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EVERYTHING OLD IS NEW AGAIN:¹

DICKENS TO DIGITAL

*Joseph J. Beard**

I. INTRODUCTION

A newspaper article dated January 29th predicted that a new technological discovery, “[i]f introduced into this or any other country [would bring] *an end to copyrights.*”² Was this new discovery some super-descrambler, an untraceable peer-to-peer system? No, it was “a new and extraordinary discovery made in Prussia by which printed works of any kind [could] be copied with perfect accuracy, and copies multiplied with no further expense than the cost of paper and press-work.”³ The January 29th in question was that of—1842! This incident demonstrates that when one contemplates contemporary technology/copyright issues, indeed “everything old is new again”, and that perhaps there are lessons to be learned from days long gone. As the lyrics to the song caution, “Don’t throw the past away, you might need it some rainy day.”⁴

It is perhaps no more than coincidence that the same issue—in fact, the same page and column—of the paper, *The Albion*, predicting the demise of copyright, also mentioned the visit of Charles Dickens to the United States.⁵ It is, however, no coincidence that I turn to Dickens and his times to demonstrate that the copyright

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1. PETER ALLEN & CAROLE BAYER SAGER, *Everything Old Is New Again*, on CONTINENTAL AMERICAN (A & M Records 1974).

2. ALBION (New York), Jan. 29, 1842, at 55 (emphasis added).

3. *Id.*

4. ALLEN & SAGER, *supra* note 1.

5. ALBION, *supra* note 2 (announcing the anticipated arrival of Charles Dickens to the United States).

issues that we face in the digital environment of the twenty-first century are not all that different from those faced by Dickens and his contemporaries in the analog world of the nineteenth century. To illustrate my point, I shall focus on two issues of the many that might be discussed: (1) The link between nineteenth century “re-origination” and late twentieth/twenty-first century “transformative use”; and (2) copyright term legislation.

II. RE-ORIGINATION, A NINETEENTH CENTURY ANCESTOR OF TRANSFORMATIVE USE?

A. *Two Novels, Two Parodies*

Two novels separated by more than a century and half, one written in England, the other in the United States, bear an uncanny similarity to one another. Each was based, in part, on an earlier work, and neither subsequent novelist had the permission of the copyright owner. Each novelist renamed the characters populating the earlier work, but in such a way that the characters were readily recognizable. Each also added characters not found in the original work. Both novelists used story elements from the earlier work, but also added new story elements. Not surprisingly, each was the subject of a lawsuit brought by the owner of the copyright in the earlier work. Perhaps surprisingly, neither was found liable. Beyond these similarities lies one more—the two novels were linked to each other by Charles Dickens!

It is time now to identify the two novels, their authors, and the antecedent works on which they were based. In 1837 England, *The Penny Pickwick: The Post-Humorous Notes of the Pickwickian Club* edited by Bos (probably Thomas Peckett Press) was published by Edward Lloyd of London.⁶ The work was based on *The Posthumous Papers of the Pickwick Club* edited by Boz (Charles Dickens) and published by Chapman and Hall beginning in 1836.⁷ In 2001, *The Wind Done Gone* by Alice Randall was published by Houghton Mifflin Company of Boston.⁸ The novel was, of course, based on the

6. THE POST-HUMOROUS PAPERS OF THE PICKWICKIAN CLUB (“Bos” ed., 1837).

7. CHARLES DICKENS, THE PICKWICK PAPERS (James Kinsley ed., Oxford Univ. Press 1986) (1837).

8. ALICE RANDALL, THE WIND DONE GONE (2001).

novel by Margaret Mitchell, *Gone with the Wind*, published by the Macmillan Company in 1936.⁹ Oh, before I forget—the Dickens connection between these two works? Besides the author’s reference to Dickens’ *Great Expectations* in her novel,¹⁰ *The Wind Done Gone*, Randall’s publisher Houghton Mifflin is the ultimate successor to the Boston publishing firm, Ticknor and Fields, Dickens’ authorized American publisher.¹¹ One can only wonder what Dickens’ reaction would be to his American publisher (or more accurately, its successor) publishing a work bearing some of the same characteristics as *The Penny Pickwick*.

As I said, *The Wind Done Gone* and *The Penny Pickwick* renamed characters. In *The Wind Done Gone*, Scarlett O’Hara became “Other,” Rhett Butler became “R.B.,” Ashley Wilkes became “Dreamy Gentleman,” and Melanie Wilkes became “Mealy Mouth.” In *The Penny Pickwick*, Samuel Pickwick became “Christopher Pickwick,” Tracy Tupman became “Percy Tupnall,” Augustus Snodgrass became “Arthur Snodgreen,” and Nathaniel Winkle became “Matthew Winkeltop.” Both novels also added new characters. In *The Wind Done Gone*, characters not found in *Gone with the Wind* included “Frederick Douglass” and the “Congressman.” *The Penny Pickwick* also added characters not found in Dickens’ novel, including “Captain Julius Caesar Fitzflash,” “John White,” and “Betty Bodger.” In an article of this length and to which these novels are but backdrop to the legal analysis, I shall say no more than that both successor novels copied plot elements from their respective predecessors and each contained new plot elements.

B. Two Suits

1. *SunTrust Bank v. Houghton Mifflin Co.*

When the trustee of the Mitchell Trust, SunTrust, brought suit

9. MARGARET MITCHELL, *GONE WITH THE WIND* (1936).

10. “In all the literature I know, only one book comes close to what I feel. This is *Great Expectations*. Pip has a guilty family. Almost guiltier than mine.” RANDALL, *supra* note 8, at 192.

11. See R. Shelton Mackenzie, *The Dickens Controversy*, in *LIFE OF CHARLES DICKENS* app. 1 (Philadelphia, T.B. Peterson & Bros. 1870). A history of Houghton Mifflin is available online. *Houghton Mifflin Company History*, at http://www.hmco.com/company/about_hm/company_history.html (last visited Sept. 15, 2004).

against Houghton Mifflin for its publication of *The Wind Done Gone*, it alleged copyright infringement, violation of the Lanham Act, and deceptive trade practices.¹² In vacating the injunction granted by the district court, the Eleventh Circuit focused on the *transformative* nature of Randall's work.¹³ "Transformative use" became part of the lexicon of fair use with the publication in 1990 of an article by Judge Pierre N. Leval,¹⁴ at that time on the bench at the United States District Court for the Southern District of New York. In his article, Judge Leval opined that the justification for a fair use claim "turns primarily on whether, and to what extent, the challenged use is *transformative*."¹⁵ He went on to state, "The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."¹⁶ Judge Leval's transformative use was picked up in the U.S. Supreme Court decision, *Campbell v. Acuff-Rose Music, Inc.*:¹⁷ "[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of *transformative* works."¹⁸ Since then, the term "transformative use" has become a part of federal jurisprudence.¹⁹

12. *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001).

13. "Randall has fully employed those conscripted elements from [*Gone with the Wind*] to make war against it. Her work . . . reflects *transformative value*." *SunTrust Bank*, 268 F.3d at 1271 (emphasis added). "There are numerous instances in which [*The Wind Done Gone*] appropriates elements of [*Gone with the Wind*] and then *transforms* them for purposes of commentary." *Id.* at 1272 (emphasis added).

14. Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

15. *Id.* at 1111.

16. *Id.*

17. 510 U.S. 569 (1994).

18. *Id.* at 579. (emphasis added).

19. *E.g.*, *Elvis Presley Enters. v. Passport Video*, 357 F.3d 896 (9th Cir. 2004) (Noonan, J., dissenting); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003); *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002); *Ty, Inc. v. Publ'ns Int'l, Ltd.*, 292 F.3d 512 (7th Cir. 2002); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Nuñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000); *Sundeman v. Seajoy Soc'y, Inc.*, 142 F.3d 194 (4th Cir. 1998).

2. *Chapman & Hall v. Lloyd*

When Chapman and Hall sought relief in Chancery against Edward Lloyd, the complaint alleged fraud.²⁰ In that regard, the bill was similar to the pleadings of SunTrust as to the Lanham Act and deceptive trade practices. Why didn't Chapman and Hall also file a copyright infringement claim as SunTrust did some century and a half later? Re-origination is the likely answer. What was re-origination? One searches in vain in the indices to nineteenth and early twentieth century treatises for the term re-origination.²¹ However, it was a term dear to those who would profit from the works of others. Richard Egan Lee published a weekly known as *Parley's Illuminated Library*. The Preface to Volume 3 of *Parley's Penny Library* uses the term:

[A] word, in conclusion, as to THE LAW on this subject. It will not we conceive be disputed that there is not the "shadow of a shade" of a decision, either in equity or at *nisi prius*, from the day of Lord Cowper to those of Lord Eldon—or even those of Brougham or Lyndhurst—against a writer *fairly exercising his own mind* by "RE-ORIGINATING AN ORIGINAL WORK"

....

[T]he *right* as well as the *benefit of condensing and cheaply diffusing* the materials of knowledge will be most assumedly claimed and exercised.²²

Note the justification of re-origination by the "benefit of condensing and cheaply diffusing."²³ This is a reference to decisions favorable to unlicensed, but *fair*, abridgments.

20. *Vice-Chancellor's Court*, TIMES (London), June 9, 1837, at 7 (stating *Chapman & Hall v. Lloyd* "was not one of copyright, but of fraudulent imitation of a work calculated to deceive a portion of mankind.").

21. E.g., GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT (Boston, Charles C. Little & James Brown, 1847); CHARLES PALMER PHILLIPS, THE LAW OF COPYRIGHT (London, V. & R. Stevens, & Haynes, 1863); THOMAS EDWARD SCRUTTON, THE LAW OF COPYRIGHT (1903); WALTER ARTHUR COPINGER, THE LAW OF COPYRIGHT (4th ed. 1904); RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW (1912); J. BROOK RICHARDSON, THE LAW OF COPYRIGHT (1913).

22. C.H. Simonds, *Peter Parley and Dickens*, 19 DICKENSIAN 129, 132 (1923) (final emphasis added).

23. *Id.*

Re-origination has its roots in a handful of eighteenth and early nineteenth century English decisions dealing with abridgements. Today, of course, in the United States, "abridgements" are within the definition of "derivative work,"²⁴ and the right to make a derivative work is an exclusive right of the author.²⁵ In eighteenth century England, however, an abridgement might not only not infringe, but might indeed be treated as a new book.

In 1740, in *Gyles v. Wilcox*,²⁶ the Lord Chancellor, Lord Hardwicke, held that:

Where books are colourably 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.

But this 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 some instances prejudicial, by mistaking and curtailing the sense of an author.

If I should extend the rule so far as to restrain all abridgments, it would be of mischievous consequence, 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.²⁷

But not every abridgment was found to be "fair." In the 1753 decision, *Tonson v. Walker*,²⁸ while the Court admitted a fair abridgement was not a piracy, it held the addition of twenty-eight notes to 1,500 was "a mere evasion."²⁹

The 1774 opinion in *Anonymous v. Newbery*³⁰ of Lord Chancellor Apsly, assisted by Mr. Justice Blackstone, "whose

24. 17 U.S.C. § 101 (2000).

25. *Id.* § 106(2).

26. 26 Eng. Rep. 489 (Ch. 1740).

27. *Id.* at 490 (internal citation omitted).

28. 36 Eng. Rep. 1017, 1020 (Ch. 1752).

29. *Id.*

30. 98 Eng. Rep. 913 (Ch. 1774).

knowledge and skill in his profession was universally known,"³¹ held:

That to constitute a true and proper abridgment of a work the whole must be preserved in its sense: and then the act of abridgment is an act of understanding, employed in *carrying a large work into a smaller compass*, and *rendering it less expensive*, and more convenient both to the time and use of the reader. Which made an abridgment in the nature of a new and a meritorious work.

That this had been done by Mr. Newbery, whose edition might be read in the fourth part of the time, and all the substance preserved, and conveyed in language as good or better than in the original, and in a more agreeable and useful manner

. . . [A]n abridgement, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work. And that this abridgment of Mr. Newbery's falls within these reasons and descriptions.³²

Note that the Lord Chancellor's opinion "carrying a large work into a smaller compass and rendering it less expensive"³³ is reflected in Lee's justification of "re-origination" of "condensing and cheaply diffusing."³⁴

In *Dodsley v. Kinnersley*,³⁵ an abridgement of Dr. Johnson's *Rasselas* less than one-tenth the size of the original was held not to be a piracy.³⁶ But it is significant to note that the language in *Dodsley* anticipated twentieth/twenty-first century analysis: "No certain line can be drawn, to distinguish a fair abridgement; *but every case must depend on its own circumstances.*"³⁷ Thus, nineteenth century re-origination had its birth in the eighteenth century

31. *Id.*

32. *Id.* (emphasis added).

33. *Id.*

34. Simonds, *supra* note 22, at 132.

35. 27 Eng. Rep. 270 (Ch. 1761).

36. *Id.*

37. *Id.* at 271 (emphasis added).

abridgement decisions. That pirates played fast and loose with the notion of re-origination does not detract from the very effective role it played at least until 1844,³⁸ as will be seen.

While Chapman and Hall did not ultimately prevail in their complaint in Chancery, there was sufficient reason to at least claim fraud. After all, the two titles were very similar: "The Posthumous Papers" v. "The Post-Humorous Notes" and "Pickwick Club" v. "Pickwickian Club." On each cover, the artwork bore the word "Pickwick" in large print although otherwise the covers were, in truth, dissimilar. There were the fictitious characters "Samuel Pickwick" v. "Christopher Pickwick" and "Tracy Tupman" v. "Percy Tupnall." Also compare "Boz" and "Bos" as editor, and "Phiz" and "Phis" as illustrator. Yet, Vice-Chancellor Sir Lancelot Shadwell was unconvinced that fraud had occurred and so he left Chapman and Hall to seek relief from the law side, which they ultimately decided against.³⁹ Still, one has to ask why Chapman and Hall's legal team had not brought a count for copyright infringement. After all, some plot elements were copied from the Dickens novel. Others were new, however. So while there are no extant records illuminating why Chapman and Hall's legal team did not base their claim in part on copyright infringement, the reason may be that they thought they would be met by a successful defense of re-origination. This conclusion is buttressed by the fact that a year later, in 1838, another of Dickens' publishers, Richard Bentley, and Dickens sought an injunction against the unauthorized printing of *Oliver Twist*.⁴⁰ Dickens had agreed to write *Oliver Twist* for publication in *Bentley's Miscellany*.⁴¹ It was not long before the work was reprinted elsewhere and without permission. Francis Basset Shenstone Flyndell began publishing installments of *Oliver Twist* in his

38. RICHARDSON, *supra* note 21, at 107.

39. *Vice-Chancellor's Court*, *supra* note 20. Finding that a sufficient case for fraud was not made, the Vice-Chancellor indicated that the plaintiff could bring an action to establish "that there had been an infringement of their right, and damage sustained." *Id.* Mr. Knight, counsel for the plaintiff, "did not know whether the matter was worth bringing an action," but accepted the liberty provided by the court. *Id.*

40. *Vice-Chancellor's Court*, *supra* note 20 (reporting on hearing on Wednesday May 2, 1838 in the case of Bentley v. Flyndell).

41. Kathleen Tillotson, *Introduction* to CHARLES DICKENS, *OLIVER TWIST*, at vii-viii (Kathleen Tillotson ed., Oxford Univ. Press 1982) (1838).

newspaper, *The Birmingham Journal*, beginning in 1837 and continuing into 1838.⁴² At the end of each installment, Flyndell stated that the article would be continued in the next paper.⁴³ On behalf of Bentley, Mr. Knight Bruce made application to the Court *ex parte* for an injunction.⁴⁴ He stated that “Bentley did not complain of what came within the limits of fair quotation” but that it was obvious that the whole of *Oliver Twist* was being reprinted.⁴⁵ In his affidavit, Bentley noted that the newspaper was sold at a lower price than the *Miscellany*.⁴⁶ The Vice-Chancellor referred to a similar case involving a paper named—tellingly—*The Thief*, “which was published with an expressed declaration of its intention to insert from time to time original articles from other publications *without any alteration*.”⁴⁷ The Vice-Chancellor, stating “he felt no hesitation,” granted the injunction.⁴⁸ In *Bentley*, the work had been reprinted virtually *ipsissima verba*; there was no re-origination, only slavish reproduction. Clearly, the reproduction was a superceding use.

While *Bentley v. Flyndell* was a victory for authors and publishers, it must be remembered that it involved no re-origination and did not dampen the ardor of the likes of Edward Lloyd. In fact, Lloyd went on to publish his own re-originations of several Dickens novels under such titles as *Pickwick in America* in 1838,⁴⁹ *The Life and Adventures of Oliver Twiss* in 1839,⁵⁰ *Nickelas Nickelbery*,⁵¹ *Mister Humfries’ Clock* in 1840,⁵² and *Barnaby Budge* in 1841.⁵³ G.M.W. Reynolds authored *Pickwick Abroad or the Tour in France*,⁵⁴ which first appeared in serial form and was later published

42. *Vice-Chancellor’s Court*, *supra* note 20.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Bos., *PICKWICK IN AMERICA!* (London, E. Lloyd 1838).

50. Bos., *THE LIFE AND ADVENTURES OF OLIVER TWISS* (London, E. Lloyd 1839).

51. Bos., *NICKELAS NICKELBERY* (London, E. Lloyl [i.e., Lloyd] 1840).

52. Bos., *MISTER HUMFRIES’ CLOCK* (London, E. Lloyd 1840).

53. Bos., *BARNABY BUDGE* (E. Lloyd 1841).

54. *GEORGE W.M. REYNOLDS, PICKWICK ABROAD OR THE TOUR IN FRANCE* (London, Thomas Tegg 1839).

in book form in 1839. So, re-origination was alive and well, at least for the time being.

C. *The Time Machine*

In keeping with the theme “everything old is new again,” it would be interesting to speculate on how the SunTrust/Houghton Mifflin dispute would have been resolved had it been heard by Vice-Chancellor Shadwell in 1837 and how the Chapman and Hall dispute would have fared in a U.S. federal court in the twenty-first century.

Although the analysis so far has focused on copyright, it must be remembered that, in *SunTrust*, the plaintiff not only alleged copyright infringement, but also a Lanham Act violation and deceptive trade practice.⁵⁵ In *Chapman & Hall*, the prayer for injunctive relief was based on fraud.⁵⁶ So I shall first address those aspects of the two disputes and then turn to the central issue, copyright infringement.

1. Fraud

As to allegations of fraud, Houghton Mifflin was better situated factually than was the successful defendant Lloyd in the *Pickwick* trial. Referring to the covers of the two *Pickwicks*, the Vice-Chancellor stated, “no person who had ever seen the original could imagine the other to be anything else than a counterfeit.”⁵⁷ The dust covers of *Gone with the Wind* and *The Wind Done Gone* are even more dissimilar in artwork. As to the similarity between the titles, *The Posthumous Papers* and *The Post-Humorous Notes*, the Vice-Chancellor dismissed the similarity, stating “there was nothing by which the two publications could be connected, except merely the words ‘Pickwick’ and ‘Boz’.”⁵⁸ How less likely is it that he would have found a connection between the two works in *SunTrust*? After all, Lloyd used “Bos” as the editor, whereas Randall used her own name as author and not a name approximating that of Margaret Mitchell. Furthermore, if *Post-Humorous Notes of the Pickwickian*

55. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

56. *Vice-Chancellor’s Court*, *supra* note 20 (reporting on trial of June 8, 1837).

57. *Id.*

58. *Id.*

Club did not provide false connections to *The Posthumous Papers of the Pickwick Club*, it is likely the Vice-Chancellor would have found no connection between *The Wind Done Gone* and *Gone with the Wind*. Lord Shadwell had said of the two works before him that “[t]he two works were so exceedingly dissimilar, that nothing but the grossest ignorance and unobservance on the part of persons intending to purchase a work which had delighted the world for nearly a year could allow them to purchase the other.”⁵⁹

An expert in *SunTrust* had testified that *The Wind Done Gone* “will not appeal to any desire among readers for a sequel to *Gone with the Wind* . . . [because] the target audiences for the two books are . . . very different.”⁶⁰ So it is likely that, as he did with *Pickwick*, the Vice-Chancellor would find *The Wind Done Gone* “exceedingly dissimilar” from *Gone with the Wind*. Thus, as to fraud, Lord Shadwell likely would have treated the defendant in *SunTrust* as he had the defendant Lloyd.

What would be the fate of Lloyd if twenty-first century American law were applied? The district court in *SunTrust* dealt only with the copyright infringement issue and did not deal with the Lanham Act and deceptive trade practices claims.⁶¹

With respect to the Lanham Act, Lloyd would face several issues: (1) the title of his work; (2) the cover artwork; (3) the use of “Bos” as editor and “Phis” as illustrator; (4) the use of disguised character names; and (5) the use of Dickens’ style.

The title, *The Post-Humorous Notes*, as it relates to the continuing adventures of Pickwick, might not be a violation of the Lanham Act under the rationale of *Rogers v. Grimaldi*.⁶² The cover artwork in *The Penny Pickwick* is closer in design to the artwork in Dickens’ *Pickwick* than the artwork of *The Wind Done Gone* is to that of *Gone with the Wind*. That said, the fact that *The Penny Pickwick* is a parody of the original *Pickwick* may excuse the resemblance under the reasoning of *Cliffs Notes, Inc. v. Bantam*

59. *Id.*

60. *SunTrust Bank*, 268 F.3d at 1280 (alteration in original).

61. *See SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev’d*, 268 F.3d 1257 (11th Cir. 2001).

62. 875 F.2d 994, 1000 (2d Cir. 1989) (“Where a title with at least some artistic relevance to the work is not explicitly misleading as to the content of the work, it is not false advertising under the Lanham Act.”).

*Doubleday Dell Publishing Group, Inc.*⁶³ In *Cliffs Notes*, the court concluded that:

[T]he parody cover of *Spy Notes*, although it surely conjures up the original and goes to great lengths to use some of the identical colors and aspects of the cover design of *Cliffs Notes*, raises only a slight risk of consumer confusion that is outweighed by the public interest in free expression, especially in a form of expression that *must to some extent resemble the original*.⁶⁴

In 1837, Vice-Chancellor Shadwell held:

Looking at the outward covers of the two publications, no person who had ever seen the original could imagine the other to be anything else than a counterfeit, bearing no resemblance to the thing it was intended to imitate. In his opinion there was nothing whatever to lay hold of except the mode in which the fancifully made word "Pickwick" was formed, and which, it must be admitted, had some resemblance to the name used in the plaintiff's work; but even in this respect there was a considerable difference, one being printed in a curved form, and the other in a strai[gh]t line It therefore appeared to him there was nothing by which the two publications could be connected, except merely the words "Pickwick" and "Boz" which he considered a very poor circumstance indeed.⁶⁵

Thus, in light of *Cliffs Notes*, it seems likely a federal court today would reach a similar conclusion.

The use of "Bos" (v. Dickens' "Boz") and "Phis" (v. Dickens' "Phiz") is more problematic. The closeness of the spelling (and pronunciation) would be more likely than the title to violate Section 43(a) of the Lanham Act.⁶⁶ (As Randall had used her own name as author, she would, in contrast, not violate Section 43(a) in that regard). If *The Post-Humorous Notes* were held to be a fair use parody, as the Eleventh Circuit tentatively suggested *The Wind Done*

63. 886 F.2d 490 (2d Cir. 1989).

64. *Id.* at 497 (emphasis added).

65. *Vice-Chancellor's Court*, *supra* note 20 (reporting on the trial of *Chapman & Hall v. Lloyd* on June 8, 1837).

66. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION § 23:21, 23:22 (4th ed. 2003).

Gone was,⁶⁷ then like the use of disguised pseudonyms in *The Wind Done Gone*,⁶⁸ such use in *The Post-Humorous Notes* would likely not be a violation of Section 43(a).⁶⁹

The Vice-Chancellor found “some sort of imitation in the style of wit, as well as in the invention of words.”⁷⁰ Style has been the subject of Lanham Act protection,⁷¹ but if the use of style was a part of the parodic thrust then it might be found non-actionable. In conclusion, the most problematic issue for Lloyd would be the use of “Bos” and “Phis” under twenty-first century law, an issue that did not, however, trouble the Vice-Chancellor in the nineteenth century.

2. Copyright infringement

Turning now to copyright, what would have been the likely fate of a copyright infringement claim by SunTrust in Vice-Chancellor Shadwell’s court? First, if SunTrust’s legal team had followed the strategy Chapman and Hall’s lawyers employed, they would not have pleaded a count for copyright infringement. Assuming they alleged

67. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276 (11th Cir. 2001) (“[B]ased upon our analysis of the fair use factors we find, at this juncture, [*The Wind Done Gone*] is entitled to a fair use defense.”) (emphasis added)).

68. Note that the Eleventh Circuit held that the characters in *Gone with the Wind* were copyrighted and copied in *The Wind Done Gone*: “While we agree with Houghton Mifflin that the characters . . . taken from [*Gone with the Wind*] are vested with a new significance . . . in [*The Wind Done Gone*], it does not change the fact that they are the very same copyrighted characters.” *Id.* at 1267. But the Eleventh Circuit, as noted above, concluded that, at that stage in the litigation, *The Wind Done Gone* was entitled to a fair use defense. *Id.* at 1276.

69. See, e.g., Hormel Foods Corp. v. Jim Henson Prods., Inc., 73 F.3d 497 (2d Cir. 1996) (Spa’am versus SPAM); Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112 (2d Cir. 1984) (Donkey Kong versus King Kong); Universal City Studios v. Casey & Casey, Inc., 622 F. Supp. 201 (S.D. Fla. 1985), *aff’d without opinion*, 792 F.2d 1125 (11th Cir. 1986) (Miami Mice versus Miami Vice); see also *Warner Bros. v. Am. Broad. Co.*, 654 F.2d 204 (2d Cir. 1981) (holding that the *Greatest American Hero* did not violate copyright or Lanham Act § 43(a) rights of *Superman*). Professor J. Thomas McCarthy has suggested that the “conjure up test” used in copyright parody cases provides “some guidance for similar trademark cases.” MCCARTHY, *supra* note 66, § 31:156.

70. *Vice-Chancellor’s Court*, *supra* note 20.

71. See, e.g., Romm Art Creations, Ltd. v. Simcha Int’l, Inc., 786 F. Supp. 1126, 1134 (E.D.N.Y. 1992) (stating that the Lanham Act provides relief for a claim of infringement with regard to art work).

copyright infringement in addition to, or in lieu of, the fraud claim, however, would the Vice-Chancellor have treated that allegation any more favorably than he did the fraud claim in *Pickwick*? I would suggest not. *Gone with the Wind* might be read as favoring the traditions of the antebellum South, including the institution of slavery. Though Dickens' pointed condemnation of slavery in the United States in *American Notes*⁷² was not to be published until some five years after the *Pickwick* litigation, the criticism reflected the existing British attitude towards slavery.⁷³ The *Post-Humorous Notes* may have been seen as a humorous criticism of Dickens' style of storytelling, worthy of protection against a copyright infringement claim, had one been made. As a matter of social conscience, an attack on a novel that might be seen as glorifying slavery would be more defensible than a mere lampoon of an elderly bachelor and his innocent adventures. I would suggest that had *The Wind Done Gone*—a re-origination of *Gone with the Wind*—been the subject of litigation in the nineteenth century, the plaintiffs would not have claimed copyright infringement, but if they had the claim would have been unsuccessful before the Vice-Chancellor based on a re-origination defense.

If Chapman and Hall were teleported to twenty-first century America and brought a copyright infringement action against Lloyd, would they be successful or would they suffer the same fate as SunTrust? Clearly, *The Post-Humorous Notes of the Pickwickian Club* imitated *The Posthumous Papers of the Pickwick Club* just as *The Wind Done Gone* imitated *Gone with the Wind*. In a sense, both *The Post-Humorous Notes* and *The Wind Done Gone* were derivatives of the copied works. As the Eleventh Circuit stated, referring to U.S. copyright law, "throughout the nineteenth century, the copyright in literature was limited to the right [of an author] . . . only to prevent others from copying and selling her *particular literary work*."⁷⁴ The court went on to say, however, that under "the

72. CHARLES DICKENS, *AMERICAN NOTES* (Modern Library 1996) (1842).

73. In 1807, the English Parliament voted to outlaw the slave trade within the British Empire. See *An Act for the Abolition of the Slave Trade*, 1807, 47 Geo. 3, c. 36, (Eng.). In 1833, it passed the *Abolition of Slavery Act*, 1833, 3 & 4 Will. 4, c. 73 (Eng.).

74. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001) (emphasis added) (citing *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514)).

1909 Act, which codified the concept of a derivative work . . . an author's right to protect his original work against imitation was established."⁷⁵ Thus, today *The Post-Humorous Notes of the Pickwickian Club* would be considered a derivative work. To escape liability, Lloyd—like Houghton Mifflin—would argue a fair use defense. The concept of re-origination was sufficient in its day to dissuade Chapman and Hall from even arguing copyright infringement. Would the twenty-first century counterpart to re-origination—transformative use—save Lloyd from liability? As did Randall, Lloyd also used a play on words in the title, suggesting this derivative work was intended as a parody. Furthermore, Lloyd also used readily recognized pseudonyms for the characters in his work.⁷⁶ As did Randall, he copied some plot elements from the original but, like Randall, created new plot elements and some characters not found in the original.⁷⁷ Although *The Post-Humorous Notes* was published for profit, that is balanced by what is arguably the *transformative* nature of Lloyd's work. Finally, it should be noted that, like *The Wind Done Gone*, *The Post-Humorous Notes* "were so exceedingly dissimilar"⁷⁸ from the copied work and, like *The Wind Done Gone*, did "more than put a new gloss on the familiar tale."⁷⁹ So, Lloyd would likely escape liability in the twenty-first century, at least as to a copyright infringement claim. Let us now return to the nineteenth century.

D. *Twilight of Re-origination*

Richard Egan Lee, whose comments on re-origination were quoted earlier, re-originated one time too many. In December 1843, Dickens published *A Christmas Carol*, his Christmas gift to the ages.⁸⁰ Dickens' story of Scrooge, Tiny Tim, and the other wonderful characters who people this tale of redemption was an instant success.⁸¹ Lee, who analyzed, abridged and re-originated the

75. *Id.*

76. *See supra* Part II.A.

77. *See id.*

78. *Vice-Chancellor's Court*, *supra* note 20 (reporting on the trial of *Chapman & Hall v. Lloyd* on June 8, 1837).

79. *SunTrust Bank*, 268 F.3d at 1279.

80. CHARLES DICKENS, *A CHRISTMAS CAROL* (WW Norton & Co. 2004) (1843).

81. E. JAQUES, *CHARLES DICKENS IN CHANCERY* 5 (photo. Reprint 2001)

works of Captain Marryat, Lytton and Byron, as well as Dickens, published *A Christmas Ghost Story, Re-originated from the Original by Charles Dickens Esquire and Analytically Condensed Expressly for This Work*.⁸² Dickens immediately sought injunctive relief in Chancery.⁸³

It is interesting to note Lee's re-origination defense. In his affidavit, Lee admitted that:

[I]n the exercise of his usual avocations and in accordance with the general custom of editors did critically examine the plaintiff's last mentioned work. That the opinion and notes of this Deponent resulting from such examination of the plaintiff's said work were communicated by this Deponent to his said coadjutor Henry Hewitt who proceeded to abridge and analytically condense the said "Christmas Carol in Prose."⁸⁴

Lee went on in his affidavit to state that the title he selected, *A Christmas Ghost Story Reoriginated from the Original by Charles Dickens Esquire and Analytically Condensed Expressly for This Work*, expressed the fact "that very considerable improvements and in some instances large original additions as well as condensation had been effected."⁸⁵ Lee then went on to criticize Dickens' skill as a writer:

That so far from the said Defendants' said publication being . . . a colorable imitation of the plaintiff's said work . . . this Deponent verily believes that numerous incongruities in the plaintiff's work involving the unhinging of the whole story or plot and some of which incongruities this Deponent had

(1914).

82. *Id.* at 73.

83. Vice-Chancellor Knight-Bruce heard Charles Dickens' application in his court on January 7, 1844. On January 18, the Vice-Chancellor continued Dickens' injunction against Lee who published a weekly literary work known as *Parley's Illuminated Library*. Simonds, *supra* 22, at 129. Number 16 advertised *A Christmas Ghost Story, Re-originated from the Original by Charles Dickens Esquire and Analytically Condensed Expressly for This Work*. *Id.* The injunction was to restrain Lee from "publishing, selling, or otherwise disposing of Number 16 . . . or any continuation . . . thereof." *Id.*

84. Affidavit of Richard Egan Lee Sworn on January 16, 1844, *reprinted in* JAUQUES, *supra* note 81, at 72.

85. *Id.* at 73.

noted to the said Henry Hewitt . . . [he] tastefully remedied⁸⁶

Serjeant⁸⁷ Thomas Noon Talfourd, Dickens' close personal friend, represented him before Vice-Chancellor Sir J. Knight Bruce. In what J.B. Richardson described as "the last English case on the subject,"⁸⁸ the Vice-Chancellor sounded the death knell for unbridled re-origination:

It is said that this is the case of an abridgement, and to be protected. *I am not at present aware that one man has a right to abridge the work of another*; nor do I mean to say that there may not lawfully be an abridgement, or that an abridgement would not be protected. How this may be, it is not for me here and now to say; but I do say, that to assert that one man has the right to abridge the work of another is going beyond what I believe law to be.⁸⁹

The *Christmas Carol* re-origination may well have been the "last English case on the subject,"⁹⁰ but it was not the end of re-origination.⁹¹ Dickens, however, chose not to pursue re-origination again (though he later did bring suit against verbatim infringers). In any event, the term re-origination ultimately faded into history. The distorted use of the term to justify piracy probably led to its demise as a term of art. Had the term not been co-opted by the likes of Richard Egan Lee, it might have survived and found itself used today in the analysis of "factor one" in a fair use determination.⁹² In its legitimate form it might arguably be considered an ancestor of transformative use. Both theories looked to whether the copyist added something of new value to the old work or whether the

86. *Id.*

87. The term serjeant was replaced by Q.C. (or K.C.).

88. RICHARDSON, *supra* note 21, at 107.

89. *Dickens v. Berger*, TIMES (London), Jan. 19, 1844, at 7 (emphasis added).

90. RICHARDSON, *supra* note 21, at 107.

91. *See, e.g.,* *Millar v. Taylor*, 98 Eng. Rep. 201, 202 (K.B. 1769) (noting that defendant asserted "a purchaser of every book or copy has a right to make what use of it he pleases").

92. A fair use determination analysis requires determination of the purpose and character of the allegedly infringing work. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001).

copying was simply intended to supercede the original work,⁹³ as “a mere evasion.”⁹⁴

III. COPYRIGHT TERM LEGISLATION

A. *Limited Times*

Copyright legislation provisions for the term of protection affords another opportunity to demonstrate “everything old is new again.” Part III of this article compares English legislation in Dickens’ time, particularly the Talfourd Act of 1842, to U.S. legislation enacted little more than a century and a half later, the Sonny Bono Act of 1998. Both acts dealt with an extension of the term of copyright and both had their supporters and detractors. What will be seen is how similar many of the arguments were despite being separated by an ocean and more than one hundred and fifty years.

Before addressing the two Acts in detail, it is appropriate to review why copyright needed legislative extensions at all—why copyright protection was not perpetual. The Constitution provides that Congress shall have the power to secure “for limited Times to Authors . . . the exclusive Right to their respective Writings.”⁹⁵ One might ask why the Constitution provided copyright protection for only “limited times,” rather than perpetual protection. Charles Dickens, for one, thought copyright should be perpetual. He wrote in his diary on February 5, 1839, “copyrights need be hereditary, for genius isn’t.”⁹⁶ In fact, little more than a century before his parents married in 1809, there was a belief that copyright in works both unpublished and published was a common law right to be enjoyed in perpetuity.⁹⁷ But any common law right in published works ended with the enactment of the Statute of Anne.

Generally acknowledged as the first copyright statute, the Statute of Anne of 1709⁹⁸ provided a term of copyright of fourteen

93. *Id.*

94. *Tonson v. Walker*, 36 Eng. Rep. 1017, 1020 (Ch. 1752).

95. U.S. CONST. art. I, § 8, cl. 8.

96. Diary of Charles Dickens (1839) (on file with the Forster Collection at the Victoria & Albert Museum in London).

97. *See, e.g., Millar v. Taylor*, 98 Eng. Rep. 201, 202 (K.B. 1769).

98. Statute of Anne of 1709, 8 Ann., c. 19 (Eng.) (effective April 10, 1710).

years, with a fourteen-year additional term if the author were alive at the end of the first term, “*and no longer.*”⁹⁹ For works already published at the time the Statute of Anne went into effect, a period of twenty-one years of protection from that date was provided.¹⁰⁰ (This provision could well have served as a model when the 1976 Act encompassed unpublished works that had hitherto enjoyed perpetual protection under state law. The 1976 Act provided that the term of protection under federal law for older unpublished words would not, in any event, terminate prior to December 31, 2002—a period of twenty-five years from the effective date of the 1976 Act, January 1, 1978).¹⁰¹ English publishers took the admittedly self-serving position that the Statute of Anne was protection in addition to, and not in lieu of, common law protection, which they claimed was perpetual.¹⁰² The decision in 1769 in *Millar v. Taylor* seemed to confirm the correctness of the publishers’ position.¹⁰³ But, in 1774, the House of Lords shattered the publishers’ hopes.

A book entitled *The Seasons* led to the demise of common law copyright of published works. At first, however, *The Seasons* appeared to be the savior of that right. In 1729, Andrew Millar published *The Seasons*.¹⁰⁴ After the expiration of the statutory copyright, Robert Taylor published a competing volume of *The Seasons*. Millar sued him in King’s Bench.¹⁰⁵ A divided court found for Millar and, most importantly, held that the Statute of Anne had not superceded the perpetual common law copyright.¹⁰⁶ The copyright to *The Seasons* was transferred to Thomas Beckett.¹⁰⁷ When two Scottish booksellers, Alexander and John Donaldson, brought out a “pirate” edition, Beckett sought and received an injunction in Chancery.¹⁰⁸ The defendants appealed to the House of

99. *Id.* (emphasis added).

100. *Id.*

101. 17 U.S.C. § 303(a) (2000).

102. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 158 (1968).

103. See 98 Eng. Rep. 201 (K.B. 1769) (citing unreported chancery cases).

104. *Id.* at 203.

105. *Id.* at 201.

106. *Id.* at 257.

107. PATTERSON, *supra* note 102, at 172.

108. See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1156 (1983).

Lords. With the benefit of advisory opinions from a panel of judges from the King's Bench, Exchequer and Common Pleas, the House of Lords reversed the Decree of the Chancery court.¹⁰⁹ If there had been a common law copyright in published works before the Statute of Anne, *Donaldson v. Beckett* declared it was no more.¹¹⁰

It is, perhaps, conjecture to assume that the decision in *Donaldson v. Beckett* influenced the drafters of the U.S. Constitution when they provided copyright protection for only "limited times," and the first Congress when it chose, as a limited time, a term identical¹¹¹ to that of the Statute of Anne, and like the House of Lords in *Donaldson v. Beckett* left unpublished works to common law protection. One can only wonder whether, if the House of Lords had come out the opposite way in *Donaldson v. Beckett*, Article One, Section Eight, Clause Eight of the Constitution might have come out differently as to the term of protection. However, one thing is clear: in England and the United States, copyright protection for published works was not perpetual. That did not mean that the copyright term was stagnant, however. It is time now to discuss the legislative histories of the Talfourd Act and then the Sonny Bono Act before turning to a comparison of the debates that led up to their respective passage.

B. The Talfourd Act

When Charles Dickens was born on February 7, 1812, copyright protection in England stood as it had in 1710, at fourteen years with a fourteen-year renewal if, and only if, the author were still alive at the end of the first fourteen-year term.¹¹² If the author died before the

109. *Id.*

110. Professor Howard B. Abrams is of the opinion that the House of Lords rejected "the notion of common law copyright." *Id.* at 1161; *see also id.* at 1139 (stating "the issue of common law copyright was not squarely passed upon by a court until almost sixty years after the enactment of the Statute of Anne," and thus, publishers sought to increase their protection in a time where they had "lost their monopoly on printing and [were] faced with ever increasing competition"). However, Abrams goes on to note that the language of the Statute of Anne suggests that publishers did not believe that any effective common law right existed. *Id.* at 1161-62.

111. The term was Fourteen years plus an additional fourteen years, provided that the author was alive at the end of the first fourteen years. [Copyright] Act of May 31, 1790, ch. 15, 1 Stat. 124.

112. Statute of Anne of 1709, 8 Ann., c.19 (Eng.).

end of the fourteen-year term, nothing was left but the balance of that first fourteen-year period. On the other hand, authors who were long-lived, might well outlive their copyrights, in some instances by many years.

On December 16, 1812, a petition by the booksellers and publishers of London and Westminster was presented in the House of Commons.¹¹³ One purpose of the petition was to relieve the booksellers and publishers of the burden of providing so many gratis copies of works to various libraries.¹¹⁴ More relevant to this discussion was the second part of the petition, which lamented the term of copyright provided by the Statute of Anne:

[T]hat, by the said act of queen Anne, the term of twenty-eight years' copyright is secured to the author, and his assigns, in case he should be alive at the end of the first fourteen years, but, in case he should then be dead, the copyright ceases at the end of the first fourteen years; and the petitioners humbly submit that this distinction is, in many cases, productive of great hardships to the families of authors, and is not founded upon just principles.¹¹⁵

While most of the debate by the Commons centered on the issue of the obligation to provide gratis copies of works to universities, one member did address the term of copyright issue. Sir Samuel Romilly made the point:

A man had a second period of 14 years in which he had an interest in his work, if he survived the first 14 years; but, if he died before the expiry of the first period, then his executors had no farther interest in the work. It operated in a way most injurious to the best interest of literature; for as young authors were more likely to reach the second term than old, it gave the immature and jejune compositions of the former double the reward reserved for the productions of ripened genius.¹¹⁶

113. 24 PARL. DEB. (1st ser.) (1813) 308 (Eng.).

114. *Id.* at 310.

115. *Id.* A similar petition was presented on behalf of the printers of London and Westminster on March 1, 1813, 25 PARL. DEB. (1st ser.) (1813) 10 (Eng.), and by Edinburgh booksellers on April 9, 1813, *id.* at 762.

116. 25 PARL. DEB. (1st ser.) (1813) 16 (Eng.).

Apart from the remarks of Romilly,¹¹⁷ the debate, such as it was, was not focused on the term of copyright, and the term of copyright was changed with no reported debate as to term.¹¹⁸ At the tender age of two, the future author of *The Pickwick Papers* and so many other works would consequently enjoy a copyright term of twenty-eight years or life, whichever was longer.¹¹⁹

If the 1814 revision of the term of copyright was apparently devoid of contention, the same may not be said with respect to the next proposed revision, debated between 1837 and 1842.

On September 27, 1837, Charles Dickens dedicated the *Pickwick Papers* to Serjeant Thomas Noon Talfourd:

MY DEAR SIR,

If I had not enjoyed the happiness of your private friendship, I should still have dedicated this work to you, as a slight and most inadequate acknowledgment of the inestimable services you are rendering to the literature of your country, and of the lasting benefits you will confer upon the authors of this and succeeding generations, by securing to them and their descendants a *permanent interest in the copyright* of their works.

Many a fevered head and palsied hand will gather new vigour in the hour of sickness and distress from your

117. "In consequence of the observations made by the distinguished and learned individual to whom he had referred—in consequence of what had fallen from Sir Samuel Romilly, the 54th George 3rd, was introduced, extending copyright to the life of the author, and with this additional provision, that instead of fixing a first period of fourteen years, and afterwards contingent upon the life of the author, extending it to another fourteen years, it gave to the author, at all events a clear and unconditional right of twenty-eight years." 63 PARL. DEB. (3d ser.) (1841) 781 (Eng.).

118. See Act to Amend the Several Acts for the Encouragement of Learning, by Securing the Copies and Copyright of Printed Books, to the Authors of Such Books or Their Assigns, 54 Geo. 3, c. 156 (1814) (Eng.).

119. *Id.* The United States did not amend its copyright law in regard to term until 1831, when it extended the first term to twenty-eight years with the additional fourteen years, available to the author, or if the author be deceased, to the surviving widow or children. [Copyright] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436. Thus, the total possible U.S. term was forty-two years whereas the English term was twenty-eight years or life. Assuming an average life span, the American term was clearly more advantageous as to works written towards the end of one's life and the English system more advantageous with respect to works written earlier in a career, at least for a long-lived author.

excellent exertions; many a widowed mother and orphan child, who would otherwise reap nothing from the fame of departed genius but its too frequent legacy of poverty and suffering, will bear, in their altered condition, higher testimony to the value of your labours than the most lavish encomiums from lip or pen could ever afford.¹²⁰

What services was Serjeant Talfourd rendering to the literature of his country? Talfourd, a barrister and author, was also a member of Parliament. On Thursday, May 18, 1837, he introduced a Bill to amend the law of copyright.¹²¹ The main purpose of the Bill was to extend the term of copyright. Referring to the common law perpetual copyright, Talfourd stated, “[t]he claim of the author to perpetual copyright was never disputed, until literature had received a *fatal present* in the first act of Parliament for its encouragement—the 8th Anne, c. 19, passed in 1709.”¹²² Like Romilly some twenty-four years before him, he reminded Parliament of the unfair consequences of too short a term of copyright. “It denies to age and experience the probable reward it permits to youth.”¹²³ He went on to state that once copyright was terminated, anyone was free “to emasculate, and to garble.”¹²⁴ Talfourd noted that he would have preferred that authors be restored to the common law protection they enjoyed before the Statute of Anne, but that “the subject . . . [had for] so long been treated as a matter of compromise” that he proposed still to treat it on the principles of compromise.¹²⁵ So Talfourd proposed that the term “be extended to sixty years, to be computed from the death of the author.”¹²⁶ So, while Dickens’ dedication of *The Pickwick Papers* referred to “a permanent interest in the copyright,”¹²⁷ Talfourd actually only sought a term that would protect descendants for a limited time. Leave was given to bring in

120. DICKENS, *supra* note 7, at xxii (emphasis added).

121. 38 PARL. DEB. (3d ser.) (1837) 866 (Eng.).

122. *Id.* at 868 (emphasis added). Talfourd went on to emphasize the point: “[T]he term of twenty-eight years, with the possible reversion beyond that time for life, is all authors have yet obtained in return for that inheritance of which the Statute of Anne deprived them.” *Id.* at 871.

123. *Id.* at 875.

124. *Id.* at 876.

125. *Id.* at 873.

126. *Id.*

127. DICKENS, *supra* note 7, at xxii.

the Bill, but "the demise of the Crown closed the Session and stopped its progress."¹²⁸ Had King William IV not died on June 20, 1837, the Bill might have passed in the twelfth Parliament.

On December 14, 1837, Talfourd was given leave in the first session of the thirteenth Parliament to bring another Bill "in substance similar to that . . . in the last session."¹²⁹ Talfourd's Bill met with strong opposition from publishers, printers, booksellers and others connected with the publishing trade.¹³⁰ Talfourd ultimately decided to withdraw it.¹³¹ He introduced the Bill for a third time in the second session of Parliament. Faced with "the opposition with which the bill was threatened," on July 9, 1839, Talfourd moved that the Bill be put off to the next session.¹³² On February 4, 1840, he introduced the Bill for the fourth time.¹³³ On July 8, 1840, Talfourd concluded that the Bill had "little chance . . . of getting . . . passed in the present Session," and moved for its discharge.¹³⁴ But Talfourd was, if anything, extraordinarily tenacious. He would try again.

On Wednesday, January 27, 1841, Sergeant Talfourd sought to introduce yet another Bill.¹³⁵ The Bill again was vigorously opposed.¹³⁶ Leave was given on a divided vote, however, to bring the Bill.¹³⁷ In debate over the motion to have the Bill read a second time, Talfourd indicated for the first time that as to the sixty-year term after death, "he was not by any means wedded to that term, but that a less term would satisfy him."¹³⁸ He mentioned a thirty-year term being discussed in Paris.¹³⁹ This retreat from the sixty-year term availed him nothing. Thomas Babington Macaulay spoke at length in opposition to the Bill, and his oratory carried the day.¹⁴⁰ A second reading of the Bill was defeated on February 5, 1841.¹⁴¹

128. 45 PARL. DEB. (3d ser.) (1839) 921 (Eng.).

129. 39 PARL. DEB. (3d ser.) (1838) 1091 (Eng.).

130. See 45 PARL. DEB. (3d ser.) (1839) 922 (Eng.).

131. *Id.*

132. 49 PARL. DEB. (3d ser.) (1839) 72-73 (Eng.).

133. 51 PARL. DEB. (3d ser.) (1840) 1250-58 (Eng.).

134. 55 PARL. DEB. (3d ser.) (1840) 557 (Eng.).

135. 56 PARL. DEB. (3d ser.) (1841) 134 (Eng.).

136. *Id.*

137. *Id.*

138. *Id.* at 342.

139. *Id.*

140. *Id.* at 344.

141. *Id.* at 360.

Talfourd thought that “he had been defeated merely by an accident, and not by any argument that had been brought forward against him.”¹⁴² Moreover, Talfourd “had no doubt that the result would be different when he brought forward the measure next Session.”¹⁴³ He was defeated, however, in his bid for re-election as the Member of Parliament from Reading.

Talfourd was now on the sidelines, but revision of the copyright term was not a dead issue. On March 3, 1842, in the second session of the fourteenth Parliament, Talfourd’s ally on copyright revision, Viscount Mahon, moved leave to bring a Bill, but it was a much reduced amendment than that sought by Talfourd.¹⁴⁴ Mahon’s Bill would provide a period of twenty-five years after the death of an author,¹⁴⁵ but in any event not less than twenty-eight years absolutely.¹⁴⁶ The proposed Bill also provided for works published after the death of the author to have a term of thirty years from the first publication.¹⁴⁷ Mahon noted that publishers, printers and stationers who first opposed the measure now expressed themselves in favor.¹⁴⁸ Macaulay countered with a suggestion of a fixed term of forty-two years¹⁴⁹ or life, whichever was longer.¹⁵⁰ Another member suggested a compromise between the proposals of Mahon and Macaulay, at forty-two years certain with a seven-year post-mortem term.¹⁵¹ The House of Commons, by a divided vote, adopted the term of life plus seven years or forty-two years, whichever was longer.¹⁵² Interestingly, the version was made applicable to

142. *Id.* at 502.

143. *Id.*

144. 60 PARL. DEB. (3d ser.) (1842) 1429 (Eng.).

145. *Id.* Mahon also proposed to give power to a committee of the Privy Council to prevent suppression of works by representatives of a deceased author. *Id.*

146. 61 PARL. DEB. (3d ser.) (1842) 1356 (Eng.).

147. *Id.* at 1391.

148. *Id.* at 1362–63.

149. This was roughly analogous to the twenty-eight years plus fourteen year renewal term of the U.S. 1831 copyright law. *See* [Copyright] Act of Feb. 3, 1831, ch.16, 4 Stat. 436. The U.S. Act of 1831, however, conditioned the additional fourteen years on the author, spouse or children being alive at the end of the twenty-eight year term, whereas Macaulay’s forty-two year term was not so conditioned. *Id.*; 61 PARL. DEB. (3d ser.) (1842) 1364 (Eng.).

150. 61 PARL. DEB. (3d ser.) (1842) 1364 (Eng.).

151. *Id.* at 1394.

152. *Id.* at 1400–02.

subsisting copyright "except when it shall belong to an assignee for other consideration than natural love and affection: in which case it shall cease at the expiration of the present term, unless its extension shall be agreed to between the proprietor and author."¹⁵³

The Bill passed the House of Commons on April 26, 1842.¹⁵⁴ Next the House of Lords considered it. The House of Lords debated the proposed extension of the term and the retroactive provision. The latter received particular attention because it affected publishers who went to press expecting that certain works would shortly be in the public domain under the provisions of the 1814 Act.¹⁵⁵ On Friday, June 24, 1842, the House of Lords passed the Bill.¹⁵⁶ The statute became effective on July 1, 1842.¹⁵⁷ It had taken five years and lengthy, at times acrimonious, debate in the House of Commons to extend the term of copyright.

What had been gained? Certainly not perpetual or hereditary copyright as Dickens desired. Certainly not a term of sixty years after the death of the author as Talfourd had originally proposed. On the other hand, the law did increase the guaranteed aspect of the term from twenty-eight to forty-two years. The seven years of post mortem protection was nominal, though little more than a tenth of what Talfourd sought. The retroactive provision did provide a significant benefit, however, for authors who owned their copyrights. Even where they did not, the publisher who wished to enjoy the benefit of the term extension would have to negotiate with the author or the author's heirs.¹⁵⁸ In addition, the Bill finally provided a forty-two-year term for a post-death publication, close to Talfourd's goal.¹⁵⁹ Dickens himself, disappointed as he must have been that the term was not at least as long as that proposed by Talfourd, nonetheless benefited from it, as all of his works were still under copyright under the 1814 Act and would enjoy the retroactive extension.

153. *Id.* at 1402.

154. 62 PARL. DEB. (3d ser.) (1842) 1110 (Eng.).

155. *See* 63 PARL. DEB. (3d ser.) (1842) 784-85 (Eng.).

156. 64 PARL. DEB. (3d ser.) (1842) 538 (Eng.).

157. Talfourd's Act (An Act to Amend the Law of Copyright), 1842, 5 & 6 Vict., c. 45 (Eng.).

158. *Id.*

159. *Id.*

C. *The Sonny Bono Act*

The Talfourd Act was five contentious years in the making. By comparison, the Sonny Bono Act took but three years to become law and might have been enacted even earlier but for the Fairness in Music Licensing Act, which had been tied to its tail.¹⁶⁰ Moreover, while there was opposition to the Sonny Bono Act, it came primarily from the legal academy and not from members of Congress.¹⁶¹

On October 29, 1993, the European Union issued a directive to its member states to harmonize their copyright laws by adopting a term of protection equal to the life of the author plus seventy years.¹⁶² That decision would ultimately lead to the passage of the Sonny Bono Copyright Term Extension Act in 1998.¹⁶³ Congress first acted with respect to adding twenty years to the term of copyright protection with the introduction of S. 483, Copyright Term Extension Act, on March 2, 1995, and reported to the Senate on July

160. Congressman Conyers stated that those who espoused the Fairness in Music Licensing Act had “kidnapped term extension and used it as a hostage.” 144 CONG. REC. E2308 (daily ed. Nov. 12, 1998). Congressman Doggett referred to the Act as the “Music Theft Act.” 144 CONG. REC. H1457 (daily ed. Mar. 25, 1998). Congressman McCollum commented, “We have been waiting around for quite a long time . . . to get this Bill to the floor of the House, simply because there has been this big dispute between the restaurants of this country . . . and the songwriters.” 144 CONG. REC. H1462 (daily ed. Mar. 25, 1998). And, most appropriately, given the theme of this article, Senator Thompson, lamenting the inclusion of Fairness in Music Licensing as Title II of Senate Bill 505, remarked, “As *Charles Dickens might say, it is the best of times and the worst of times* for those who create the property that is protected by copyright.” 144 CONG. REC. S12,434 (daily ed. Oct. 12, 1998) (statement of Sen. Thompson) (emphasis added).

161. See Lawrence Lessig, *Lecture: Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1067–68 (2001) (“[N]o member of [C]ongress had the courage to question this [copyright term] extension—but law professors . . . testified against the action . . .”).

162. Council Directive 93/98 of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9.

163. See *Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003) (describing the 1993 European Union directive extending copyright terms as a “key factor” in Congress’s adoption of the Copyright Term Extension Act); 144 CONG. REC. S12,377 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch) (arguing if United States copyright laws “do not keep pace with . . . the EU Directive, American works will fall into the public domain 20 years before those of our European trading partners, undercutting our international trading position and depriving copyright owners of two decades of income”).

10, 1996 as the Copyright Term Extension Act of 1996.¹⁶⁴ That Bill died with the end of the 104th Congress. The Senate passed S. 505, the Copyright Term Extension Act of 1997, on October 7, 1998, and renamed it the Sonny Bono Copyright Term Extension Act in honor of the late congressman.¹⁶⁵ That same day the bill was passed by the House. The president signed the bill on October 27, 1998.¹⁶⁶

The Sonny Bono Copyright Term Extension Act added twenty years to the term of copyright.¹⁶⁷ Thus, life plus fifty became life plus seventy. For works for hire, anonymous and pseudonymous works, the term changed from the lesser of 100 years from creation or seventy-five years from publication to the lesser of 120 years from creation or ninety-five years from publication.¹⁶⁸ In addition, Congress increased the second term of copyright for works published prior to 1978 from forty-seven years to sixty-seven years. Thus, works published as early as 1923 and for which renewal had been obtained were protected for a total of ninety-five years. Finally, unpublished works were protected for the life of the author plus seventy years, with a term for older works that would not end before December 31, 2002; works published by that date would enjoy a term ending December 31, 2047.¹⁶⁹

D. *The Debates*

1. *The Differences*

There was one very significant difference between the debate that preceded the enactment of the Sonny Bono Act and the one that preceded the Talfourd Act: the dissent to the Sonny Bono Act was limited and unsuccessful, whereas the opposition to Talfourd's proposal was, not to understate, vigorous and to a degree successful. Talfourd's Act was less than its namesake hoped for. This is not to say there was not opposition to the Sonny Bono Act; there was—but mainly from outside the Congress itself.¹⁷⁰ The reason there was not

164. S. 483, 104th Cong. (1996).

165. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. 1, (codified at 17 U.S.C. §§ 101-305), 112 Stat. 2827, 2834 (1998).

166. *Id.*

167. 17 U.S.C. § 302.

168. *Id.*

169. *Id.* § 303.

170. *See supra* note 161.

as vigorous a dissent in Congress in the late twentieth century as there had been in the Parliament in the nineteenth century lies in the differences between the two economies. Nineteenth century England had an industry-based, goods economy.¹⁷¹ Intellectual property was not then a source of significant revenue, at least not international revenue.¹⁷² In contrast, the late twentieth/early twenty-first century U.S. economy has been driven in large measure by intellectual property.¹⁷³ Congressman Howard Coble summed it up best: “Our most valuable economic resource is no longer our industrial power and natural resources, but the creative potential of the minds of our citizens.”¹⁷⁴ The Senate report accompanying the 1996 term extension bill emphasized the importance of intellectual property to the U.S. economy:

America exports more copyrighted intellectual property than any country in the world, a huge percentage of it to nations of the European Union. In fact, in 1996, the core U.S. copyright industries achieved foreign sales and exports exceeding \$60 billion, surpassing, for the first time, every other export sector, including automotive, agriculture and aircraft. . . . In fact, in 1996, the total copyright industries employed more workers than the four leading noncopyright manufacturing sectors combined.¹⁷⁵

The economies of nineteenth century England and twenty/twenty-first century America were very different. The technology for exploiting copyrighted works had gone from printing and live performances to phonorecords, motion pictures, radio television, and the Internet. Even so, as shown below, the debate about the Sonny Bono Act was in many ways an echo of the debate over the Talfourd Act as shown below.

Both the dialogue that led up to the Bono Act and that which led

171. See CRAFTS, BRITISH ECONOMIC GROWTH DURING THE INDUSTRIAL REVOLUTION 57 (1985); CLIVE H. LEE, THE BRITISH ECONOMY SINCE 1700: A MACROECONOMIC PERSPECTIVE 3–23 (1986); N.F.R.; BRIAN R. MITCHELL, ABSTRACT OF BRITISH HISTORICAL STATISTICS 366 (1962).

172. See CRAFTS *supra* note 171.

173. Copyright Term Extension Act, 144 CONG. REC. H1458 (daily ed. Mar. 25, 1998) (statement of Rep. Coble).

174. *Id.*

175. 144 CONG. REC. S12,377 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch).

up to the Talfourd Act included a patriotic call to arms. In 1998, Senator Kennedy stated, "Effective copyright protection is an important national priority. If the United States is to continue its leadership in [the] world of ideas and creativity, we must continue to provide a climate that encourages America's authors, artists, inventors and composers and the important work that they do."¹⁷⁶ Little more than a century and a half earlier, Viscount Mahon had said, "I should say let England take the lead; let it not be said that in so noble a work Englishmen alone were backward."¹⁷⁷

The comparison of the debates that preceded the enactments of the Talfourd Act and the Sonny Bono Act reveals a number of themes: (1) the desirability of extending the term of copyright as an incentive to creativity; (2) the proposed term extension's effect on the price to the consumer; (3) the possibility of censorship by the heirs of authors; and (4) the desirability of a retroactive application of term extension.

2. Term Extension as an Incentive to Creativity

a. PRO—The proponents of term extension argued that it was not enough to grant copyright to an author during the author's lifetime, but that the copyright term should also benefit the family of a deceased author.

Certainly one of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and grandchildren. Whatever the reason, the inescapable conclusion must be drawn that copyrights in valuable works are too often expiring before they have served their purpose of allowing any author to pass their benefits on to his or her heirs.¹⁷⁸

—Senator Hatch, 1995

176. 144 CONG. REC. S11,673 (daily ed. Oct. 7, 1998) (statement of Sen. Kennedy).

177. 61 PARL. DEB. (3d ser.) (1842) 1361 (Eng.).

178. *Copyright Term Extension Act of 1995: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 2–3 (1995) [hereinafter *Hearing Before the S. Judiciary Comm.*] (statement of Sen. Hatch).

*[W]hile providing for the instruction and the delight of distant ages, to contemplate that he shall leave in his works themselves some legacy to those for whom a nearer, if not a higher duty, requires him to provide, and which shall make "death less terrible."*¹⁷⁹

—Talfourd, 1837

[T]he primary purpose of a proprietary interest in copyrighted works that is descendible from authors to their children and even grandchildren is to form a strong creative incentive for the advancement of knowledge and culture in the United States.¹⁸⁰

—Senate Report, 1996

*Believe me the report of your proceedings to-night will be watched with deep anxiety by many a mother sorrowing for the future fortunes of her children, by many a writer whose eye-sight perhaps has failed in long labours for the cause of knowledge, and whose declining years are saddled by the thought that his works—the labours of his life—are all he can bequeath to those he loves, and that even those works you will not allow him to call his own. This is no imaginary picture—even to the remotest districts of the kingdom—even among the hills of Cumberland—will your decision of to-night be most anxiously awaited.*¹⁸¹

—Viscount Mahon, 1840

When, however, we so often see copyrights expiring before even the first generation of an author's heirs have fully benefited from them, then I believe it is accurate to say that our term of copyright is too short and for too limited a time.¹⁸²

—Senator Hatch, 1995

179. 38 PARL. DEB. (3d ser.) (1837) 873 (Eng.).

180. S. REP. NO. 104-315, at 11 (1996).

181. 52 PARL. DEB. (3d ser.) (1840) 413 (Eng.).

182. *Hearing Before the S. Judiciary Comm.*, *supra* note 178.

*What could be more monstrous than . . . [a] man possessing a revenue arising from works of great learning, of which he was the author, . . . by which he was enabled to support his family in comfort and respectability, . . . [finding] . . . at the very moment of death, as soon as his eyes were closed, that the doors of his house would be forced open, his family driven from its shelter, and his effects seized by strangers and distributed amongst the public.*¹⁸³

—Lord Chancellor, 1842

The observation was also made, both in the twentieth century and the nineteenth century, that not all authors are blessed with economic independence:

What we are saying is, we want to encourage creativity, not simply as a hobby, not simply as something that people who are independently wealthy can do on their own time, but as a way for people to earn a living to support themselves and their families.¹⁸⁴

—Congressman Frank, 1998

*He found himself born to an inheritance of wealth, and he found at the same time with pain, that others, who were far superior to him in merit, industry, and reputation, were far below him in the accidental gifts of fortune—he found men, who were an honour to their country, subject to wants and privations which such merit ought never to have known. The object then of the Bill was this, to give these eminent men full scope for their talents, and to enable them, by their own exertion, to obtain that competency which he and others possessed, without any merit of their own.*¹⁸⁵

—Viscount Mahon, 1840

183. 63 PARL. DEB. (3d ser.) (1842) 782 (Eng.).

184. 144 CONG. REC. H1,459 (daily ed. Mar. 25, 1998) (statement of Rep. Frank).

185. 52 PARL. DEB. (3d ser.) (1840) 406 (Eng.).

Proponents also personalized the arguments by reference to authors of their day:

[T]he famous American composer Irving Berlin, who wrote such famous musical works as 'A Pretty Girl is Like a Melody,' 'What I Will Do,' [sic] and 'Alexander's Rag Time Band,' began publishing in 1907, and died in 1989, at an age of 101. Not only did he survive the 75-year fixed term of protection in some of his own works, even for his most famous works, his heirs will benefit from only a few years of protection. In an increasing number of cases, widows and widowers of American authors are outliving the 75-year term of copyright protection in their spouses' works.¹⁸⁶

—Senate Report, 1996

*It is unjust in this case, which is that of Wordsworth now in the evening of life, and in the dawn of his fame, to allow the author to share in the remuneration society tardily awards him?*¹⁸⁷

—Talfourd, 1838

186. S. REP. NO. 104-315, at 10–11 (1996). One of Berlin's daughters submitted her own written statement: "Because of my father's long life and young beginnings, his songs—most notably 'Alexander's Ragtime Band'—began falling into the public domain more than a decade ago, before he himself died. At that time his daughters were in their forties and fifties and his grandchildren (all but one) in their teens and twenties. Every year now more of those songs he hoped to leave as a legacy to those children and grandchildren become public property." *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 104th Cong. 272 (1995) [hereinafter *Hearing Before House Judiciary Comm.*] (statement of Mary Ellin Barrett, daughter of Irving Berlin).

187. 42 PARL. DEB. (3d ser.) (1838) 559 (Eng.). As Talfourd recounted, Mr. Wordsworth filed his own petition with the House of Commons:

Mr. Wordsworth states that he is on the point of attaining his 70th year; that 46 years ago he published his first work, and that he has continued to publish original works at various intervals down to 1835. The copyright in a considerable part of these works is now contingent on his life; in a few years the far larger portion will be holden by the same tenure; and a most extensive and elaborate work, *The Excursion*, will be in this condition, if he should be spared for four years longer. He represents, that 'having engaged and persevered in literary labours,

The reference to the situation of particular authors gave rise to criticism from the opponents of term extension:

We do not recognize new intellectual property rights, or strengthen old ones, simply because it appears that a worthy person may benefit; rather, we do so only for a public purpose and where it appears that there will be a public benefit.¹⁸⁸

—Professor Karjala, 1995

*Members had been roused and enlisted on behalf of one or two destitute authors, that the House would be anxious to inquire in what respect a new Act of Parliament should be framed for the purpose of extending the period of copyright from what it now was.*¹⁸⁹

—Mr. Wakely, 1840

Serjeant Talfourd's reply seems equally responsive, not only to the criticism of 1840, but to that of 1995 as well:

*[A]lthough I agree that we ought not to legislate for these cases, I contend that we ought to legislate by the light of their examples.*¹⁹⁰

less with the expectation of producing speedy effect than with a view to interest and benefit mankind remotely though permanently, his works, though never out of demand, have made their way slowly into general circulation;' and he states as a fact directly bearing on this question, that his works have, within the last four years, brought a larger emolument than in all his preceding life, which would now be bounded by his death

45 PARL. DEB. (3d ser.) (1839) 928.

188. *Hearing Before House Judiciary Comm.*, *supra* note 186, at 294–95 (statement of Dennis S. Karjala, Professor of Law, Arizona State University, on behalf of the U.S. copyright and intellectual law professors).

189. 51 PARL. DEB. (3d ser.) (1840) 1251 (Eng.).

190. 42 PARL. DEB. (3d ser.) (1838) 567 (Eng.).

- b. CON—Those who opposed term extension argued that there was no evidence that the then existing term was insufficient to encourage creativity.

[T]here is no evidence that the current monopoly grant of life-plus-50 years is an insufficient incentive. There is nothing in the hearing record that suggests extending the copyright term will result in more works or higher quality works.¹⁹¹

—Senator Brown, 1996

*There was only one question to be asked. Was the present term of copyright sufficient effectually to secure to an author himself the benefit which he ought to derive from the exercise of his talents? If so, then why extend it? It might be a pleasing thing to contemplate the extension of the benefit to the posterity of an author. But it was impossible so to extend it without doing a great and manifest injustice to the public.*¹⁹²

—The Solicitor General, 1838

It does not follow that a longer term automatically drives creative authors to work harder or longer to produce works that can be enjoyed by the public. Indeed, there is necessarily a type of diminishing return associated with an ever-longer protection period, because the benefit to the author must be discounted to present value.¹⁹³

—Professor Karjala, 1995

The question, therefore, arose with double force, whether the privilege at present enjoyed by authors was not sufficient to induce them to employ their talents. He did not think that the hon. and learned Member had succeeded in establishing the position that it was not sufficient; and on

191. S. REP. NO. 104-315, at 32 (1996) (minority view of Sen. Brown).

192. 42 PARL. DEB. (3d ser.) (1838) 570 (Eng.).

193. *Hearing Before the House Judiciary Comm.*, *supra* note 186, at 299 (statement of Dennis S. Karjala, Professor of Law, Arizona State University, on behalf of the U.S. copyright and intellectual law professors).

*that ground, principally, he (Mr. Hume) was opposed to the Bill. If the principles contained in the petition which he had that night presented against the Bill, were correct, it would be for the House to consider whether the present limitation of copyright to twenty-eight years was insufficient; and whether it would be wise or expedient to extend the duration of the copyright to fifty years, or more.*¹⁹⁴

—Mr. Hume, 1838

If the proponents of term extension could employ the examples of individual authors, so could the opponents:

Do you know any creator that would fail to create if the monopoly grant ran out at life-plus-50 years of protection rather than life-plus-70 years? Would Hemingway have produced another work if he were guaranteed another 20 years of copyright protection? Would Wyeth have painted more? Would Sinatra have sang more?¹⁹⁵

—Senator Brown, 1996

*Dr. Johnson died fifty-six years ago Now, would the knowledge, that this copyright would exist in 1841, have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal?*¹⁹⁶

—Mr. Macaulay, 1841

194. 42 PARL. DEB. (3d ser.) (1838) 568 (Eng.).

195. S. REP. NO. 104-315, at 32 (1996) (minority view of Sen. Brown).

196. 56 PARL. DEB. (3d ser.) (1841) 349-50 (Eng.).

3. Prices Are Lower for Works Under Copyright

a. PRO—The proponents of term extension argued that prices for works under copyright were lower than for works in the public domain.

This is *Moby Dick*, written by Herman Melville in 1851. This book went into the public domain over 100 years ago. This is *The Chamber*, written by John Grishman [sic] in 1994. The price of *Moby Dick* is twelve dollars and ninety-five cents. The price of *The Chamber* is seven dollars and fifty cents.¹⁹⁷

—Mr. Menken, 1995

*If they took the works of Scott, Byron, Southey, Wordsworth, and he might add the works of a relation of his own, and compared the price obtained for them with the price charged by the trade for the works of Hume, Johnson, Burke, and other authors of the last age, they would find that the public obtained the works of the former at a far cheaper rate than those of the latter authors, who had all been dead for many years.*¹⁹⁸

—Mr. D'Israeli, 1838

In theory, at least, opponents of copyright extension are correct to observe that the price charged consumers for a work will be higher if copyright subsists in the work than if the work is in the public domain. But theory does not always prove true in practice, and it is entirely plausible that

197. *Hearing Before the S. Judiciary Comm.*, *supra* note 178, at 54 (statement of Alan Menken).

198. 42 PARL. DEB. (3d ser.) (1838) 577 (Eng.).

the exploitation of public domain works will result in comparable, or even higher, prices to consumers.²⁰⁰

—Professor Goldstein, 1995

*Had books become cheaper or dearer since the extension of the copyright in 1814? Was it not within the knowledge of every individual, that books had become cheaper since that time, were daily becoming cheaper, and thus becoming more accessible to the mass of mankind. It was the interest of the persons who published, whether he were an author or a bookseller, to print the books in a cheap shape.*²⁰⁰

—Chancellor of the Exchequer, 1839

- b. CON—The opponents of term extension argued to the contrary, that, in fact, works in the public domain were sold at lower prices than works under copyright.

The direct economic costs of a 20-year-longer period of protection, although difficult to calculate precisely, includes higher cost to the consuming public for works that would otherwise be in the public domain. That these costs are substantial is shown by the very claims of the proponents of this legislation that they will miss out on the European windfall if we do not extend our term to that of Europe.²⁰¹

—Professor Karjala, 1995

*If Gentlemen who supported the measure would show him that he was in error—if they would show him that printing under a copyright would be cheaper than printing without a copyright, his opposition to the Bill would be withdrawn.*²⁰²

—Mr. Grote, 1838

199. Letter from Paul Goldstein, Professor of Law, Stanford Law School, to Jack J. Valenti, President, Motion Picture Association of America 3–4 (June 28, 1995), in *Hearing Before House Judiciary Comm.*, *supra* note 186, at 583–84.

200. 45 PARL. DEB. (3d ser.) (1839) 941.

201. *Hearing Before the House Judiciary Comm.*, *supra* note 186, at 296 (statement of Dennis S. Karjala).

202. 42 PARL. DEB. (3d ser.) (1838) 585 (Eng.).

[T]he only reasonable conclusion is that the increased term would impose a heavy cost on the public—in the form of higher royalties and an impoverished public domain—without any countervailing public benefit in the form of increased authorship incentives.²⁰³

—Law School Professors, 1995

*He held in his hand a statement by which it appeared that during the last year of the existence of the copyright of Sir Walter Scott's 'Lay of the last Minstrel,' that work was sold at two guineas; but that in the year after the expiration of the copyright it was published at five shillings; and in the subsequent year at eighteenpence! The same was the case with respect to 'Marmion.' It was originally published at a guinea and a half. After the expiration of the copyright it was published at five shillings; and more recently at tenpence! Was not that diminution of price a great advantage to the public—an advantage which ought not to be relinquished unless on very good grounds? . . . Why, without being desired to do so, agree to a measure calculated to produce a great evil—that of increasing the price of books?*²⁰⁴

—Mr. Hume, 1838

4. Works Under Copyright Are Not Censored by Successors in Interest

a. PRO—The proponents of term extension argued that an author's successors in interest were not likely to prevent publication of the author's works.

Copyright owners are generally interested in exploiting their works for money. Despite isolated anecdotes, situations where authors or their families seek to deny public access to works are unusual. They will be even less

203. *Hearing Before S. Judiciary Comm.*, *supra* note 178, at 149 (statement of various law school professors).

204. 42 PARL. DEB. (3d ser.) (1838) 569 (Eng.).

frequent during the extended term, more than 50 years after the author's death; strong personal feelings about a work's contents tend to diminish over time.²⁰⁵

—Professor Perlmutter, 1995

*It had been brought forward as an argument, that the measure would put it in the power of an individual to refuse the publication of a work calculated to amuse or to instruct the people, that it would give authors the power of withholding from the public works calculated to improve and to elevate the mind, and to promote the happiness and prosperity of the country. . . . In legislating on this important subject, they had no right to suppose, that such a difficulty would have to be encountered; but, on the contrary, they were bound to suppose, that a man in the possession of property would wish to make the best possible use of it, so as to reap from it the greatest possible advantage.*²⁰⁶

—Mr. D'Israeli, 1838

b. CON—The opponents of term extension argued that successors in interest might withhold publication where they disagreed with the author's sentiments.

The rights of the copyright owner include not only the right to profit from the exploitation of the work, but also the right to withhold that work, even where a profit could be earned from its exploitation. Sometimes, it is rational for the copyright owner to withhold permission because the new exposure of an old work might interfere with the market prospects of a new one.

Sometimes, however, copyright owners refuse to license their works—even those which have little current

205. Memorandum from Shira Perlmutter, Professor of Law, Catholic University of America, to Jack J. Valenti, President, Motion Picture Association of America 12 (July 10, 1995), in *Hearing Before House Judiciary Comm.*, *supra* note 186, at 598.

206. 42 PARL. DEB. (3d ser.) (1838) 576 (Eng.).

commercial value—for other, non-economic reasons. It is in the very nature of copyright that during its limited term, it is a charter for ‘private censorship,’ and copyright owners routinely exercise the authority the law gives them to control the content of the uses other[s] make of their works.²⁰⁷

—Professor Jaszi, 1995

*The heirs of an author might entertain opinions, political or religious, opposed to those maintained in his work, and might, in consequence, think it advisable that the work should be suppressed, and in the result, the public would be deprived of the work altogether. He would suppose the case of the prose works of Milton coming into the hands of a person who differed with the writer’s opinions respecting the royal cause during the civil war. Would any man contend, that the public would not have had great and just cause for complaint, had they been suppressed in consequence of such a circumstance?*²⁰⁸

—Lord John Russell, 1838

While primary control over the work, including the rights to refuse publication or republication and to create derivative works, properly remains in the author who has created it, giving such control to distant descendants of the author can deprive the public of creative new works based on the copyright-protected work. Artistic freedom to make creative derivative works based on public domain works is a significant public benefit, as shown by musical plays like *Les Miserables*, *Jesus Christ Superstar*, and *West Side Story*, as well as satires like *Rosencrantz and Guildenstern are Dead* and even literary classics like James Joyce’s *Ulysses* Authors of histories and biographies can also be inhibited from presenting independent analyses of earlier authors and their works by descendants who, for whatever

207. *Hearing Before S. Judiciary Comm.*, *supra* note 178, at 76 (statement of Peter A. Jaszi).

208. 43 PARL. DEB. (3d ser.) (1838) 557 (Eng.).

personal reason, use copyright to prevent the publication of portions of protected works.²⁰⁹

—Professor Karjala, 1995

*I think it right, Sir, to call the attention of the House to an evil, which is perhaps more to be apprehended when an author's copyright remains in the hands of his family, than when it is transferred to booksellers. I seriously fear, that if such a measure as this should be adopted, many valuable works will be either totally suppressed or grievously mutilated Most of us, I am sure, have known persons who, very erroneously, as I think, but from the best motives, would not choose to reprint Fielding's novels, or Gibbon's History of the Decline and Fall of the Roman Empire. Some Gentlemen may perhaps be of opinion, that it would be as well if Tom Jones and Gibbon's History were never reprinted.*²¹⁰

—Mr. Macaulay, 1841

5. Authors Should Enjoy the Term Extension for Already-Published Works Still Under Copyright

a. PRO—The proponents of term extension argued that retroactive protection would enhance the possibility that the quality of copies of works would be maintained and continued distribution assured.

The public will benefit in another meaningful respect from the extension of term for . . . existing . . . works. During the extra 20 years, copyright owners will have a greater incentive to take whatever steps may be necessary to disseminate their works in high-quality form if they can retain control over reproduction and distribution, and exclude free riders from the market.²¹¹

—Professor Perlmutter, 1995

209. *Hearing Before S. Judiciary Comm., supra* note 178, at 82 (statement of Dennis S. Karjala).

210. 56 PARL. DEB. (3d ser.) (1841) 353 (Eng.).

211. Memorandum from Shira Perlmutter, *supra* note 205, at 593.

*[T]ake any of the standard works of our literature at present out of print, and selling at a high price in the market. Why selling at a high price? Because nobody would venture to republish them. Every man said, "If I republish these works to-morrow, somebody else will bring out an edition the day after, and so my capital will be lost; give me indemnity, give me security, and I will lay out my capital in the republication of these works, and sell them at a comparatively cheap price to the public."*²¹²

—Lord Chancellor, 1842

Extending copyright protection will be an incentive for U.S. authors to continue using their creativity to produce works, and provide copyright owners generally with the incentive to restore older works and further disseminate them to the public. Authors will be able to pass along to their children and grandchildren the financial benefits of their works.²¹³

—House Report, 1995

*[P]aradoxical as it might seem—it was undoubtedly true, that in some instances where copyright existed, books could be sold even cheaper than where there was none. This applied to works of great popularity, and requiring a large number of editions, some in one size and some in another—some with large type and some with small—so as to meet the various tastes of purchasers. Now, if a work of this kind were illustrated with many expensive plates or maps, then it might be published at a cheaper rate by a bookseller who had the exclusive right of issuing it, than by several, who would each of them be obliged to incur the expense of having a separate set of plates engraved. It was therefore not clear, that the price of works was in all cases enhanced by the existence of copyright.*²¹⁴

—Viscount Mahon, 1840

212. 63 PARL. DEB. (3d ser.) (1842) 786 (Eng.).

213. H.R. REP. NO. 105-452, at 4 (1995).

214. 52 PARL. DEB. (3d ser.) (1840) 409–10 (Eng.).

Whatever work is not owned is a work that no one protects and preserve [sic]. The quality of the print is soon degraded. There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale. A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues. How does the consumer benefit from the steady decline of a film's quality? What academics offer in numbing detail are the arcane drudgeries of graphs and charts, all of which dwell in ivory tower isolation, separated from the realisms of the marketplace.²¹⁵

—Jack Valenti, 1995

*Where there was no copyright, great works often became scarce and got out of print. The works of Bacon and Hobbes were difficult to get, because it was nobody's interest to publish them.*²¹⁶

—Mr. Milnes, 1842

b. CON—Those who opposed retroactive application of any term extension argued that it created no incentive for creation, as the work already existed, and deprived the public of anticipated unfettered access.

[A]s much as we may want to, we cannot provide an incentive to create something that has already been created! This Bill would retroactively apply term extension to add 20 years of protection for works already in existence. Furthermore, many of the creators of these prior works are dead. No grant of additional time will help them create, but it will give the current owners . . . an enormous windfall at the expense of consumers.²¹⁷

—Senator Brown, 1996

215. *Hearing Before S. Judiciary Comm., supra* note 178, at 42 (statement of Jack Valenti).

216. 61 PARL. DEB. (3d ser.) (1842) 1387 (Eng.).

217. S. REP. NO. 104-315, at 32 (1996) (minority view of Sen. Brown).

*It was, moreover, an ex post facto law, and therefore still more objectionable. It gave to authors the copyright of works already published for sixty years, instead of twenty-eight. There was just as much right to take from the author's term fourteen years as to deprive the public of thirty-two years' right—which was the effect of this Bill.*²¹⁸

—Mr. Baines, 1839

Obviously, justifications based on the provision of incentives to creativity are irrelevant where the works subject to terms extension are already in being. Indeed, such an extension can only serve to [act] as a disincentive to new creativity, in that it must to some extent tend to discourage the making of new works derivative of those for which protection has been extended, which would otherwise be in the public domain.²¹⁹

—Professor Jaszi, 1995

*He would direct their Lordships' attention for a few moments to the 4th clause, which proposed to extend the term of copyright to works published prior to the passing of the act. He thought this clause would operate most injuriously to the public . . . Works were written and published with a full knowledge of the law relating to copyright. The author certainly could not complain of being treated unfairly; but by the 4th clause it was proposed to take away from the public an interest in which they had a legal right, and it gave the author an extended term of copyright in books published before this act was proposed for the adoption of Parliament.*²²⁰

—Lord Cottenham, 1842

218. 45 PARL. DEB. (3d ser.) (1839) 936 (Eng.).

219. *Hearing Before S. Judiciary Comm.*, *supra* note 178, at 75 (statement of Peter Jaszi).

220. 63 PARL. DEB. (3d ser.) (1842) 810 (Eng.).

The parallels between the debates over the Talfourd Act and the Sonny Bono Act, like the similarities between “re-origination” and “transformative use,” demonstrate that, indeed, “everything old is new again.” It is not enough, though, to look back from today to yesterday for lessons to be learned: we must continue to do so in the future, and it is with the future in mind that I close this article.

E. The Next Time?

In his appearance before the Senate Committee on the Judiciary on September 20, 1995 Professor Peter Jaszi stated:

Nineteen years ago, the Copyright Act of 1976 added 19 years to the life of then-subsisting renewal copyrights. The current legislation would add 20 more years. A cynical observer might be forgiven the suspicion that it represents a downpayment on perpetual copyright on the installment plan, *thus raising obvious and substantial constitutional issues . . .*²²¹

Professor Jaszi went on to state, “it is my opinion that . . . across-the-board copyright term extension of the sort proposed . . . may well constitute a violation of the ‘limited times’ provision of Article I, Section 8, Clause 8 of the Constitution.”²²² He cautioned,

The question of how often, and under what circumstances, Congress would have to extend subsisting copyrights in order to run afoul of the “limited times” language of the Copyright Clause is an interesting one, which would be likely to be litigated seriously were this term extension measure to become law.²²³

His prophecy proved accurate. In 1999, Eric Eldred and others who commercially exploited public domain works challenged the constitutionality of the Sonny Bono Act as a violation of the First Amendment and, with respect to the retrospective extension of copyright, as beyond the Congress’s enumerated power under the Copyright Clause.²²⁴ The plaintiffs lost in the district court²²⁵ and in

221. *Hearing Before S. Judiciary Comm.*, *supra* note 178, at 72 (statement of Peter Jaszi) (emphasis added).

222. *Id.* at 77.

223. *Id.* at 124.

224. *Eldred v. Reno*, 74 F. Supp. 2d 1, 2 (D.D.C. 1999), *aff’d*, 239 F.3d 372 (D.C. Cir. 2001), *aff’d sub nom.*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

the Court of Appeals.²²⁶ They fared no better in the Supreme Court.²²⁷ The petitioners argued that “even if the CTEA’s 20-year term extension is literally a ‘limited Tim[e],’ permitting Congress to extend existing copyrights allows it to evade the ‘limited Times’ constraint by creating effectively perpetual copyrights.”²²⁸ The Supreme Court disagreed.²²⁹ So, the twenty-year term extension was upheld.²³⁰

Professor Jaszi had posited that the twenty-year term extension was merely a down payment on perpetual copyright. The Supreme Court, as had the Court of Appeals below, held that a “regime of perpetual copyrights ‘clearly is not the situation before us.’”²³¹ One might, however, still ask whether the Sonny Bono Act is merely a down payment on perpetual copyright. Let’s take a look at the legislative history.

In a hearing before the House Subcommittee on Courts and Intellectual property on June 27, 1997, Chairman Coble posed a question to Fritz Attaway, Senior Vice-President, Government Relations, and General Counsel, Motion Picture Association of America:

225. *Id.* at 3.

226. *See Eldred*, 239 F.3d at 380.

227. *Eldred*, 537 U.S. at 222.

228. *Id.* at 208.

229. *Id.* “Nothing before this Court warrants construction of the CTEA’s 20-year term extension as a congressional attempt to evade or override the ‘limited Times’ constraint.” *Id.* at 209. It is interesting to note that, in *Eldred v. Ashcroft*, the Supreme Court cited to Samuel Johnson’s *Dictionary of the English Language* for the definition of limited: “At the time of the Framing, that word meant what it means today: ‘confine[d] within certain bounds’, ‘restrain[ed]’, or ‘circumscrib[ed].’” *Id.* at 199 (citing SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785)).

230. In the spirit of “everything old is new again,” it is worth comparing *Donaldson v. Beckett* in 1774 and *Eldred v. Ashcroft* in 2003. Each was brought before that nation’s highest tribunal: in England, the House of Lords and in the United States, the Supreme Court. Each upheld a legislative enactment: in England, the Statute of Anne, and in the United States, the Sonny Bono Act. In each, the plaintiff lost: in England, Thomas Beckett, and in the United States, Eric Eldred. Despite these similarities, there was one great difference: in England, the decision upheld a *shorter* copyright term than that claimed by the plaintiff, and in the United States, the decision upheld a *longer* term than that claimed by the plaintiff!

231. *Eldred*, 537 U.S. at 209.

Let us assume that this [twenty year] extension is enacted and approved, and then some guy comes along and says, maybe we need to extend it again. How long or how many times could the term be extended without running afoul of the constitutional structure allowing a grant for a limited time?²³²

Mr. Attaway responded:

It could be that *in 2020, circumstances would suggest that an additional term be provided*. I think it is a balance, and I think the world is coming to the conclusion that the correct balance today is life plus 70. . . .²³³

Congresswoman Bono, widow of performer, songwriter and congressman Sonny Bono, speaking of her late husband said:

Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.²³⁴

If the Sonny Bono Act is a down payment, when will the next installment come due? Mickey Mouse, in the guise of "Steamboat Willie," was born in 1928.²³⁵ But for the term extension, the first version of "Steamboat Willie" would have been in the public domain

232. *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearings Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 105th Cong. 83 (1997).

233. *Id.* (emphasis added).

234. 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Bono).

235. "On November 18, 1928, a little known character named Mickey Mouse stepped onto the silver screen." Legend on back of packaging for a *STEAMBOAT WILLIE* 1928 Holiday Plate 2000. Admittedly, the performance on "the silver screen" was not, itself, a publication. *Ferris v. Frohman*, 223 U.S. 424, 425 (1912). However, as the film was registered on December 16, 1930 by Walter E. Disney with a "publication" date of November 21, 1928, the film was subject to a finite term of copyright protection. Thus, under the 1976 Act, the copyright would have expired on December 31, 2003 (n.b., the legend on the plate package states a date of November 18, 1928, whereas, the registration form listed November 21, 1928).

at the end of 2003. The first bill to extend copyright by twenty years was introduced in 1995, some eight years before the first “Steamboat Willie” publications would be in the public domain. As it is, “Steamboat Willie” is protected through 2023. If the same timetable were followed as was done with respect to the 1998 Act, a Bill would be introduced in 2015, some ten years from now. This is not to say that Disney will, in fact, seek an extension, or that Superman, born in 1933 (the same year as your author), would seek protection beyond 2028 for his first publication, but, the two statements quoted above suggest that those who opposed the extension were not merely alarmists saying that the “sky is falling.”

It requires no particular citation to the myriad of articles in newspapers and magazines to suggest that the last several years have witnessed a widespread disregard of U.S. copyright law (and the copyright laws of other nations as well). Clearly, digital technology and the Internet have combined to create an environment in which copyright is flouted on a worldwide basis even in countries with highly developed and enforced domestic copyright laws such as the United States. Peer-to-peer sharing of music has been a major concern of the recording industry. Lawsuits have not only been filed against service providers such as Napster,²³⁶ Grokster,²³⁷ and KaZaA,²³⁸ but against individual consumers as well.²³⁹ The film industry is also concerned about unauthorized duplication of DVDs.²⁴⁰ People who would never engage in shoplifting at a record store or a video store think differently about unauthorized copying via the Internet. The 108th attempted to respond to the challenge of unauthorized copying without success. Presumably the 109th Congress will continue the effort. I shall not attempt to explain why otherwise law-abiding citizens flaunt the law where copyright is involved. What I would suggest is that any further increase in the term of copyright beyond that provided by the Sonny Bono Act is not

236. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

237. See, e.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir.), *cert denied*, 125 S. Ct. 686 (2004).

238. *Id.*

239. See, e.g., *Sony Music Entm't, Inc. v. Does 1–40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

240. See, e.g., *Living Room Pirates*, S.F. CHRON., Aug. 25, 2004, at B8.

likely to improve public attitudes towards copyright.

Over a century and a half ago, Thomas Babington, later Lord Macaulay, made a dire prediction about a breakdown of respect for copyright by the public. Given the current state of public attitude it is worth reflecting on his words of caution, which I quote at length.

On February 5, 1841, Thomas Babington Macaulay said:

I am so sensible, Sir, of the kindness with which the House has listened to me, that I will not detain you longer. I will only say this,—that if the measure before us should pass, and should produce one tenth part of the evil which it is calculated to produce, and which I fully expect it to produce, there will soon be a remedy, though of a very objectionable kind. Just as the absurd acts which prohibited the sale of game were virtually repealed by the poacher, just as many absurd revenue acts have been virtually repealed by the smuggler, will this law be virtually repealed by piratical booksellers. At present the holder of copyright has the public feeling on his side. Those who invade copyright are regarded as knaves who take the bread out of the mouth of deserving men. Every body is well pleased to see them restrained by the law and compelled to refund their ill-gotten gains. No tradesmen of good repute will have anything to do with such disgraceful transactions. Pass this law: and that feeling is at an end. Men of a character very different from that of the present race of piratical booksellers will soon infringe this intolerable monopoly. Great masses of capital will be constantly employed in the violation of the law. Every art will be employed to evade legal pursuit; and the whole nation will be in the plot. On which side indeed should the public sympathy be when the question is whether some book as popular as Robinson Crusoe, or the Pilgrim's Progress shall be in every cottage, or whether it shall be confined to the libraries of the rich for the advantage of the great grandson of a bookseller who, a hundred years before, drove a hard bargain for the copyright with the author when in great distress? Remember too that when once it ceases to be considered as wrong and discreditable to invade literary property, no person can say where the invasion will stop. The public seldom makes

nice distinctions. The wholesome copyright which now exists will share in the disgrace and danger of the new copyright which you are about to create. And you will find that, in attempting to impose unreasonable restraints on the reprinting of the works of the dead, you have, to a great extent, annulled those restraints which now prevent men from pillaging and defrauding the living.²⁴¹

If there is a next time for a further proposed copyright term extension, these words of Lord Macaulay provide a warning that may be even more compelling in the future than it was in 1841. It would be well advised to keep Macaulay's warning in mind, for, as Santayana reminds us, "Those who cannot remember the past are condemned to repeat it,"²⁴² or as the song says:

Don't throw the past away, you might need it some rainy day!

241. 56 PARL. DEB. (3d ser.) (1841) 356–57 (Eng.).

242. GEORGE SANTAYANA, THE LIFE OF REASON 284 (1905).

