC). See also Prince Albert v. Strange, (1849) 47 Eng. Rep. 1302, 1310 (Ch.) (where Lord Cottenham LC observed that "the property in . . . any work, whether of literature, art or science . . . cannot be disputed" (emphasis added)). In this case of unauthorised publication of unpublished etchings, the question at issue was the so-called common law right of copyright (recognised by British courts before abrogation by the Copyright Act of 1911) but there is no suggestion that the standard of "authorship" would have been different had the work been published and thus under statute.

37. *Walter v. Lane*, [1900] A.C. 539 (H.L.) (confirming the judgment of North J. at first instance, *rev'g* the Court of Appeal [1899] 2 Ch. 749. North J. himself cited cases of copyright being found in *inter alia* translations, abridgments and directories in support of his conclusion that the standard of authorship for statutory copyright law's purposes was simply one of "independent labour." See *Walter v. Lane*, [1899] 2 Ch. 749, 757.

38. *Walter*, [1900] A.C. at 542.

39. *Id.* at 554 (holding also that it was this that rendered the reporters in question "authors" of their reports).

statutory purposes<sup>40</sup>—adding that “to preserve the memory” of them is “a merit” worthy in itself of the attention of the Act.<sup>41</sup>

Perhaps it might still have been argued, regarding the recording a fairy tale in “writing or print,” that distinctions should be drawn between, say, writing down an oral tale, finding an obscure chapbook, carrying out some rewriting, and simply copying a well-known chapbook version. Nevertheless, it was clear that copyright might well be claimed in at least some cases. In the circumstances, for those seeking to side-step copyright, a waiver being something not precluded by the law—which, as section two of the 1842 Act stated, granted the “sole and exclusive Liberty of printing or otherwise multiplying Copies,”<sup>42</sup> but did not insist it be asserted—was the most appropriate step to take.

No doubt there was *some* copyright that the anthologists thought they were entitled to, did not waive, and specifically identified in referring to themselves as “editors,” “selectors,” or “collectors”; and it was this they relied on for public recognition and the limited financial remuneration they received for their considerable efforts—in Jacobs’s case, for instance, ten years of collection before his first fairy tale book was published.<sup>43</sup> A corollary of the low standard of authorship accorded under nineteenth century British copyright law was that the “author,” so to speak, of a compilation could have copyright in the compilation separate from the individual works compiled. To the extent this may have been unclear before, it was made clear in 1890. The case of *Macmillan v. Suresh Chunder Deb*<sup>44</sup> concerned an Indian “piracy” of Francis Palgrave’s well-known compilation, *The Golden Treasury of Songs and Lyrics*.<sup>45</sup> Infringement was found. In the High Court of Calcutta Judge Wilson said:

Such a selection as Mr. Palgrave has made obviously requires extensive reading, careful study and comparison and the exercise of taste and judgment . . . . It is open to anyone who pleases to go through a like course of reading; and by the exercise of his own taste and judg-

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40. *Id.* at 546. If anything, the standard posited was lower than may be implied in Lord James’s reference to “considerable training.” Indeed, Lord Halsbury questioned whether particular “skill” was needed (certainly he thought “literary merit” was not—but then neither did Lord James). See *id.* at 549. The lower standard was truer to the idea of authorship as simply mental labour—and even after insertion of the “originality” threshold in the Copyright Act 1911 it was this standard that prevailed. F.E. SKONE JAMES, *COPINGER ON THE LAW OF COPYRIGHT* 6–7 (6th ed. 1927).

41. *Walter*, [1900] A.C. at 549.

42. The British Copyright Act, § 2.

43. See ENGLISH FAIRY TALES, *supra* note 2, at v.

44. *Macmillan v. Suresh Chunder Deb*, I.L.R. 17 (Cal.) 951 (1890).

45. *Id.* at 960. *The Golden Treasury of the Best Songs and Lyrical Poems in the English Language*, “selected and arranged” with notes by Professor Palgrave, was first published by Macmillan in 1861. See FRANCIS TURNER PALGRAVE, *THE GOLDEN TREASURY OF THE BEST SONGS AND LYRICAL POEMS IN THE ENGLISH LANGUAGE* (London, Macmillan 1861). It ran through several printings and editions: the relevant one at the time of the case was published in 1882. *Macmillan*, I.L.R. 17. at 953, 956.



ment to make a selection for himself. But if he spares himself this trouble and adopts Mr. Palgrave's selection, he offends against the principle [of copyright].<sup>46</sup>

Later years have seen some blurring of the distinction between such copyright as exists in a compilation (which, according to Judge Wilson, was concerned to prevent adoption of "the selection"<sup>47</sup>) and its component parts.<sup>48</sup> But in the simpler time of *Macmillan v. Suresh Chunder Deb* the early folklorists could easily understand that copyright might be claimed in a compilation yet waived in each of the parts<sup>49</sup>—fostering their position that the author-ising tendency of copyright need not be fully embraced.

#### IV. CONCLUDING COMMENTS

Copyright law's development was probably not a particular reason for the eventual demise of the golden era of fairy-folk tale anthologies. The main reasons lie outside the law and include the demise of the early British folklorists, a period of hiatus that followed in the Society,<sup>50</sup> the rise of the professional author (taking over from the "divine amateur" of Victorian times), plus a strengthened individualistic ethos which above all, more than copyright law we suspect, has fuelled the idea that every story should have an author and authorship should be maintained. Nevertheless the history of the British fairy tale anthologies—which ensured that stories that were at risk of dying out could instead, through the generous efforts of a community of folklorists, be not only preserved but widely published for the benefit of present and future generations<sup>51</sup>—shows the possibilities for main-

46. *Id.* at 961.

47. *Id.* at 961–62.

48. Catherine Seville has noted that "[t]he law on substantial taking was not yet particularly . . . developed [before the 1842 Act], since the early reported cases generally involve[d] obvious piracies" and the Act left such cases as did arise to be dealt with under the general unfair use standard for infringement that then prevailed. CATHERINE SEVILLE, *LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND* 241–42 (1999). However, the unfair use standard was replaced with a more specific "substantial part" test in the 1911 Copyright Act ("fair dealing" being relegated to various defences) with the result that attention was focussed on the amount and quality of what was taken. See SKONE JAMES, *supra* note 40, at 119–29.

49. Waiver is not the only reason that copyright may not be maintained in the parts, as illustrated by Palgrave's *Golden Treasury*. In *Macmillan v. Suresh Chunder Deb* the headnote records that "copyright in the works of the original authors had long lapsed." I.L.R. 17 at 952.

50. At least according to Dorson who posited a number of reasons (including ideological disputes and lack of leadership). See THE BRITISH FOLKLORISTS, *supra* note 19, at 266–315. The Society did however continue to function and also to publish its Journal, *Folklore*, on a regular basis even through the "lean" years.

51. As gracefully acknowledged by J.R.R. Tolkien, author of the classic modern fairy tale *The Lord of the Rings*, in a public lecture "On Fairy Stories" given at St. Andrew's in 1939. See J.R.R. TOLKIEN & PAULINE BAYNES, *POEMS AND STORIES* 113 (1980). Indeed Tolkien's major criticism of Lang (and the other 19th Century antholo-

taining a vibrant public domain, the impetus of copyright law notwithstanding.

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gists) is that they limited the audience of their fairy tales to children rather than preserving their messages for all ages.