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The Pre-History of Fair Use

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This article reconsiders the history of copyright’s pivotal fair use doctrine. The history of fair use does not in fact begin with early American cases such as Folsom v. Marsh in 1841, as most accounts assume—the complete history of the fair use doctrine begins with over a century of copyright litigation in the English courts. Reviewing this ‘pre-history’ of the American fair use doctrine leads to two significant conclusions. The first is that copyright and fair use evolved together. Virtually from its inception, statutory copyright went well beyond merely mechanical acts of reproduction and was defined by the concept of fair abridgment. The second insight gained by extending our historical view is that there is in fact substantial continuity between fair abridgment in the pre-modern era and fair use in the United States today. These findings have substantial implications for copyright law today, the principal one being that fair use is central to the formulation of copyright, and not a mere exception.

INTRODUCTION

The fair use doctrine is a central part of modern copyright law: academics, critics, journalists, teachers, film makers, fan fiction writers, and technology companies all rely on the fair use doctrine to give them a certain amount of freedom in dealing with other people’s copyrights. The fair use doctrine recognizes that very few works are created without some recognizable borrowing from antecedent works. Fair use allows the use of copyrighted material without permission; in so doing it sets limits on the otherwise expansive rights of copyright owners to control the reproduction and performance of their works.1 As part of copyright law’s overall balance between authorial incentives and public freedom, the fair use doctrine “permits and requires courts to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity which that law is designed to foster.”2 However, for all its acknowledged importance, the fair use doctrine is difficult, some say impossible, to define.3 This Article proposes that a full understanding of fair use cannot be achieved without appreciating both its origins in English copyright law and its development as a legal transplant in the United States.

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1 Technically, the fair use doctrine renders certain otherwise infringing actions relating to copyrighted works noninfringing. 17 U.S.C. § 107 (2006) (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”).


Two recent cases illustrate the salience and difficulty of fair use. In 2005 Google, Inc., began its massive unauthorized digitization of library books to create an unashamedly commercial book search engine. Google argues in responding to criticism and litigation from copyright owners that its conduct is protected by the fair use doctrine. In 2007, famed children’s book author J.K. Rowling sued to prevent the publication of *The Harry Potter Lexicon*, an encyclopedia of fictional facts and observations distilled from the seven volume *Harry Potter* series. The Google Books and Harry Potter cases each raise basic questions about the extent and duration of copyright owner control. These are fundamental questions of public policy: What is a fair return for authors? When does control over subsequent use harm creativity, technological progress or freedom of expression?

Copyright owners and defendants alike make claims about the history and essential nature of copyright and of fair use. The plaintiffs in the Google Book litigation argue that a hundred million dollar commercial enterprise has never and can never be justified by a narrow exception like fair use. The defendants in the Harry Potter Lexicon case argue that copyright ownership does not and has never conveyed unlimited rights of control. Claims and inferences about copyright history often play a significant role in addressing such questions.

If history is going to play a part in modern policy discussions, it is important to try to get the history right. Unfortunately, historical discussion of the fair use doctrine in the United States tends to proceed from the wrong baseline. Specifically, it falls short by over 100 years by treating the first American fair use case, *Folsom v. Marsh* (1841), as the beginning of the American fair use doctrine. As this Article will show, the fair use doctrine is better understood as the continuation of a long line of English copyright cases dating back to the beginning of statutory

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9 *See* generally Justin Hughes, *Copyright And Incomplete Historiographies: Of Piracy, Propertization, And Thomas Jefferson* 79 S. CAL. L. REV. 993 (2006) (summarizing and challenging historical claims that copyright has become increasingly 'propertized').
copyright law in 1710.\textsuperscript{10} In evaluating the history of the fair use doctrine, it is a mistake to start with \textit{Folsom v. Marsh}—the complete history of the fair use doctrine begins with over a century of copyright litigation in the English courts. This is the ‘pre-history’ of the American fair use doctrine.\textsuperscript{11}

This pre-history of fair use consists largely of fair abridgment cases litigated in English courts of law and equity between 1710, the year the first copyright act was enacted, and 1841. Abridgment—the process of making a shortened version or abstract of a longer text—was common in this era, but its lawful scope was contested. The review of early English copyright cases and other aspects of the historical record in this Article leads to two significant conclusions. The first is that, virtually from its inception, statutory copyright went well beyond merely mechanical acts of reproduction. By the middle of the 18\textsuperscript{th} century at least, courts had begun to set boundaries on the acceptability of abridgments. The second insight gained by extending our historical view beyond \textit{Folsom v. Marsh} is that there is in fact substantial continuity between fair abridgment in the pre-modern era and fair use in the United States today.

This Article proceeds as follows: Part I begins with a brief summary of the fêted case of \textit{Folsom v. Marsh} and its place in the development of American copyright law. \textit{Folsom v. Marsh} has been criticized for expanding copyright protection beyond acts of merely mechanical reproduction to include an abstract concept of the value of the work. This critique of \textit{Folsom v. Marsh} is, of course, premised on a belief that the scope of copyright prior to Justice Story’s intervention was so limited as to tolerate almost all secondary works. Part II exposes the frailty of this premise.

Specifically, Part II explores the foundation for the mechanical conception of pre-modern copyright and argues that it is incomplete. The apparently narrow grant of rights in the Statute of Anne, the results of some of the earliest cases interpreting the statute, and a number of contemporary writings, can be interpreted to suggest a rather narrow vision of literary property. However, as Part II also explains, a close reading of the pre-modern copyright cases and the earliest copyright treatises shows that copyright was not consistently limited to merely mechanical acts of reproduction in the pre-modern era. From 1741 to 1841

\textsuperscript{10} Statute of Anne, 1710, 8 Ann., ch. 19, (Eng.).

\textsuperscript{11} The ‘pre-history’ of fair use coincides nicely with Sherman and Bently’s use of the expression ‘pre-modern’ copyright. Sherman and Bently draw the distinction between modern and pre-modern copyright, using 1850 as a rough dividing line. For ease of reference, the period between 1710 and 1841 is referred to in this Article as the pre-modern era of copyright. The distinction between modern and pre-modern is useful in this context because up until the middle of the 19\textsuperscript{th} century the categories of the law of intellectual property were still quite fluid and the law of copyright had yet to be significantly influenced by the drive to internationalize copyright that ultimately gave rise to the Berne Convention. See Brad Sherman and Lionel Bently, \textit{The Making of Modern Intellectual Property Law: The British Experience}, 1760-1911 3 (1999).
we see courts distinguishing between abridgments of copyrighted works that were deemed fair or *bona fide* and those that were not—the very fact of that distinction expands upon the narrow statutory language of the first copyright act.\(^\text{12}\) This crucial development in copyright law predates *Folsom v. Marsh* by at least 100 years.\(^\text{13}\)

As Part III establishes in detail, the criteria used to evaluate claims of *bona fide* abridgment in the pre-modern cases are surprisingly similar to the modern fair use doctrine in the United States. Like their modern counterparts, judges in the pre-modern abridgment cases relied on case-by-case analysis and they evaluated the amount taken by the defendant in a highly contextual fashion. What is even more striking is the extent to which the early cases parallel the modern focus on the market effect of the defendant’s conduct and the extent to which the defendant’s use is transformative. Although the language used often differs, questions of substitution effects and the degree of labor and authorial skill injected by the defendant permeated the pre-modern copyright cases.

Part IV concludes with a reassessment of the 1841 case of *Folsom v. Marsh* and its contribution to American copyright law. Understanding the pre-history of fair use is useful for understanding fair use in the present. The co-evolution of copyright and fair use demonstrates that fair use need not be a narrow and occasional exception to the rights of copyright owners. More generally, this Article demonstrates the utility of looking beyond American shores for the origins of legal doctrine: a salient lesson in an increasingly internationalized world.

## I. The Questionable Significance of *Folsom v. Marsh*

The 1841 case of *Folsom v. Marsh* concerned two different literary treatments of the life of George Washington.\(^\text{14}\) The plaintiffs in this seminal copyright dispute were a partnership of publishers, Folsom, Wells & Thurston who held the rights in relation to Jared Sparks’ multi-volume collection of *The Writings of George Washington*.\(^\text{15}\) The accused work was Rev. Charles Upham’s *The Life of Washington*, which was mainly comprised of extracts from Washington’s own writings.\(^\text{16}\) Upham’s abbreviated and simplified *Life of Washington*, intended for local school libraries, weighed in at a mere 866 pages, light in comparison to Sparks’

\(^{12}\) See infra note 109 and accompanying text.

\(^{13}\) See infra note 118 and accompanying text.


\(^{15}\) William W. Story, *Reports of Cases Argued and Determined in The Circuit Court of The United States For The First Circuit* (1812-1875) 100-119 (1853)

massive 6,763 page compilation.\textsuperscript{17} About a third of Upham’s work consisted of previously unpublished presidential writings that were presumably copied from Sparks’ compilation.\textsuperscript{18}

Upham’s publisher, the firm of Marsh, Capen & Lyon,\textsuperscript{19} argued that even if Folsom held the copyright in Sparks’ twelve-volume collection of Washington’s writings, the good Reverend’s work was nonetheless a fair abridgment that did not infringe.\textsuperscript{20} The publisher argued that once Washington’s papers and correspondence had been published, anyone had the right to selectively use those materials to prepare a new and original work.\textsuperscript{21}

This defense was entirely plausible given the state of the legal authorities at the time. As discussed in more detail in the next Part, there were numerous English authorities where similar abridgments had been allowed.\textsuperscript{22} In the 1741 case of \textit{Gyles v. Wilcox}, Lord Chancellor Hardwicke explained that a real fair abridgment should be regarded as a new book and not as a trespass on the original from which it was derived.\textsuperscript{23} In the 1775 case of \textit{Strahan v. Newbery}, Lord Chancellor Apsley found that an abridgment of Dr. Hawkesworth’s \textit{Voyages} did not infringe the original because by employing his own understanding “in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration” the defendant had created “an allowable and meritorious work.”\textsuperscript{24} In that case, Newbery’s revised edition preserved the

\begin{verbatim}
\textsuperscript{17} Id.
\textsuperscript{18} The special Master appointed to review the facts concluded that 319 pages had been copied, but note that 64 of those pages were official documents that should not have been subject to any claim of copyright. See L. Ray Patterson, \textit{The Worst Intellectual Property Opinion Ever Written: Folsom v. Marsh and its Legacy}, 5 J. INTELL. PROP. L. 431, 433 (1998). Note also that the defendant’s work did not reproduce any original writing by Sparks. Id. Justice Story’s conclusion that Folsom somehow held the copyright to the words of President Washington after their publication was probably erroneous at the time and would certainly be wrong now. Id. at 436. We must suspend disbelief on this point in order to comprehend the remainder of Justice Story’s decision.
\textsuperscript{19} Bela Marsh was the main defendant. See Story Reports of the First Circuit 1853, 100-119.
\textsuperscript{20} Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).
\textsuperscript{21} Reese, supra note 16.
\textsuperscript{22} See infra Part II.
\textsuperscript{23} Gyles v. Wilcox, 2 Atk. 141, 26 Eng. Rep. 489 (1741). See infra notes 96 to 108 and accompanying text.
\textsuperscript{24} Strahan v. Newbery, C33/444, f. 575 (Ch. 1775); 98 Eng. Rep. 913. The work in question, generally referred to as \textit{Hawkesworth’s Voyages}, was the first authorized account of Captain Cook’s circumnavigation of the globe. The longer title was “An account of the voyages undertaken by the order of His present Majesty, for making discoveries in the southern hemisphere, and successively performed by Commodore Byron, Captain Wallis, Captain Carteret, and Captain Cook, in the Dolphin, the Swallow, and the Endeavour ...” by John Hawkesworth, Printed for W. Strahan and T. Cadell, 1773. The defendant’s work, \textit{Journal of the Resolution’s Voyage on Discovery to the Southern Hemisphere, &c. Also a Journal of the Adventure’s Voyage, &c. with an Account of the Separation of the two Ships, and the most remarkable Incidents that befell each}, although extolled by the court, was reviewed as “hastily written, and hastily
\end{verbatim}
substance of the original but reduced its volume by as much as three quarters.\textsuperscript{25} Likewise, in the 1761 case of \textit{Dodsley v. Kinnersley}, an abridgment of a popular novel in the modestly titled \textit{Grand Magazine of Magazines} was also found to be non-infringing, principally because the copyright owners had already published their own abstract of the book in their own periodical.\textsuperscript{26}

Nonetheless, Justice Story had little sympathy for such arguments. Although he acknowledged the English authorities holding that “a fair and bona fide abridgment of an original work” did not amount to copyright piracy, he also relied on those same authorities for a series of limiting principles. Justice Story argued that “[i]t is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment.”\textsuperscript{27} On the contrary, he contended that to qualify as a fair and bona fide abridgment “[t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.”\textsuperscript{28}

Deciding in favor of the plaintiff Folsom, Justice Story drew a distinction between easy cases of copyright infringement, in which the defendant’s work is almost exactly the same as the plaintiff’s—i.e. cases where “the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions”—and hard cases requiring a balance of “the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used.”\textsuperscript{29} Justice Story illustrated the application of this second category by noting that a review for “the purposes of fair and reasonable criticism” which cites “largely from the original work” should be regarded as fair.\textsuperscript{30} However, a review that “cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.”\textsuperscript{31} The distinction here is predominantly a question of effect: in Story’s view, a new work

\textsuperscript{25}Id.\textsuperscript{26} Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270 (Ch.). See \textit{infra} Part III for further discussion.\textsuperscript{27} Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).\textsuperscript{28} Id. (citing Gyles v. Wilcox, (1741) 26 Eng. Rep. 489).\textsuperscript{29} Id. at 344.\textsuperscript{30} Id.\textsuperscript{31} Id. at 345.
that “supersedes” the original and “substitutes” for it infringes on the rights of the copyright owner.\textsuperscript{32}

What is the significance of \textit{Folsom v. Marsh}? Justice Story’s decision is often celebrated as the origin of the fair use doctrine in the United States.\textsuperscript{33} Indeed, many elements of the decision are discernible in the current statutory formulation of the doctrine.\textsuperscript{34} However, the decision has also come to be viewed as a significant expansion of the rights of copyright owners.

In a recent article in the Yale Law Journal, Professor Oren Bracha argues that \textit{Folsom v. Marsh} was a pivotal component of the transformation of American copyright law in the 19th century.\textsuperscript{35} Bracha contends that over the course of the 19\textsuperscript{th} century, copyright changed from an exclusive right to make verbatim copies of particular texts to an abstract right of general control in which the only boundaries of the work were identified with respect to its market value.\textsuperscript{36}

Significantly, Bracha sees Justice Story as playing a central part in this transformation. Bracha argues that the concept of fair use announced in \textit{Folsom v. Marsh} was a fundamental change in copyright’s baseline. He reasons that, whereas in the past “infringement was limited to near-verbatim reproduction and all other subsequent uses were considered legitimate; in the new fair use environment, all subsequent uses became presumptively infringing unless found to be fair use.”\textsuperscript{37} Thus, in Bracha’s view, \textit{Folsom v. Marsh} is both transformative and ironic: “although the fair use doctrine is commonly celebrated today as one of the major safeguards against overexpansion of copyright protection[,] at the time it

\begin{footnotesize}
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\item Id. Justice Story’s view can be rationalized as follows: if a new work incorporates the most important parts of the original, then the risks of such impermissible substitution increase.
\item Oren Bracha, \textit{The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright}, 118 YALE L.J. 186 (2008).
\item Id. \textit{See also} BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE 1760-1911 (1999) (describing the same transition in England).
\item Id. \textit{See also} Patterson, \textit{supra} note , at 432 (arguing that Justice Story redefined the concept of copyright infringement in \textit{Folsom v. Marsh}: “in his hands became any copying, duplicative or imitative, in whole or in part of the copyrighted work. This redefinition of infringement enlarged the copyright monopoly and became the basis for what was to become fair use.”)
\end{enumerate}
\end{footnotesize}
was introduced by Justice Story . . . it was a vehicle for a radical enlargement of the scope of copyright.”

Without doubt, there is something to be said for the general story of transformation and expansion that Bracha relates. However, as this Article shows, a review of the early English copyright cases casts that transformation in a different light. The disjunctive view of Folsom v. Marsh presumes that the scope of copyright prior to Justice Story’s intervention was so limited as to tolerate almost all secondary works. As Part II explores in more detail, this mechanical conception of pre-modern copyright begins to look quite frail in light of an examination of early English copyright cases. Similarly, the significant points of continuity between the pre-modern fair abridgment cases and the modern doctrine of fair use surveyed in Part III contradicts the notion that the fair use doctrine originates with Folsom v. Marsh.

II. ABRIDGMENTS, COMPILATIONS AND OTHER FAIR USES IN THE PRE-MODERN ERA OF COPYRIGHT

English copyright law in the pre-modern era offers significant insights into the transition of American copyright law in the 19th century. The notion that Folsom v. Marsh constituted a radical departure from precedent can only be properly evaluated by considering the state of the law prior to that case. With a handful of exceptions, the majority of that prior case law was English. In fact, prior to Folsom v. Marsh there were only 11 reported copyright decisions in the United States. A review of those decisions and the American copyright treatises confirms that the far more developed body of English case law was treated as persuasive in American courts in the mid-19th century. For example, in the Supreme Court’s first copyright in 1834, Wheaton v. Peters, the majority cites to eight English cases and no local authorities; the dissent cites to three additional English cases and two American cases. Likewise, in Folsom v. Marsh Justice Story cites 16 English authorities and not a single U.S. case. The use of English authority clearly outweighs the nascent American case law in almost all of the reported U.S. cases up to 1841.

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38 Id. at 229–230. See also Matthew Sag, God in the Machine: A New Structural Analysis of Copyright’s Fair Use Doctrine, 11 Mich. Telecomm. Tech. L. Rev. 381 (2005) (arguing that the existence of the fair use doctrine allows the rights of copyright owners to be phrased more expansively than would otherwise be possible).
Thus, to evaluate the significance of *Folsom v. Marsh* in the development of American copyright law requires a proper understanding of the development of English copyright law in the pre-modern era.

The scope of pre-modern copyright is usually depicted as narrow, limited, and mechanical.\(^{42}\) As surveyed in more detail below, the text of the Statute of Anne itself, the arguments of the supporters of perpetual copyright, the comments of such literary luminaries as Dr. Samuel Johnson, and the outcomes of certain prominent early copyright cases, all point to a narrow vision of copyright scope. This is especially so in relation to the practice of abridgment, the social importance and legality of which was frequently asserted.\(^{43}\) Based on this narrow vision, the first American fair use case, *Folsom v. Marsh* (1841), looks like a radical departure from both the spirit and the letter of the law. Section A of this Part begins by exploring the foundations of the mechanical view of pre-modern copyright. However, as Section B goes on to demonstrate, the actual scope of pre-modern copyright was not as narrow as it is often depicted. Indeed, the legitimacy of abridgment and other practices of textual borrowing was contested both inside and outside the courtroom throughout the pre-modern era.

### A. The Mechanical Conception of Pre-Modern Copyright

The first place to look for a narrow conception of pre-modern copyright is the text of the Statute of Anne. The Act begins with the rationale:

> Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families … \(^{44}\)

As the preamble indicates, the Act was drafted to address the paradigm of rivalrous reprinting of entire works. No thought appears to have been given to abridgments, translations, compilations or derivative works. Historians have debated whether the Statute of Anne should be seen as displacing, regulating or merely entrenching the cozy monopoly of the...
London booksellers who monopolized the trade in the 17th century.\(^{45}\) Regardless of that debate, there can be little doubt that the drafters of the Statute had one particular problem in mind: rivalrous re-publication of identical books.\(^{46}\) By omission or design, the Statute did not address the question of fractional copying or the threshold of similarity for works based on original works but with minor textual differences. Under the statute, “the author of any book or books already printed” or his assignees, was entitled to “the sole right and liberty of printing such book and books for the term of one and twenty years.”\(^{47}\) Constrained literally, the Act only regulated exact and entire reprinting.\(^{48}\)

Subsequent legislative history might also indicate a narrow construction of the Statute of Anne. Although the Statute of Anne was enacted in response to sustained lobbying by the London bookselling trade, it was ultimately regarded by that same group as unsatisfactory. Consequently a number of London booksellers began to lobby for significant changes to the 1710 Act a mere 20 years after its enactment.\(^{50}\) In particular, a Bill was introduced in the House of Commons on March 3, 1737,\(^{51}\) that would have made it unlawful to “print, publish, import, or sell any abridgement of [a copyrighted work], or any translation thereof … without the consent of the author or proprietor first obtained in writing” within the first three years of the work’s publication.\(^{52}\) The fact that booksellers found it necessary to make their monopoly over abridgments and translations explicit suggests that it was not thought to be part of the original grant contained in the Statute of Anne. This suggestion becomes

\(^{45}\) While some authors regard the passage of the Statute of Anne as marking a shift from a regime of censorship and trade regulation to one of property rights, others see the act primarily in terms of trade regulation. Contrast Mark Rose, supra note 1, at 48 with LYMAN RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS (1991). There is also disagreement as to whether the act was primarily drafted in service of the London booksellers, or whether it embodied a new social bargain between authors, booksellers, and the reading public. Contrast JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING at 55 withRONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695-1775) 46 (2004).

\(^{46}\) ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 29 (2010).

\(^{47}\) Statute of Anne, 1710, 8 Ann., ch. 19, §1 (Eng.).

\(^{48}\) Richard Godson, the author of an early treatise on patent and copyright law, notes that consistent with its Saxon origins, the word book may be applied to any writing, whether bound or unbound, or consisting of one sheet or many. RICHARD GODSON, A PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND OF COPYRIGHT: WITH AN INTROD. BOOK ON MONOPOLIES 219-20 (1823).

\(^{49}\) See generally, Deazley, supra note 45, at 94-110.

\(^{50}\) Id.


\(^{52}\) An Act for the Encouragement of Learning (3 March 1737), BL 357.c.7.(41), clause 22. Full text available at Primary Sources on Copyright (1450-1900), ed. by L. Bently and M. Kretschmer (www.copyrighthistory.org). (emphasis added). Note that this Article uses the modern spelling of abridgment except when quoting directly from original sources.
even stronger considering that this ‘new’ right was only for a period of three years.\textsuperscript{53}

The first reported case to test the scope of copyright under the newly enacted Statute of Anne was \textit{Burnett v. Chetwood} in 1720 or 1721.\textsuperscript{54} The plaintiff in this equity proceeding was the executor of a deceased author of two books written in Latin.\textsuperscript{55} The executor sought to enjoin the publication of English translations of both the unpublished \textit{De Statu Mortuorum} and the published work \textit{Archoeologia Philosophica}.\textsuperscript{56}

The defendants, for their part, denied that translations fell within the intended scope of the Statute of Anne.\textsuperscript{57} Translations, they argued, went beyond the merely mechanical art of printing and required the investment of the translator’s own skill, style, and expression.\textsuperscript{58} Chancellor Parker leaned toward the view that “a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act . . . .”\textsuperscript{59} Nonetheless, the court granted an injunction on the more idiosyncratic basis that the “strange notions” contained in the original Latin work should not be exposed to the less educated who could read them in English.\textsuperscript{60} \textit{Burnett v. Chetwood}’s suggestion that a translation should be regarded as a new work rather than a mere reprinting of the

\textsuperscript{53} Some have argued that the terms of Royal printing patents before and after the Statute of Anne has a bearing on its construction, however, the evidence here is inconclusive. Ronan Deazley has recently reviewed a large number of printing patents granted in the 17th and 18th Century. He notes that although some prominent royal licenses specifically included an exclusive right with respect to printing abridgments and/or translation, the majority did not. \textit{Id.} (citing S. Rogers, “The Use of Royal Licences for Printing in England, 1695-1760”, \textit{The Library} (2000): 133-92.)

\textsuperscript{54} (1720) 35 Eng. Rep. 1008 (Ch.). Recent research indicates that in spite of its common citation \textit{Burnett v. Chetwood} was actually decided in 1721. Tomás Gómez-Arostegui, Correspondence (on file with the author.)


\textsuperscript{56} \textit{Id.} Although decided in 1721 \textit{Burnett v. Chetwood} was only reported sometime between 1817 and 1819 as a note to Chancellor Eldon’s decision in \textit{Southey v. Sherwood} (1817) 35 Eng. Rep. 1008 (Ch.) (referring to Burnett v. Chetwood, 35 Eng. Rep. 1008 (Ch.)). However, we know that the outcome of \textit{Burnett v. Chetwood} was known to many in the eighteenth century because it is mentioned in the 1752 case of \textit{Tonson v. Walker}. As Siegel notes, reference to unreported cases in the Register’s Book was commonplace in the era before official court reporting. \textit{Id.}, at 687, however that record would not have contained the rationale for enjoining the translating or printing of the \textit{Archoeologia Philosophica}. \textit{Id.}

\textsuperscript{57} 35 Eng. Rep. 1008 (Ch.).

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.} at 1009. Although this part of the decision is dicta, Robert Maugham, the author of what is arguably the first copyright treatise, reports this passage of \textit{Burnett v. Chetwood} as though it were the holding. ROBERT MAUGHAM, \textit{TREATISE ON THE LAWS OF LITERARY PROPERTY} (Longman, Rees, Orme, Brown, & Green) 89 (1828).

\textsuperscript{60} \textit{Id.}
original indicates a fairly narrow view of the rights of copyright owners under the Statute of Anne.

The pronouncements of supporters of perpetual copyright also lend credence to the notion that copyright of the pre-modern era was envisaged as a limited right regulating the wholesale reproduction of books. Advocates of perpetual common law copyright were naturally drawn to stress the narrow scope of the right, if only to defend it against their critics. Blackstone, for example, was a staunch supporter of an enduring author’s right derived from a Lockean conception of natural rights. In his *Commentaries*, Blackstone describes literary property in terms of identity. He argues that:

> the identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so exhibited.

In Blackstone’s view, the infringement of literary property required a level of similarity verging on identity: the “same conceptions” in the “same words.” Blackstone’s view is echoed and endorsed by all three of the early copyright treatise authors, Robert Maugham, Richard Godson and Isaac Espinasse. This narrow conception of copyright would seem to allow ample space for partial appropriation and abridgment, and there is evidence that Blackstone himself was amenable to the same.

Another example of the advocates of perpetual common law copyright relying on a narrow construction can be found in the 1769 case

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62. *Id.*
63. *Id.*
64. Maugham, *supra* note 59, at 126; Godson *supra* note 48 at 215; *Isaac Espinasse, A Treatise On The Law Of Actions On Statutes, Remedial As Well As Penal, In General: And On The Statutes Respecting Copyright; For Offences Against The Law Concerning The Election Of Members To Parliament; Against The Hundred; And Against Sheriffs Or Their Officers* (1824). Note although Godson adopts this Blackstone’s language and agrees that the transcription “of nearly all the sentiments and language of a book” would amount to “a glaring piracy,” he also adds that “To copy part of a work, either by taking a few pages verbatim, where the sentiments are not new, or by imitation of the principle ideas, although the treatises are in other respects different, is also to be illegal.” *Id* (emphasis original). This is actually quite a broad statement of the reach of copyright into partial similarity.
65. See *supra* note 24, discussing *Strahan v. Newbery*. Blackstone assisted Lord Chancellor Apsley in his decision in Strahan v. Newbery, C33/444, f. 575 (Ch. 1775). According to the case report, the two men spent some hours discussing the matter and were in agreement that an abridgment such as Newbery’s was an allowable and meritorious new work and not an infringement. *Id.*
of *Millar v Taylor*. In that case a majority of the King’s Bench upheld the existence of a common-law copyright, a right that was eventually overturned by the House of Lords in 1774 in *Donaldson v Beckett*. As part of the majority in *Millar*, Justice Aston insisted that although:

> the right of the copy still remains in the author [the public obtains] an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it; oppose its sentiments: but he buys no right to publish the identical work.

Arguably the best evidence of the conventional understanding of copyright scope in the pre-modern era can be located in the then prevailing attitude towards abridgments. Passages by famous authors, judges and legal commentators extolling the importance and legality of abridgment in the pre-modern era of copyright are not difficult to locate. The liberty of subsequent authors to abridge existing works was seen as part of the sphere of public use authors admitted upon a work’s publication. Thus Godson begins his commentary on abridgments:

> Nearly upon the same principles by which it is shewn that there cannot be a monopoly of a general subject, it appears that books themselves for certain purposes, besides the mere act of reading them, may be used by the public. … They may be taken as the ground work of other literary labours.

Abridgment, compilation and reprinting played an important role in the dissemination of scientific, technical and cultural knowledge in the pre-modern era of copyright. As Ronan Deazley summarizes, “periodical publication throughout the eighteenth century was an appropriative affair in both substance and method.”

One of the most famous and forceful advocates of the right of abridgment was the author, essayist and commentator, Dr. Samuel Johnson. In an article titled “Considerations on the case of Dr Trapp’s Sermons, Abridged by Mr Cave” Johnson argued emphatically in favor of the practice of abridgment on three principal grounds. Johnson’s first argument addressed the question of fairness. Johnson argued that the

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69 Godson *supra* note 48 at 238. (emphasis original).  
71 Dr. Samuel Johnson, *Considerations on the case of Dr Trapp’s Sermons, Abridged by Mr Cave*, 1739, 57 GENTLEMEN’S MAGAZINE (July 1787), reprinted in 2 THE WORKS OF SAMUEL JOHNSON 547 (1837). It can hardly be overlooked that Samuel Johnson was employed by the very same magazine that had abridged Dr. Trapp’s sermons.
abridgment was so widely practiced and well understood that neither authors nor publishers had any cause to complain when their works were abridged. Johnson acknowledged that an abridgment may do some harm to authors and publishers but he also noted that the hazard of such treatment was, even if unstated, a recognized part of the copyright bargain. He thus concluded that:

To abridge a book, therefore, is no violation of the right of the proprietor, because to be subject to the hazard of an abridgment was an original condition of the property.\(^{72}\)

Second, Johnson contended abridging larger works into smaller extracts was vital to the encouragement of learning, a theme which resonated with the Statute of Anne’s avowed purpose of ‘the Encouragement of Learning’.\(^{73}\) He reasoned that abridgments facilitate the transmission of knowledge “by contracting arguments, relations, or descriptions, into a narrow compass; conveying instruction in the easiest method, without fatiguing the attention, burdening the memory, or impairing the health of the student.”\(^{74}\) As an illustration, he noted that the transactions of the Royal Society were generally read as abridgments, to the great improvement of science.\(^{75}\)

Third, Johnson maintained that established conventions in the printing industry confirmed the legality of abridgment. Without citing any case law, Johnson confidently declared that the practice of abridgment was “an act, in itself legal, and justifiable by an uninterrupted series of precedents, from the first establishment of printing among us, down to the present time.”\(^{76}\) Johnson observed that:

numberless abridgements that are to be found of all kinds of writing, afford sufficient evidence that they were always thought legal, they are printed with the names of the abbreviators and publishers without the least appearance of clandestine transaction.\(^{77}\)

In Johnson’s view, the abridgment of Clarendon’s *History of the Rebellion and Civil Wars in England* and other well known works with the apparent

\(^{72}\) Id.

\(^{73}\) The long title of the Statute of Anne is “An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.” Statute of Anne, 1710, 8 Ann., ch. 19 (Eng.).

\(^{74}\) Id. See also Godson *supra* note 48 at 238 (noting that “Many valuable works are so voluminous that abridgments of them are extremely useful.”)


\(^{76}\) Johnson, *supra* note 71.

\(^{77}\) Id. Later in the same article Johnson also stated that “there are few books of late that are not abridged.” Id.
forbearance of their proprietors was abundant evidence of the legality of the practice.\textsuperscript{78}

Johnson’s defense of abridgment as lawful and socially productive is echoed in Robert Maugham’s comments on the topic of the “Pirating of the Copyright in Printed Books.” As Maugham explains:

\begin{quote}
[a]n abridgment of a voluminous work, executed with skill and labor, in a bona fide manner, is not only lawful in itself, and exempt from the charge of piracy; but is protected from invasion by subsequent writers.\textsuperscript{79}
\end{quote}

The law not only treated abridgments as non-infringing, abridgments themselves accorded copyright and protected against “invasion by subsequent writers.”\textsuperscript{80} In other words, abridgments were lawfully created new works and in view of their utility and merit ought to be encouraged.\textsuperscript{81}

Consistent with the case law he reports, Maugham’s view on abridgment was grounded on a recognition of the skill and labor displayed by the abridger.\textsuperscript{82} He quotes Lord Hardwicke in the 1741 case of \textit{Gyles v. Wilcox}:

\begin{quote}
A real and fair abridgment, … may with great propriety be called a new book, because the invention, learning, and judgment of the author are shewn in it, and in many cases abridgments are extremely useful.\textsuperscript{83}
\end{quote}

Of course, treatise writers had a strong interest in proclaiming their freedom to make abridgments on the one hand whilst protesting their property interest in notes and annotations made to pre-existing works on the other. It is unsurprising then that Robert Maugham boldly proclaims the legality of both legal and literary compilations, by which he means “a collection from various authors into one work.”\textsuperscript{84} In Maugham’s eyes, the social utility of abridgments was such that they must be allowed considerable scope. He argued that abridgments must be given “considerable latitude” and that:

\begin{quote}
[i]t seems a necessary consequence of the legality of a compilation, that the law must also sanction its being done
\end{quote}

\textsuperscript{78} Id.

\textsuperscript{79} Maugham, \textit{supra} note 59, at 129. Godson illustrates the import of the law with an example: “one man may compose a work, for instance in the Latin language, another abridge it, a third translate it, a fourth write annotations upon it; and every one of them will acquire a copyright in the product of his own ingenuity and labour.” Godson \textit{supra} note 48 at 238. See also Espinasse, \textit{supra} note 64 at 78.

\textsuperscript{80} Id. See also Espinasse, \textit{supra} note 64 at 77-78.

\textsuperscript{81} Godson \textit{supra} note 48 at 238.

\textsuperscript{82} Id. at 129.

\textsuperscript{83} Id. (citing \textit{Gyles v. Wilcox}, (1741) 26 Eng. Rep. 489 (Ch.).

\textsuperscript{84} Maugham, \textit{supra} note 59, at 132.
in a complete manner, and to effect this object, the quotations must generally be both full and numerous.\textsuperscript{85}

In sum, the text of the Statute of Anne, the results of early cases such as\textit{Burnet v. Chetwood} and\textit{Strahan v. Newbery} and the writings of Blackstone and Johnson each suggest a rather narrow vision of literary property under the first copyright act. Support for this view can also be found in the early copyright treatises of Maugham, Godson and Espinasse.

\section*{B. Beyond a Mechanical Conception of Pre-Modern Copyright}

Having made the case for a narrow view of pre-modern copyright, it is now time to unmake it. As the remainder of this section makes clear, the characterization of pre-modern copyright as limited to near-verbatim reproduction and permissive of all other subsequent uses of a work is misplaced. Although the scope of copyright in the pre-modern era was undoubtedly narrower than it is today, it did not leave abridgment so entirely unconstrained. The legality of abridgment in the pre-modern period was in fact heavily qualified. Furthermore, not all authors agreed with Samuel Johnson on its virtues. Writing in 1704, Daniel Defoe, for example, decried abridgment without the consent of the author as “a certain sort of Thieving which is now in full practice in England.”\textsuperscript{86}

Abridgment was a staple feature of the emerging magazine business of the mid-1700s.\textsuperscript{87} Monthly digests such as Edward Cave’s \textit{Gentleman’s Magazine} featured original composition as well as extensive extracts from other periodicals and books. Cave’s liberal use of abridgment was confronted by a trio of London booksellers named Austen, Gilliver and Clark who brought an action in the court of Chancery on August 7, 1739.\textsuperscript{88} Cave argued that he was free to publish “short extracts, parts of books, pamphlets or other writings newly published on various subjects” and that this practice was beneficial to the proprietors of such books.\textsuperscript{89} According to Johnson’s account, Cave had copied from only 37 individual pages of Dr Trapp’s original 69 page book, \textit{The Nature, Folly, Sin and Danger of Being Righteous Over-Much}.\textsuperscript{90} Furthermore,
those 37 pages had been reproduced only in part so as to amount to a mere 13 pages of the same print in *The Gentleman’s Magazine*.  

Lord Hardwicke issued a temporary injunction to prohibit the defendant from printing the book or any part thereof until he answered the plaintiff’s complaint. However, when the answer came, it was found to be insufficient, and although the defendant was given additional time to resubmit his pleadings, no such pleadings were ever entered and the injunction remained in force. In spite of Johnson’s insistence that the legality of abridgment was justified “by an uninterrupted series of precedent,” one of the earliest cases on the legality of abridgment seems to have found that the reproduction of 13 pages out of an original 69 was excessive.

Lord Hardwicke’s 1739 decision in favor of the plaintiff in *Austen v. Cave* was unreported and is not mentioned in the early copyright treatises. The case has been understandably overshadowed by the Lord Chancellor’s later statements in support of abridgment in *Gyles v. Wilcox* a mere two years later.

Like many early copyright cases, the controversy in *Gyles v. Wilcox* centered on an important book of learning, Sir Matthew Hale’s *Historia Placitorum Coronæ* (The History of the Pleas of the Crown). Although Hale died on Christmas Day 1676, his *Historia Placitorum Coronæ* was not published in an authorized form until 1736. The
defendant John Wilcox had commissioned the production of an abridgment of the *Historia* to be entitled *Modern Crown Law*. The plaintiffs alleged that the defendant’s work was:

borrowed *verbatim* from *Sir Matthew Hale’s Pleas of the Crown*, only some old statutes have been left out which are now repealed; and in this new work all the Latin and French quotations in the *Historia Placitorum Coronæ* are translated into English[.]

The first indication of the dual nature of the decision in *Gyles* is revealed by Lord Hardwicke’s approach to interpreting the Statute of Anne. As already noted, the 1710 statute was expressed in terms easily reconciled with a narrow view of copyright as merely “the sole liberty of printing and reprinting” works in their entirety. The defendant publisher urged a similarly narrow reading on the court, arguing that as an act of monopoly, the Statute of Anne should be strictly construed. The Lord Chancellor rejected this suggestion, saying:

I am quite of a different opinion, and that it ought to receive a liberal construction, for it is very far from being a monopoly, as it is intended to secure the property of books in the authors themselves, or the purchasers of the copy, as some recompence for their pains and labour in such works as may be of use to the learned world.

Lord Hardwicke’s purposive reading of the statute led him to an equivocal position on the legality of abridgment. Hardwicke distinguished reprints with minor alterations from ‘true abridgments’, holding that “where books are colorably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment.” However, the Lord Chancellor also cautioned that:

this [proposition] must not be carried so far as to restrain persons from making a *real and fair abridgment*, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in

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98 *Gyles*, 26 Eng. Rep. at 490. The defendant’s work is also referred to in the original bill of complaint to the Court of Chancery as *A Treatise of Modern Crown Law*. See Ronan Deazley, [*The Statute Of Anne And The Great Abridgement* Swindle](working paper 2010 on file with the author).

99 *Id.* at 489 (emphasis in original).

100 Statute of Anne, 1710, 8 Ann., ch. 19 (Eng.).


102 *Id.* at 490.

103 *Id.*
some instances prejudicial, by mistaking and curtailing the sense of an author.104

Echoing Samuel Johnson, whose commentary Lord Hardwicke had almost undoubtedly read, the Lord Chancellor cautioned that a rule restraining all abridgments would have “mischievous consequences, for the books of the learned, les Journals des Scavans, and several others that might be mentioned, would be brought within the meaning of this Act of Parliament.”105

Lord Hardwicke continued the injunction pending a report on the similarities between the two works by a Master of the Court, assisted by “two Persons skilled in the Profession of Law.”106 As a result of this court assisted arbitration proceeding it was eventually agreed that the defendant’s work was a fair abridgment outside the scope of the Statute of Anne.107 Accordingly, the injunction was dissolved.108

Although Gyles is often cited as the origin of the fair use doctrine in England and generally received as a pro-abridgment decision, Lord Hardwicke’s reasoning gave as much to copyright owners as it took away. Gyles confirmed the legality of some abridgments (those described as fair), it also entrenched a broad purposive reading of the Statute of Anne and condemned another set of abridgments (those deemed unfair) as infringing copyright.109 Lord Hardwicke’s purposive reading of the copyright statute was also an expansive one.

Another case involving the abridgment of legal authorities suggests that the eventual vindication of the defendant in Gyles was far from preordained. In the 1801 case of Butterworth v. Robinson it was alleged that the defendant’s Abridgment of Cases Argued and Determined in the Courts of Law was an impermissible copy of the plaintiff’s Term Reports of cases in the courts of law.110 The defendant had extracted the same cases as Butterworth, but had omitted certain parts of the cases, such as the arguments of Counsel.111 The defendant had also restructured the reports, presenting the material in alphabetical as opposed to chronological

104 Id. (emphasis added).
105 Les Journals des Scavans was the French equivalent of the Transactions of the Royal Society. What is curious about Hardwicke’s comment is that the French journal would not have been subject to copyright protection in England at the time in any event. The Statute of Anne did not “prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas...” Statute of Anne, 1710, 8 Ann., ch. 19, §7 (Eng.)
106 Id. at 419.
108 Id.
109 See ROBERT BURRELL AND ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT (Cambridge: Cambridge University Press, 2005), 255-56 (arguing that the Statute of Anne was subject to broad purposive reading almost from it inception).
111 Id.
order. These alterations were characterized at trial as merely an artful arrangement designed to give the appearance of a new work. Lord Chancellor Loughborough considered the defendant’s publication to be “extremely illiberal” and issued an injunction upon the plaintiff’s motion with leave for the defendant to answer. As far as can be determined the matter was not brought before the court again.

The cases of Austen v. Cave, Butterworth v. Robinson and even Gyles v. Wilcox illustrate that the scope of copyright was not consistently limited to merely mechanical acts of reproduction in the pre-modern era. There were, in fact, numerous instances where defendants were enjoined from partial copying and even non-literal copying. While it is true that the scope of permissible abridgment and reuse was broad by modern standards, it is important to recognize that courts in the pre-modern era did not regard all abridgments the same; rather, they drew a distinction between those that were deemed fair or bona fide and those that were not. Elaborating on the threshold of copying which amounts to piracy, Godson notes:

> a variance in form and manner is a variance in substance, and that nay material melioration cannot be considered as a piracy; yet a piracy is committed whether the author attempt an original work, or call his book an abridgment; if the principal parts of a book are servilely copied, or unfairly varied.

In other words, honest intention to create an original work and merely labeling a work as an abridgment were not sufficient to elude the author’s copyright in every case. Godson continues:

> A man may fairly adopt part of the work of another; he may so make use of another’s labours for the promotion of science, and the benefit of the public: but having done so, the question will be—Was the matter so taken fairly with

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112 Id.
113 Id.
114 Id. Maugham takes issue with this decision in his treatise, saying: “Yet a selection of what is material from a large body of Reports, commodiously arranged, whether alphabetical or systematic, seems an original work. Indeed the right is undisputed of selecting passages from books and reports (including entire judgments) in treatises on particular subjects.” Maugham, supra note 59, at 132.

115 For example, the defendant was enjoined in Austen v. Cave, C33/371, f. 493 (Ch. 1739); Butterworth v. Robinson, (1801) 31 Eng. Rep. 817; and Wilkins v. Aikin, (1810) 34 Eng. Rep. 163. In addition, recent historical research by Tomás Gómez-Arostegui shows that, although unreported, Tonson v. Baker, C9/371/41 (Ch. 1710) was the first lawsuit filed under the Statute of Anne. H. Tomás Gómez-Arostegui, The Untold Story of the First Copyright Suit under the Statute of Anne in 1710, 25 BERKELEY TECH. L.J. (forthcoming 2010). In that case, Tonson was able to secure ex parte temporary restraining order in spite of his acknowledgment that the defendant’s book was not identical to his own; he merely argued that it was the “Same in Substance & Effect”. Id.

116 Godson, supra note 48 at 215-16. (emphasis original)
that view, and without what may be termed the *animus furandi* [intention to steal]?\(^\text{117}\)

The requirement that abridgments be “real and fair” as opposed to merely “colorably shortened” distinguished between abridgments in general and a narrower subset of *bona fide* abridgment. The very fact of that distinction expands upon the narrow statutory language of the first copyright act. This crucial development in copyright law predates *Folsom v. Marsh* by at least 100 years.\(^\text{118}\)

### III. **FOUR CONSTANTS OF FAIR USE**

Abridgment was neither categorically allowed or prohibited in the pre-modern era of copyright. Instead, the legality or *bona fide* of abridgment was usually determined by a process not unlike the modern fair use enquiry. Although they are not as systemized, the pre-modern abridgment cases demonstrate a surprising continuity with modern fair use. Like their modern counterparts, the early abridgment cases treat the question of whether a use was *bona fide* as a complex factual question that resists bright line rules and requires case-by-case analysis.\(^\text{119}\) Likewise, the early cases regard the amount of copying by the defendant as a key, but not decisive, issue.\(^\text{120}\) Neither of these observations is that unexpected. What is surprising is the extent to which the modern fair use factors of market effect and transformative use are present in these 18th and early 19th century decisions.\(^\text{121}\) As the remainder of this Article demonstrates, questions of substitution effects and the degree of labor and authorial skill injected by the defendant were central in pre-modern copyright cases.

#### A. **Case By Case Analysis**

The modern law of fair use is often assailed for its fact-intensive, case-by-case, and consequently unpredictable nature.\(^\text{122}\) The U.S. Supreme Court’s admonition in *Campbell v. Acuff-Rose* that application of fair use cannot “be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis” appears to cement

\(^\text{117}\) *Id.*


\(^\text{119}\) *Infra* Part III-A

\(^\text{120}\) *Infra* Part III-B.

\(^\text{121}\) *Infra* Part III-C & D.

\(^\text{122}\) Even copyright *minimalist* Lawrence Lessig disparages fair use on this ground, arguing that fair use is so uncertain that it is merely “the right to hire a lawyer.” LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004). See also Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007).
this aspect of the doctrine.\textsuperscript{123} For good or ill, in this respect at least, it appears that not much has changed between 1828 and the present day. As Robert Maugham concedes:

It would, perhaps, be unreasonable to expect, that any full and precise definition should have been made of the extent to which a writer may lawfully quote or extract from the works of his predecessors. The courts have generally confined themselves to the decision of the mere point in litigation.\textsuperscript{124}

Similarly with respect to the use of quotations, Maugham observes that:

It is difficult to define the exact limits to which a compiler is confined in his extracts or quotations from original authors, or from abridgments or previous compilations. In each case the peculiar circumstances attending it must be ascertained and considered.\textsuperscript{125}

Like modern commentators, Robert Maugham was quick to point out that this case-by-case development gave rise to legal doctrines that were incomplete, inconsistent and confusing. The dominance of case by case analysis was not simply a product of the nascent stage of doctrinal development. Even in those cases where the judges regarded the issues as fairly settled, they understood that resolution as being highly fact specific, this requiring individualized consideration and resistant to rules of general application.\textsuperscript{126} The pre-modern copyright abridgment cases and the early copyright treatises evince the importance of case-by-case analysis in determining the \textit{bona fides} of the defendant.

\section*{B. Amount Copied}

A key element of the modern fair use doctrine is “the amount and substantiality of the portion used [by the defendant] in relation to the

\textsuperscript{123} Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994). Nonetheless, as Pamela Samuelson argues, in spite of the necessity of case-by-case analysis, fair use law is probably “more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns.” Pamela Samuelson, \textit{Unbundling Fair Uses}, 77 \textit{Fordham L. Rev.} 2537, 2542 (2009).

\textsuperscript{124} Maugham, supra note 59, at 126; see also Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270 (Ch.) (“No certain line can be drawn, to distinguish a fair abridgment; but every case must depend on its own facts.”); Wilkins v. Aikin, (1810) 34 Eng. Rep. 163 (Ch.) (fair quotation is “in all cases very difficult to define”). The same sentiment is expressed by the U.S. Supreme Court in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) and in Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).

\textsuperscript{125} Maugham, supra note 59, at 132.

\textsuperscript{126} In the 1761 case of \textit{Dodsley v. Kinnersley}, the Master of the Rolls, Sir Thomas Clarke noted that “the subject matter of this suit has been so often before the Court upon other occasions, that when a case of this kind comes to be litigated, little more is necessary than to see whether it is adapted to the rules and principles before laid down.” 27 Eng. Rep. at 271.
copyrighted work as a whole.” Not surprisingly, this factor also played a central role in fair use decisions almost from the very beginning of modern copyright. However, consistent with modern doctrine, although the extent of the defendant’s appropriation was evidently probative to the ultimate question of infringement, courts were reluctant to provide any precise statement as to how much copying was too much. The cases of Dodsley v. Kinnersley in 1761, Roworth v. Wilkes in 1807 and Wilkins v. Aikin in 1810 are illustrative.

The 1761 case of Dodsley v. Kinnersley revisited the question of fair abridgment in relation to magazines. Ironically, the author of the work allegedly copied in this case was none other than Samuel Johnson, the same Samuel Johnson whose resounding defense of the practice of abridgment has already been noted.

The London bookseller Robert Dodsley, together with William Strahan, and William Johnston, had paid Johnson £75 for the first edition of the two-volume *Rasselas, The Prince of Abyssinia, a Tale*. Relying on the customs of the day, the defendant had reproduced parts of the narrative in his *Grand Magazine of Magazines*. According to the case report, the defendant produced evidence that it was usual to print extracts of new books in magazines without the permission of the author. The report also notes that this was “often done at the request of the author, as being a means to help the sale of the book.”

The plaintiff argued for the opposite conclusion on the basis that the defendant had abstracted an excessive amount of the original work and “because it was done in such a way, as not to recommend the book, but quite the contrary; by printing only the narrative, and leaving out all the moral and useful reflections.” The plaintiffs relied on depositions from three other influential London booksellers, Jacob Tonson, Andrew Millar, and John Rivington. These witnesses were, unsurprisingly, all in agreement that *Grand Magazine* had extracted such large portions of *Rasselas* that readers would no longer be interested in purchasing the actual book. However, Ambler’s report of the decision notes some ambiguity as to exactly how much of Johnson’s book had been

127 17 U.S.C. § 107(3) (2006). This inquiry can be traced back to Justice Story’s original formulation of the fair use doctrine in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841). In that case, Justice Story was concerned to protect the “chief value of the original work” against the extraction of its “essential parts” through the mere “facile use of scissors” or its intellectual equivalent. *Id.* at 345.

128 (1761) 27 Eng. Rep. 270, 271 (Ch.).

129 See *supra* note 71 and accompanying text.

130 Nancy A. Mace, *What Was Johnson Paid for "Rasselas?"* 91 MODERN PHILOLOGY 455, 458 (1994) (clarifying a discrepancy between Boswell’s account and the evidence presented by the booksellers at trial to establish their ownership of the copyright.)

131 Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270 (Ch.).

132 *Id.*

133 *Id.*

134 See Mace, *supra* note 130, at 457.

135 *Id.*
reprinted.\textsuperscript{136} The report describes the plaintiffs’ witnesses as “conjecture[ing], that about two-thirds of the book was printed in the Magazine.”\textsuperscript{137} However, as the report also notes, although that may have been true by the time the case was heard, at the time the plaintiff filed its initial bill of complaint only a small amount, “not above one-tenth,” had in fact made its way into the magazine.\textsuperscript{138} The Master of the Rolls had little to say on the amount copied by the defendant, other than to crisply note that “[i]t does not appear that one-tenth part of the first volume has been abstracted.”\textsuperscript{139} The court considered this amount to be patently insufficient to sustain a charge of infringement.\textsuperscript{140} The 1807 case of \textit{Roworth v. Wilkes} concerned the abridgment of a treatise on the art of fencing, \textit{The Art Of Defence On Foot With The Broadsword}, by the \textit{Encyclopedia Londinensis}, a multi-volume compendium which styled itself as a “universal dictionary of arts and sciences and literature.”\textsuperscript{141} The \textit{Encyclopedia Londinensis} had quite brazenly copied 75 pages of the 118 page fencing text in its own volume on the same topic—a practice which was apparently not unusual.\textsuperscript{142} Lord Ellenborough’s brief written opinion reduces the question of infringement to whether the defendant’s publication would serve as a substitute for the original.\textsuperscript{143} Substitution, according to the Lord Chancellor, was to be determined based on whether the later work communicates the same knowledge as the original.\textsuperscript{144} Lord Ellenborough did not accept the argument made on behalf of the defendant that “in a dictionary of all arts and sciences the compiler was justified in taking larger extracts than in another work of the same description.”\textsuperscript{145} On the contrary, he reasoned that although a compilation such as the \textit{Encyclopedia Londinensis} might differ from a specific treatise published by itself:

\begin{quote}
there must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works; or an
\end{quote}

\begin{itemize}
\item\textsuperscript{136} Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270 (Ch.).
\item\textsuperscript{137} Id.
\item\textsuperscript{138} The original bill of complaint was filed on May 21, 1759. The defendant’s answer is dated September 12, 1759. Yet the case was finally heard on June 15, 1761. \textit{See} Mace, \textit{supra} note 130, at 457. The plaintiff’s witness was a fellow London Bookseller by the name of Tonson, who was also the plaintiff in the case of \textit{Tonson v. Walker}, (1752) 36 Eng. Rep. 1017 (Ch.).
\item\textsuperscript{139} Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270 (Ch.).
\item\textsuperscript{140} Id. Similarly, in \textit{Gyles v. Wilcox}, the abridgment in question contained 35 sheets, whereas the original was 275 sheets in length. This was ultimately held to be a fair abridgment. \textit{See} \textit{Tonson v. Walker}, (1752) 36 Eng. Rep. 1017 (Ch.) (discussing \textit{Gyles v. Wilcox}).
\item\textsuperscript{141} (1807) 170 Eng. Rep. 889 (K.B.).
\item\textsuperscript{142} Id. In the course of his discussion of compilations in general Godson notes that the authors of encyclopedias “have generally taken from the works of others with unsparing hands.” Godson, \textit{supra} note 48 at 233.
\item\textsuperscript{143} Id.
\item\textsuperscript{144} Id.
\item\textsuperscript{145} Id.
\end{itemize}
Encyclopaedia would be a recipe for completely breaking down literary property.\footnote{Id. at 890. He also noted that “[h]ere 75 pages have been transcribed out of 118, and that which the plaintiff sold for half-a-guinea may be bought of the defendant for eightpence.”}

Lord Ellenborough held in favor of the plaintiff both with respect to the text and the drawings.\footnote{Id. at 891 (The jury found separate damages for the letter-press and the prints, £70 for the former, and £30 for the latter.) Id.}

Whereas *Dodsley* tends to illustrate that copying a mere one-tenth of a work was considered too insignificant to sustain a charge of copyright piracy, *Roworth* gives us an example of an amount of copying—just under two-thirds—that was clearly considered too much. In contrast, the next case considered, *Wilkins v. Aikin* illustrates a more context dependent quantitative investigation. Wilkins was the author of a single volume entitled *The Antiquities of Magna Græcia* which he had written based on his travels to Sicily and Greece in 1807.\footnote{Wilkins v. Aikin, (1810) 34 Eng. Rep. 163 (Ch.).} The defendant freely acknowledged quoting sections of Wilkins’ book in his own 23 page *Essay on the Doric Order of Architecture*.\footnote{Id.} He argued, however, that he had done so in accordance with the norms of the Society of Professors of Architecture, of which he was a member, and without any intention of injuring the plaintiff’s work.\footnote{Id.} The decision of Lord Chancellor Eldon recognizes that the rights of the copyright owner extend to both partial and complete reproduction but that the practice of fair quotation must still be allowed. The Lord Chancellor accordingly declared:

> [t]here is no doubt, that a man cannot under the pretence of quotation, publish either the whole or part of another's work; though he may use, what it is in all cases very difficult to define, fair quotation.\footnote{Id.}

Differentiating between fair quotation and its pretense required first hand observation of the works of both the plaintiff and the defendant. After what appears to have been a fairly close review of the two works, the Lord Chancellor noted that the defendant had acknowledged a considerable proportion taken from the plaintiff’s work but had also failed to acknowledge some.\footnote{Id.} Determining whether the defendant had crossed the line between fairness and pretense was not a strictly arithmetical exercise for the court.

illustration of the history of the maps of a particular region would be fair “if it was a fair history of maps of the county,” but he cautioned that “if a jury could perceive the object to make a profit by publishing the map of another man, that would require a different consideration. The slightest circumstances therefore in these cases make the most important distinction.”\(^{154}\) It seems, then, that the court would have countenanced the wholesale replication of a copyrighted map if it were merely an illustration of a broader history of map-making and did not substitute for the original publication of the map. The passage of time has somewhat obscured the facts in \textit{Wilkins v. Aikin}. Council for the defendant argued that he had extracted “by no means the most valuable or material” aspects of the plaintiff’s work and that, in any event, any such abridgment and quotation did not exceed three pages.\(^{155}\)

There is an interesting parallel between this 19\(^{th}\) century thought experiment and recent controversial cases such as \textit{Bill Graham Archives v. Dorling Kindersley Ltd.}\(^{156}\) In the \textit{Bill Graham Archives} case, the Court of Appeals for the Second Circuit held that the use of historic concert promotional posters for the \textit{Grateful Dead} in a rock biography was “a purpose separate and distinct from the original artistic and promotional purpose for which the images were created”; thus, even total copying did not necessarily weigh against fair use.\(^{157}\) Likewise, in two contemporary cases involving visual search engines, \textit{Perfect 10, Inc. v. Amazon.com, Inc.}\(^{158}\) and \textit{Kelly v. Arriba Soft Corp.},\(^{159}\) the Court of Appeals for the Ninth Circuit held that reproducing images on a smaller scale as part of a visual search engine was fair use because using these works as pointing devices did not substitute for the expressive value of the authors’ original expression.\(^{160}\)

Godson’s treatise indicates another way in which the amount of copying by the defendant was understood contextually. Godson notes that if the work complained of is \textit{in substance} a copy, then it is not necessary to shew the \textit{intention} to pirate; for the greater part of the matter of the book having been purloined, the intention is apparent, and other proof is superfluous. A piracy has \textit{undoubtedly} been committed. But if only a small

\(^{154}\) Wilkins v. Aikin, (1810) 34 Eng. Rep. 163 (Ch.).

\(^{155}\) Wilkins v. Aikin, (1810) 34 Eng. Rep. 163 (Ch.). However, rather than enjoining the defendant’s publication, the court issued an injunction permitting the work to be sold subject to the defendant undertaking to account according to the result of the action.

\(^{156}\) Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609-10 (2d Cir. 2006).

\(^{157}\) \textit{Id.} at 613.

\(^{158}\) 487 F.3d 701, 721 (9th Cir. 2007).

\(^{159}\) 336 F.3d 811 (9th Cir. 2003).

\(^{160}\) These cases are discussed in detail as illustrations of the interaction between copyright law and copy-reliant technology in Matthew Sag, \textit{Copyright and Copy-Reliant Technology}, 103 NW. U.L. REV. 1607 (2009).
portion of the work is quoted, then it becomes necessary to prove that it was done \textit{animo furandi} [intention to steal]; with the intention of depriving the author of his just reward, by giving his work to the public in cheaper form.\footnote{161}

Godson suggests here that intention to pirate can be presumed from significant amount of copying and that where less is copied the intention of the defendant must be investigated more thoroughly. It is also noteworthy that the \textit{animo furandi} or intention to steal Godson identifies is not an intention to free ride—which Godson does not condemn—but rather the intention to interfere with the author’s market-based rewards.

On first impression, we could infer from \textit{Dodsley v. Kinnersley} and \textit{Roworth v. Wilkes} that an abstraction of a mere one-tenth of a larger work was considered too little to amount to infringement,\footnote{162} but that an appropriation of two thirds was too much to escape the charge of piracy.\footnote{163} However, like their modern counterparts, these cases should not be read as setting any immutable numerical thresholds. While it is clear that the extent of the defendant’s appropriation was an important consideration in copyright cases of this era, it is also apparent from the discussion in \textit{Wilkins v. Aikin} that the amount of tolerable copying varied according to both the purpose of the defendant’s use and the effect of that use on the copyright owner.\footnote{164} This observation leads naturally into the next consideration, that of market effect.

\section*{C. Market Effect}

Courts in the United States are required by statute to consider “the effect of the use upon the potential market for or value of the copyrighted work” in any fair use determination.\footnote{165} Judges and commentators enlightened by the law and economics movement are naturally drawn to describe the fair use doctrine in the language of economics.\footnote{166} As Judge...
Posner explains in *Ty, Inc. v. Publications International*, the difference between fair use and infringement can often be reduced to the difference between complementary and substitutive uses: i.e. a parody does not substitute for its target; a political attack advertisement does not substitute for a televised debate; a search engine is no substitute for the websites it indexes. While this focus on market substitution is unremarkable in the modern context, it is more surprising to find it so pervasively ingrained in the discourse of late 18th and early 19th century copyright cases. Writing in 1828, Maugham found the state of the law as follows:

According to some authorities, however, they [bona fide extracts] must not be so extensive as to injure the sale of the original work, even though made with no intention to invade the previous author...

In another passage the same author explains:

Yet reasonable bounds must be set to the extent of transcripts. If an article in a general compilation of literature and science copies so much of a book, the copyright of which is vested in another person, as to serve as a substitute for it, though there may have been no intention to pirate it, or injure its sale,—this is a violation of literary property for which an action will lie to recover damages.

Understanding exactly what was meant by substitution and its broader significance in differentiating bona fide abridgments from infringing ones requires some unpacking. Both passages stress that the absence of intention to invade the rights of the copyright owner was not considered dispositive; the key concern was, apparently, substitution as determined through market displacement. Although Godson adopts more intention based language, he also clearly identifies the wrong of an unfair abridgment as interfering with the author’s market based rewards: i.e.

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167 292 F.3d 512 (7th Cir. 2002).
168 Id. at 517.
171 See, e.g., Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007).
172 Maugham, *supra* note 59.
173 Id. at 132-33 (emphasis added). See also Godson, *supra* note 48 at 247 (noting that “no one is allowed , under the pretence of quoting, to publish either the whole of principle part of another man’s composition; and therefore a review must not serve as a substitute for the book reviewed.”) (citations omitted).
“depriving the author of his just reward, by giving his work to the public in a cheaper form.”174

Maugham’s treatise contains a revealing section on the relevance of injury to the copyright owner.175 He begins by observing the existence of some confusion:

The grounds of the decisions on this important subject, as reported in the law books, are not altogether consistent in principle. In some of them, it appears that the piracy occasioning, or obviously tending to, a depreciation in the value of the original work, is a fact on which much reliance has been placed in determining the question. In others, this circumstance has been altogether disregarded.176

Other passages in Maugham’s treatise make it clear that what he means by depreciation in value is an injury to the sales of the original work. Making the same point differently, Maugham notes that in some cases a bona fide abridgment is considered a new work and thus allowed even if it injures sales of the original:

On the one hand it has been held, that a fair and bona fide abridgment of any book, is considered a new work; and however it may injure the sale of the original, yet it is not deemed a piracy or violation of the author’s copyright.177

Maugham cites the 1741 decision in Gyles v. Wilcox for this proposition. In the relevant paragraph of Gyles, Lord Hardwicke makes his famous statement that a “real and fair abridgment” should not be restrained by copyright.178 In the same passage, Hardwicke equates a fair abridgment with new works of authorship because “the invention, learning, and judgment of the author is shewn in them.”179 Note there that Hardwicke acknowledges that even a fair abridgment may injure the textual integrity of the original author’s work: i.e. it may be ‘prejudicial’ to the author ‘by mistaking and curtailing the sense of the author.’180

Another case already referred to, Wilkins v. Aikin, also held that a fair and bona fide abridgment was non-infringing, prejudice to the copyright holder notwithstanding.181 As discussed previously, this case concerned a claim of infringement by William Wilkins in relation to his book, The Antiquities of Magna Græcia against Aikin’s An Essay on the Doric Order of Architecture. While the facts of this case have already been related, it is interesting to reflect on the chain of reasoning invoked

174 Godson supra note 48, at 216-17.
175 Maugham, supra note 59, at 126.
176 Id. at 130.
177 Id.
179 Id.
180 Id.
181 Wilkins v. Aikin, (1810) 34 Eng. Rep. 163 (Ch.).
by Lord Chancellor Eldon in this case. His lordship begins with the essential question of the legitimacy of defendant’s use of the plaintiff’s publication: “The question upon the whole is, whether this is a legitimate use of the Plaintiff’s publication in the fair exercise of a mental operation, deserving the character of an original work.” Note here that the Lord Chancellor sees the question of legitimacy and “the fair exercise of mental operation” as equivalent: i.e. if the use is deemed legitimate, presumably because of the intellectual labor added by the defendant, the work is regarded as a new work, not an infringing one. The exculpatory effect of the ‘fair exercise of mental operation’ was not contingent on a lack of harm to the original copyright holder. Quite the contrary, Lord Chancellor Eldon explained: “[t]he effect. I have no doubt, is prejudicial: it does not follow, that therefore there is a breach of the legal right[.]”

In contrast to the decisions in Gyles v. Wilcox and Bell v. Walker, Maugham notes that in Roworth v. Wilkes (the case of the Encyclopedia Londinensis) the court held for the plaintiff precisely because of the risk that the encyclopedia entry on fencing would substitute for the plaintiff’s more expensive treatise on the subject.

The key determinant of infringement, according to Lord Ellenborough, was whether the defendant’s publication was “in substance a copy” and thus would serve as a substitute for the plaintiff’s. Substitution in this sense appears to have been assessed in this case at a functional level: his Lordship was concerned with whether “so much be extracted that it communicates the same knowledge with the original work.” As noted above, Lord Ellenborough held in favor of the plaintiff both with respect to the text and the drawings.

Maugham resolves the apparent tension between cases that take account of injury to the plaintiff and those that do not by observing “a clear distinction in the nature of these two cases, although the fact of depreciation might be in each the same.” In Maugham’s view, cases strongly influenced by the prejudice done to the copyright owner were distinguishable from those that were not because the latter involved the application of labor and judgment by the defendant, whereas the former were merely instances of “wholesale compilation.” Maugham sees the Encyclopedia Londinensis case, for example, as one “in which seventy-

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182 Id. at 165. Lord Chancellor Eldon continued the interim injunction and directed that an action should be brought forthwith. Id. However, no action appears to have been brought. See Alexander supra note 46, at 184.
183 Roworth v. Wilkes, (1807) 170 Eng. Rep. 889 (K.B.). See Maugham supra note 59, at 130 (“On the other hand, in the case of the Encyclopedia Londinensis, in which a large part of a treatise on fencing was transcribed, though there might have been no intention to injure its sale, yet as it might serve as a substitute for the original work, and was sold at a much lower price, it was held actionable, and damages were recovered.”).
184 Id.
185 Id.
186 Id.
187 Maugham, supra note 59, at 130.
188 Id.
five pages were successively transcribed, without addition or alteration, and on which consequently no skill or learning had been bestowed.”

He concludes that “the exercise of which may be considered as the true criterion by which to determine the bona fide character of the abridgment or compilation.” Modern fair use case law makes a similar distinction between different kinds of market effect.

Nonetheless, in spite of the foregoing observations of continuity and congruity, the parallels between the pre-modern understanding of market effect and our current law should not be overstated. The pre-modern abridgment cases clearly part company with their modern counterparts in their narrow conception of derivative rights. Under modern copyright law the exclusive rights of the author include the right “to prepare derivative works based upon the copyrighted work.” The statute defines derivatives broadly as a “work based upon one or more pre-existing works,” the statutory definition also expressly includes abridgments and translations. However, case law indicates that a work is not derivative unless it has substantially copied from a prior work.

The case of Dodsley v. Kinnersley already discussed illustrates the narrow conception of the copyright owner’s rights with respect to derivative works which prevailed in the pre-modern era. In this case, the plaintiffs argued that Grand Magazine’s publication of Samuel Johnson’s novel, Rasselas, was particularly harmful because “it was done in such a way, as not to recommend the book, but quite the contrary; by printing only the narrative, and leaving out all the moral and useful reflections.” In this plea to protect both their literary and commercial interests the plaintiffs portrayed the abridgment in Grand Magazine as an inferior version of the original work, bleached of intellectualism and literary merit. However, the Master of the Rolls, Sir Thomas Clarke, was not

\[189\] Id.

\[190\] Id.

\[191\] For example, in Campbell, the Supreme Court explained that “when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically, the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.” Campbell, 510 U.S. at 591–92 (quoting, in part, Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986); Benjamin Kaplan, An Unhurried View of Copyright 69 (1967)) (internal quotation marks and citations omitted).


\[194\] Caffey v. Cook, 409 F. Supp. 2d 484, 496 (S.D.N.Y. 2006); 1-3 Nimmer on Copyright § 3.01. See generally, Naomi Abe Voegtli, Rethinking Derivative Rights, 63 Brooklyn L. Rev. 1213 (1997) (reviewing the history of the derivative right in the United States).

\[195\] Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270 (Ch.).

\[196\] On the defendant’s side it could be argued that they had merely “retrenched the unnecessary and uninteresting” parts of the text “which rather deaden the narration.” This was Apsley’s conclusion in Strahan v. Newbery, C33/444, f. 575 (Ch. 1775); 98 Eng. Rep. 913.
sympathetic to arguments based on either literary or commercial integrity. He dismissed the notion that the abridgment could harm the work’s reputation, stating that “it tends to the advantage of the author, if the composition is good; if it is not, it cannot be libeled.”

The court also appeared to accept the defendant’s argument, based on prevailing custom, that the abridgment of books in magazines actually inured to the benefit of copyright owners as a form of free advertising. The Master noted that “[t]he nature of annual registers, magazines, &c., is to give an abstract or analysis of authors” and that the plaintiffs themselves had benefited from this freedom in relation to their own periodicals in the past.

The Master of the Rolls warned that to find a subsequent abridgment infringing would require holding, at great prejudice to the plaintiff, that every abridgment was an infringement. The master’s decision was not, however, based on a broadly construed right of abridgment and reuse. Instead, the primary ground for the decision in favor of the defendant was the lack of market prejudice. According to the Master, the plaintiffs suffered no prejudice because they had already published an abstract of the book in their own periodical, the London Chronicle. Accordingly, the plaintiff’s bill was dismissed. Implicit in the Master’s conclusion is an assessment that unauthorized abridgments are only impermissible to the extent that they substitute for the copyright owner’s original work. What is missing here, from a modern perspective, is any consideration of how an unlicensed abridgment may substitute for the plaintiff’s own derivative work. Unauthorized derivative works were enjoined from time to time in the pre-modern era, but seemingly only when they would compete directly with the copyright owner’s original work. There is no evidence in these early cases that courts considered prohibiting unlicensed derivatives on the theory that they would compete with the plaintiff’s own derivative.

The pre-modern copyright cases touching on market effect are both familiar and strange. The essential question of whether the effect of the defendant’s copying on the plaintiff’s market is familiar to the modern

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197 Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270 (Ch.). See also Godson, supra note 48 at 238 (“In general, an abridgment tends to the advantage of the author, if the composition be good; and may serve the end of an advertisement. The inquiry whether the work is prejudiced by the manner of making the abridgment cannot be entertained.”)

198 Id.

199 The court did not regard these trade customs as binding, but it considered that it ought to “take notice of the springs flowing from trade” and consider their consequences. Id.

200 Id. The exact words of the Master of the Rolls were “[w]hat I materially rely upon is, that it could not tend to prejudice the plaintiffs, when they had before published an abstract of the work in the London Chronicle. If I was to determine this to be elusory, I must hold every abridgment to be so; and that, from its extensive consequence, would prejudice the plaintiffs.”

201 Id.

202 Id.
copyright scholar, but the decidedly narrow conception of that market is less so.\footnote{203}

D. Transformative use

In modern fair use jurisprudence, a use may be considered to be transformative if it incorporates an existing work in a way that adds something new, by casting a critical eye on the original, by incorporating the original into an entirely different sort of work, or by processing the original as an intermediate step in the production of a non-infringing end product such as the automated copying of websites in order to construct a search engine index.\footnote{204} If the early copyright treatises and cases reviewed in this Essay are any guide, the transformative uses referred to above would also have been regarded as non-infringing in the pre-modern era, but perhaps for slightly different reasons.

The essence of the pre-modern cases is synthesized by Maugham in his assessment that, the application of skill or labor should “be considered as the true criterion by which to determine the bona fide character of the abridgment or compilation.”\footnote{205} There is an essential difference between fair use in the pre-modern cases and the approach that has emerged in the United States since the Supreme Court’s Campbell decision: the latter focuses on the legitimacy of appropriative uses that result in transformative output, whereas the early copyright cases focus more on inputs. Nonetheless, the distance between the modern approach and the views of the early English copyright courts may be narrower than an input/output dichotomization suggests.

There are other passages in Maugham’s treatise that can be read in terms equivalent to the modern parsing of the concept of transformative use. For example, Maugham says:

Where labor, judgment, and learning, however, have been applied in adapting existing works into a new method, and the composition has been evidently made with a fair and honest intention to produce a new and improved work, it seems that the law will justify the publication, although the abridgment or compilation should injure the sale of the former works.”\footnote{206}

It seems unlikely that a composition “evidently made with a fair and honest intention to produce a new and improved work” could fail to satisfy the Supreme Court’s standard of adding “something new, with a

\footnote{203} A similar shift on market conception is evident in trademark law. See generally Mark P. McKenna, The Normative Foundations of Trademark Law, 82 NOTRE DAME L. REV. 1839 (2007)
\footnote{204} This is not intended as an exhaustive statement of the boundaries of transformative use.
\footnote{205} Maugham, supra note 59, at 130.
\footnote{206} Id. at 126.
further purpose or different character, altering the first with new expression, meaning, or message].”\(^{207}\)

The early copyright cases stressed the importance of the defendant’s labor and the link between the newness of an abridgment or compilation and its social utility. As already noted, in Gyles v Wilcox Lord Hardwicke explained that “[a] real and fair abridgment . . . may with great propriety be called a new book, because . . . the invention, learning, and judgment of the author [are] shewn in it, and in many cases abridgments are extremely useful . . .”\(^{208}\) In addition, there are indications that the exculpatory labor the courts were looking for to constitute a fair abridgment was authorial in nature and not merely industrious. Godson, for example, argues that a ‘real and fair abridgment’ must not be merely colorably shortened, i.e. by omitting some parts and merely transposing others, and that “[t]here must, at least, be invention, learning, and judgment shewn by the author of [the abridgment].”\(^{209}\) The application of invention, learning and judgment sounds more like authorship than mere industry and mechanical application. This point is illustrated in the 1775 case of Strahan v. Newbery, where abridgment was explicitly recognized as an act of ‘understanding’.\(^{210}\) We cannot dismiss the possibility that the court’s desire to see an account of Dr. Hawkesworth’s Voyages made more broadly available was in fact the primary impetus for allowing the abridgment. However, it is significant nonetheless that the court at least claimed to have considered the editorial contribution of the defendant and that it chose to frame its decision in those terms. According to the report, both Lord Chancellor Apsley and Mr. Justice Blackstone agreed that “an abridgment, where the understanding is employed … is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work.”\(^{211}\)

Wilkins v. Aikin in 1810 demonstrates a similar framing of the issues. In determining whether the defendant’s Essay on the Doric Order of Architecture had impermissibly copied the plaintiff’s Antiquities of Magna Græcia the court delineated the question in terms of the mental and authorial contribution of the defendant: i.e. “whether this is a legitimate use of the plaintiff’s publication in the fair exercise of a mental operation, deserving the character of an original work.” Admittedly, in both of these cases, it is hard to be sure whether the identification of mental labor producing a “new” work should be treated as an instrumental finding, or merely as a restatement of the court’s conclusion.\(^{212}\)

\(^{208}\) Gyles v. Wilcox, (1741) 26 Eng. Rep. 489, 490 (Ch.) (emphasis added). See also Maugham, supra note 59, at 129.
\(^{209}\) Godson, supra note 48 at 230.
\(^{210}\) Strahan v. Newbery, C33/444, f. 575r (Ch. 1775); 98 Eng. Rep. 913.
\(^{211}\) Id.
\(^{212}\) This problem applies with equal force to modern fair use cases. See Sag, supra note 38.
The importance of the defendant’s addition of authorial value is perhaps most apparent in the case of *Burnett v. Chetwood* in 1720. The Council for the defendant argued that:

the translator may be said to be the author, in as much as some skill in language is requisite thereto, and not barely a mechanic art, as in the case of reprinting in the same language; that the translator dresses it up and clothes the sense in his own style and expressions … and therefore should rather seem to be within the encouragement than the prohibition of the act.

The defendant in this case clearly rests his claim of non-infringement on a claim to equal status as an author. The Lord Chancellor agreed: “a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act . . .”

**CONCLUSION**

Some periods of copyright history are better known than others. The dismantling of the Stationer Guild’s printing monopoly at the end of the 17th century, the beginning of statutory copyright with the Statute of Anne in 1710 and the death-knell of perpetual common law copyright in *Donaldson v. Becket* in 1774 are each deservedly well studied. The latter two events are particularly well rehearsed in American copyright lore. However, having addressed those topics which the founders may have had in contemplation in the late 1770s as they drafted the U.S. Constitution and the new nation’s first Copyright Act, most American discussion then proceeds directly to technological and social developments of 20th century. Even those U.S. scholars who do take a backward glance at the 19th century tend to do so from a strictly American point of view. Consequently, the development of English copyright law from 1774 to the middle of the 19th century has been largely neglected in this country.

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214 Id. at 1009.
215 Id.
216 Classic works encompassing these events include HARRY H. RANSOM, THE FIRST COPYRIGHT STATUTE (1956); BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1966); L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); and MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993).
217 See, e.g., Craig Joyce & L. Ray Patterson, Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution, 52 EMORY L.J. 909 (2003).
By examining the pre-history of fair use, this Article sheds new light on the origins of the fair use doctrine in the United States. The complete history of the fair use doctrine begins with over a century of copyright litigation in the English courts. This broader view of copyright history shows that Justice Story’s 1841 decision in *Folsom v. Marsh* was not the origin of the fair use doctrine. As Part II explains, that review also shows that the narrowness of pre-modern copyright may have been overstated by contemporary copyright-skeptics. More significantly, this study of the pre-history of fair use demonstrates the gradual co-evolution of copyright and fair use. Plaintiffs in copyright lawsuits are quick to characterize the fair use doctrine as a narrow exception that should be cautiously applied.\(^{219}\) Nonetheless, the suggestion that fair use should be seen as the exception to the norm of total copyright owner control is historically unfounded.\(^{220}\) The pre-history of fair use makes it plain that rights of copyright owners have always been subject to and defined by the public’s fair use rights since the beginnings of statutory copyright.

Cumulatively, the cases reviewed in this Article demonstrate the gradual, if haphazard, development of the body of law we have come to understand as fair use. Part III of this Article explored the substantial continuity between the fair abridgment decisions of the pre-modern era and the fair use doctrine in the United States today. Just as it does now, the problem of fair use presented difficult line-drawing questions in copyright’s pre-modern era. What is illuminating for the modern copyright scholar is not so much where these lines were drawn in specific historical cases, but rather the analytical tools used to draw them. As Part III establishes, the criteria used to evaluate claims of fair use in the pre-modern cases demonstrates a surprising level of continuity with the modern fair use doctrine. The key inquiries in fair abridgment cases in the pre-modern era are quite similar to the fair use factors enshrined in the Copyright Act of 1976. Nevertheless, although the general questions courts ask in fair use cases have has remained largely constant over the years, the answers that flow from them have changed markedly. No court today would entertain the notion that an abridgment with no critical commentary that merely retells the same story as the original was anything other than an infringement.

Focusing on the continuity between fair use in the pre-modern era and the doctrine today assists in reframing the true significance of *Folsom v. Marsh*. As discussed in Part III, analysis of substitution and market effects was a staple feature of abridgment cases in the pre-modern era. However, although courts in the pre-modern era were sensitive to market


effects, their understanding of the constitution of the relevant market was quite narrow by modern standards. As the contrast between Roworth v. Wilkes (1807) and Dodsley v. Kinnersley (1761) illustrates, a copyright owner’s petition to enjoin an unauthorized abridgment was likely to be well received if the abridgment in question threatened to substitute directly for the copyright owner’s original work. However, courts did not accept that a copyright owner was harmed by an abridgment that merely competed with his own derivative work.

The pre-modern cases illustrate a half-formed notion of the derivative right: unauthorized derivatives could be enjoined to defend the market of the original work, but they did not constitute a separate market unto themselves. This observation brings the contribution of Justice Story’s 1841 decision in Folsom v. Marsh into sharper focus. Folsom departs from the earlier English cases in that it recognizes derivatives as inherently valuable, not just a thing to be enjoined to defend the original work against substitution. This subtle shift is important because while the boundaries of a defensive derivative right can be ascertained with respect to the effect of the defendant’s work on the plaintiff’s original market, the boundaries of an offensive derivative right can only be determined with reference to some other limiting principle.

This extension of the derivative right may well have been inevitable. It seems likely that as more and more derivatives were enjoined defensively, courts and copyright owners began to see these derivatives as part of the author’s inherent rights in relation to his creation. In other words, once copyright owners were allowed to preclude derivatives to prevent competition with their original works, they quickly grew bold enough to assert an exclusive right in derivative works for their own sake. A development which, for good or ill, bridges the gap between pre-modern and modern copyright.

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221 Just how far the pendulum had swung by the time of Folsom v. Marsh can be seen in the staunch criticism that George Ticknor Curtis leveled at the jurisprudence of the English courts in his 1847 treatise. Curtis’ rather extreme, almost hyperbolic, position was that the copyright owner’s rights covered “the whole book and every part of it … the style, or language, and expression; the learning, the facts, or the narrative; the sentiment and ideas, as far as their identity can be traced; and the form, arrangement and combination which the author has given to his materials”. GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 273 (1847).