

Copyright cases not to be forgotten

Presented by:

Gwilym Harbottle
Hogarth Chambers

Adela Wang
Herchel Smith PhD candidate at Queen Mary University

James Parish
Kings College, London

Alison Firth
BLACA Vice-Chairman

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Pope v Curl

Gwilym Harbottle 2024

Alexander Pope



“The Unspeakable Curll”



Pope: Authors: William Bromley and D. Gibson artist. Llyfrgell Genedlaethol Cymru – The National Library of Wales

Curll: Grub Street Journal No. 147, 26 October 1732. Folger Shakespeare Library. [Creative Commons Attribution-ShareAlike 4.0 International License](#) (CC BY-SA 4.0). Part of a triptych. Author unknown.

The facts: per the secondary sources

16 April 1741: authorised (by Pope) London publication of the Swift Correspondence as part of a larger book: Mack p. 670; Elwin (lxxiii) quotes the preface (probably untrue): "copied from an impression sent from Dublin, and said to have been printed by the Dean's direction,... which was begun without our author's knowledge, and continued without his consent."

30 May 1741: Curl's publication of the Swift Correspondence with additional material. [Rogers p. 397; Straus p. 310]. Copied from the 16 April 1741 edn (Rose Ch. 4 fn. 9, Rogers p.397) or an advance copy of the Irish edition (Straus p. 192)

5 June 1741: On Pope's application: interim injunction restraining printing, publishing and vending letters written by Pope. Recites that Pope is the Author and "never sold or disposed of the Copy-right": Entry from the Court's Book of Orders, London (1741), transcribed by Neil Younger, in Primary Sources

?? June 1741: Swift Correspondence published in Ireland: Mack p. 670.

17 June 1741: Curl's motion to dissolve the injunction dismissed (1741) 2 Atk. 342.

The Statute of Anne: relevant provisions

- An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned
- [*Since the lapse in 1662 of the Licensing Act in 1695*] Printers, Booksellers and others have of late frequently taken the Liberty of printing etc. Books and other Writings without Consent of authors or Proprietors of such too often to the Ruin of them and their Families
- For Preventing such Practices and the Encouragement of Learned Men to Compose and Write useful Books
- Author or transferee of the Copy of Books already printed on 10 April 1710 has sole Right and Liberty to print for 21 years from 10 April 1710
- Books (i) composed but unprinted on 10 April 1710 or (ii) not composed on that date: same rights for Author/Assignee for 14 years from First Publishing [*Moral right of divulgation?*] after which the Right reverts to [*or remains with?*] the Author

The Bill of Complaint

(written by William Murray, 5 KBW – later Lord Mansfield – and transcribed by Kate Brookson-Morris – see Primary Sources) asserts:

- the Statute provides for the author to have the sole liberty of printing books composed on or after commencement for a term of 14 years from first publication
- Pope is the sole author of letters written by him and had “never disposed of the Copy right of such Letters” and has the sole right of printing
- Pope hoped none of the letters would be printed without his consent but Curl has printed and published them in a Surreptitious & Pyrate Edition [sic] and threatens to continue to do so
- Pope is without remedy at common law
- Seeks information on oath about sales, profits etc. and whether Curl’s activities “are not or will be any & what Prejudice to [Pope] in preventing [Pope] from Printing, Publishing and Selling the letters”

The Answer

(written by John Browning – and transcribed by Kate Brookson-Morris – see Primary Sources):

- Admits parts of the Statute relied on by Pope
- Puts Pope to proof of:
 - sole authorship
 - proprietorship of such part of the Book mentioned in Pope's Bill as purports to be written by him
 - not having disposed of his Right therein
 - whether Pope has the sole right of printing etc.
- Letters were all sent and so Pope not Author or Proprietor of the said letters
- Letters not a work of the type protected by the Statute
- Letters first printed in Dublin by the direction of Swift so can be copied in England (and vice versa) and Curl's edition copies that edition

The decision (Lord Chancellor Hardwicke)

- The Statute only refers to “books” (not, e.g., “[literary] works”). But no reason to distinguish between books of letters and other learned works. Even if the letters were only on “familiar subjects, and inquiries after the health of friends”, no works have done more service to the public (compare letters composed for publication – “very little worth ... reading”)
- A letter only gives a “special property” to the recipient. Possibly the property in the paper may belong to the receiver but this does not give a licence to the world to publish for at most the receiver has only a joint property with the writer [*separation of the fixation from the work*]
- Publication in Ireland [*in a “personal union” with but not part of GB*] did not make the work a “lawful prize” here. It would enable booksellers to “intirely evade the act” [*international exhaustion?*]
- Injunction continued but only in relation to letters written by Pope

Aftermath: a case of unpublished letters?

Lord Mansfield in *Tonson v Walker* (1752) 3 Swanston 672 at 674: Pope's Bill was a "Bill to prevent publication of his letters with Dr Swift". In *Tonson v Collins* (1761) 1 Black W. 301 (*The Spectator*) at 311: *Pope v Curl* fell into a category of cases where "there hath been no printing or publication at all"

Tonson v Collins (1761) 1 Black W. 321 Argument (of Blackstone) on the stood over case at 331: *Pope v Curl* is the case of an unpublished manuscript. ... Indeed it goes much farther. If, in any case, an author parts with his property by publication, the writer of a letter seems to have consigned his to his correspondent. [Case referred to the 12 common law judges who refused to hear it on the basis that it was "collusive": Deazley pp. 146-147]

Millar v Taylor (1769) 4 Burr. 2303, 98 ER 201:

Aston J ER at 221 "It is settled and admitted that literary compositions in their original state, and the incorporeal right of the publication of them are the private and exclusive property of the author, and that they may ever be retained so; and that if they are ravished from him before publication, trover or trespass lies": citing *Pope v Curl*

Yates J ER at 241-242: in *Pope v Curl* was a case "on private trespass; surreptitiously or treacherously publishing what the owner had never made public at all, nor consented to the publication of"

Lord Mansfield at 252: "I know, Mr. Pope had no paper upon which [his letters to Swift] were written; and a very imperfect memory of their contents: which made him the more anxious to stop this publication -; knowing the printer had got them"

Unpublished letters?

Donaldson v Beckett (1774) *Hansard*, 1st ser., 17 (1774): 953-1003; 1 ER 837 (common law copyright):

- Appellants' submission (ER p. 138) listed *Pope v Curl* amongst “Injunctions for printing unpublished MSS. without licence from the author.”
- Baron Eyre (*Hansard* p. 973): injunctions had frequently been granted but the court had cautiously avoided giving any final adjudication. Injunctions had been granted on the appearance of something fraudulent upon the face of the transactions as in *Pope v Curl*

Gurry §2.39 “Statute of Anne was limited in scope to published works”. §2.41: “Pope’s bill ... put the claim squarely, if surprisingly, in terms of an author’s rights under the Statute of Ann”; §2.41 “Authorial rights in unpublished manuscripts were further recognised ...”. But see also §4.78, suggesting that the case was one of common law copyright.

Deazley p. 73: “the Act said nothing as to an author’s rights over his unpublished work. ... In this absence [Lord Hardwick] began to formulate a policy-oriented approach”. See also fn. 120 on p. 74 and p. 141.

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Ronan Deazley *On the Origin of the Right to Copy* Hart Publishing 2004 (“Deazley”)

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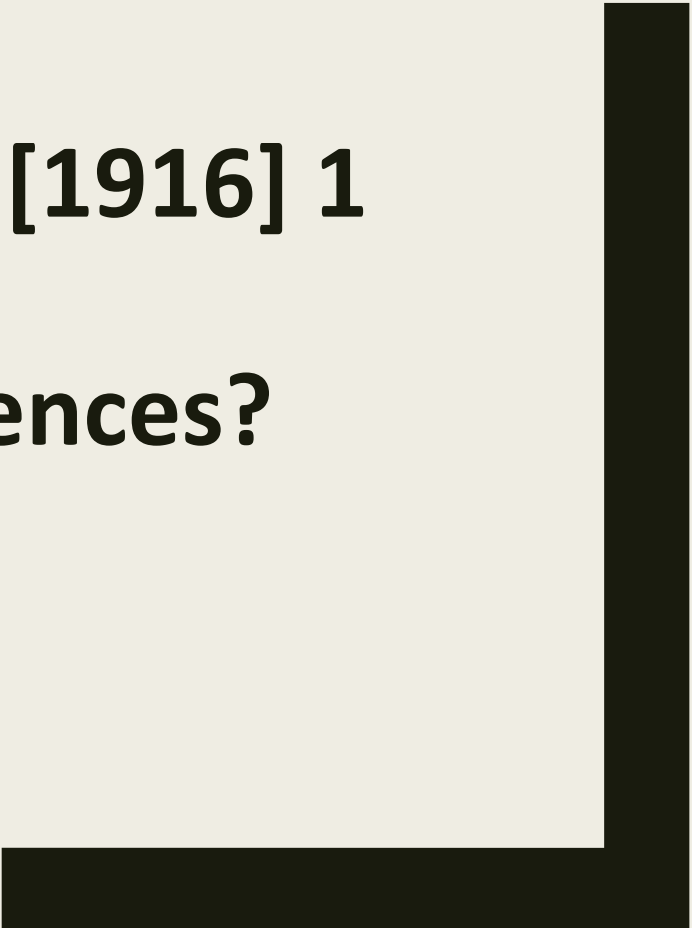
Ralph Straus *The Unspeakable Curll* Augustus M. Kelley, New York, 1970, a reprint of the first Edn, 1927 (“Straus”)

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Glyn v Weston Feature Film Co [1916] 1
Ch 261:
A Tale of Unintended Consequences?

Adela (Zhixuan) Wang

a.w.wang@qmul.ac.uk





The '*Three Weeks*' Litigation

- "*Three Weeks*" (1907) – Elinor Glyn's novel
 - Glyn was financially supported by the Society of Authors for the litigation cost
 - "*Three Weeks*" (1914) – a US film adaptation authorised by Glyn
- "*Pimple's Three Weeks (without the Option)*" (1915) – a comedic film lampooning Glyn's novel

Held:

- Younger J found in favour of the film company, Weston, agreeing that the two works were so different that it could not be said a substantial part had been copied.
- And that would have sufficed, except...

A Lengthy Literary Analysis

- About one-third of the analysis was dedicated to an extensive literary analysis of Glyn's novel, before concluding it as being 'hackneyed'. (Phillips 1982)
- 'These exaggerated incidents or others like them are of course quite absurd enough to be destitute of novelty in literature of the kind; but if the particular cachet of the plaintiff's novel is not to be found in this setting, then, so far as I can see, it has no cachet at all. At the best, the plaintiff has chosen a hackneyed theme for her episode, and her privilege as an authoress must be strictly confined to the method of treating it which she has adopted.'
- *Glyn v Weston Feature Film Co* [1916] 1 Ch 261, 267.

Copyright and Culture -Immorality

- Cultural assumptions concerning morality:
- ‘Now it is clear law that copyright cannot exist in a work of a tendency so grossly immoral as this, a work which, apart from its other objectionable features, advocates free love and justifies adultery where the marriage tie has become merely irksome. It may well be that the Court in this matter is now less strict than it was in the days of Lord Eldon, but the present is not a case in which the public interest it ought, as it seems to me, to be at all anxious to relax its principles.’
- *Glyn v Weston Feature Film Co* [1916] 1 Ch 261, 269.

A Moral Panic?

- Concerns about the possible societal influence (Alexander & Handler 2015)?
- ‘We are constantly hearing of the injurious influence exercised upon the adventurous spirit of our youth by the penny dreadful which presents the burglar in the guise of a hero and so excites the imagination of the juvenile reader that, adopting in the spirit of true adventure the life of his idol, he presently finds himself in the dock branded by an unfeeling world as a common thief. So is a glittering record of adulterous sensuality masquerading as superior virtue, as it does in this book, calculated, with consequences as inevitable as they are sure to be disastrous, to mislead into the belief that she may without danger choose the easy life of sin many a poor romantic girl striving amidst manifold hardships and discouragements to keep her honour untarnished.’
- *Glyn v Weston Feature Film Co* [1916] 1 Ch 261, 269-70.

Not Concerned with Taste? - The Chimera of Aesthetic Neutrality

- Awareness of an institutional competence problem?
- ‘This renders it necessary for me to say a word about the film. It is, as I have already indicated, indescribably vulgar; but vulgarity is merely a question of taste, and with that I have here no concern.’
- *Glyn v Weston Feature Film Co* [1916] 1 Ch 261, 270.

The worry was perhaps a bit unnecessary...

- Attempts at censoring the film versions in Britain proved futile and backfired (Kuhn 2018).
- In the late 1920s, Glyn's works had fallen out of the public favour.
- By the time of her death in 1943, her work was even considered by some to be “old-fashioned”.

Elinor Glyn (1864-1943)

- A war correspondent during World War I
- A notorious author with copyright protection stripped away?
 - Backed financially by the Society of Authors for the litigation
 - A growing acceptance of female authors as professionals at the time?
- A woman film pioneer with a transcontinental career (Kuhn 2018)?
 - 28 story or screenwriting credits
 - 3 producing credits
 - 2 directing credits



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***Wright v Tallis* (1845) 135 ER 794, 1 CB 892 (Ct of Comm Pleas):
a coalescent moral right?**

James Parish

Thursday 11 January 2024

EVENING DEVOTIONS
(OR)
The Worship of God in Spirit and in Truth
For every Day in the Year
FROM THE GERMAN OF C. C. STURM.
Author of the Morning Devotions.
BY
ROBERT HUISE, ESQ. F.L.A. & H. Soc.



LONDON.
Published by William Wright, 13, St. George's Road, Southwark.

EVENING DEVOTIONS;

OR,

The Worship of God

IN SPIRIT AND IN TRUTH

FOR EVERY DAY IN THE YEAR.

TRANSLATED FROM THE GERMAN OF

C. C. STURM,

AUTHOR OF 'THE REFLECTIONS ON THE WORKS OF GOD.'

BY

ROBERT HUISE, Esq., F.R.S.

TRANSLATOR OF STURM'S MORNING DEVOTIONS; CONTEMPLATIONS ON THE
SUFFERINGS OF CHRIST; EDITOR OF THE TRAVELS OF BEECHY
AND BACK; TRANSLATOR OF LAMARTINE'S TRAVELS
IN THE HOLY LAND, &c. &c.

LONDON:

PUBLISHED BY WILLIAM WRIGHT

13, ST. GEORGE'S ROAD, SOUTHWARK;

1840.

PREFACE.

THE unprecedented patronage which the **MORNING DEVOTIONS**, and the **CONTEMPLATIONS ON THE SUFFERINGS OF CHRIST** by **STURM**, have deservedly received from every class of readers, and their consequent incorporation with the **Standard Literature** of this country, has operated as a flattering encouragement to the publisher of the above mentioned works, to present to the public, a translation of the **EVENING DEVOTIONS, FOR EVERY DAY IN THE YEAR**, by the same inspired Writer. To descant upon the merits of **Sturm** as a pious and moral Author, would, with the knowledge which we now possess of his works, be superfluous.

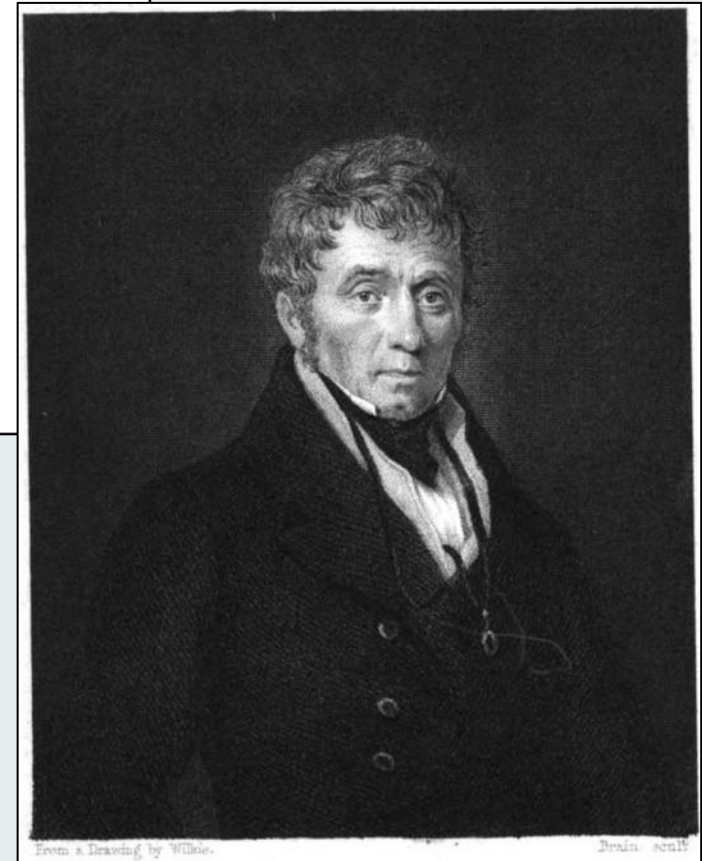
The author?

Christoph Christian Sturm

- 1740–1786
- German preacher and author

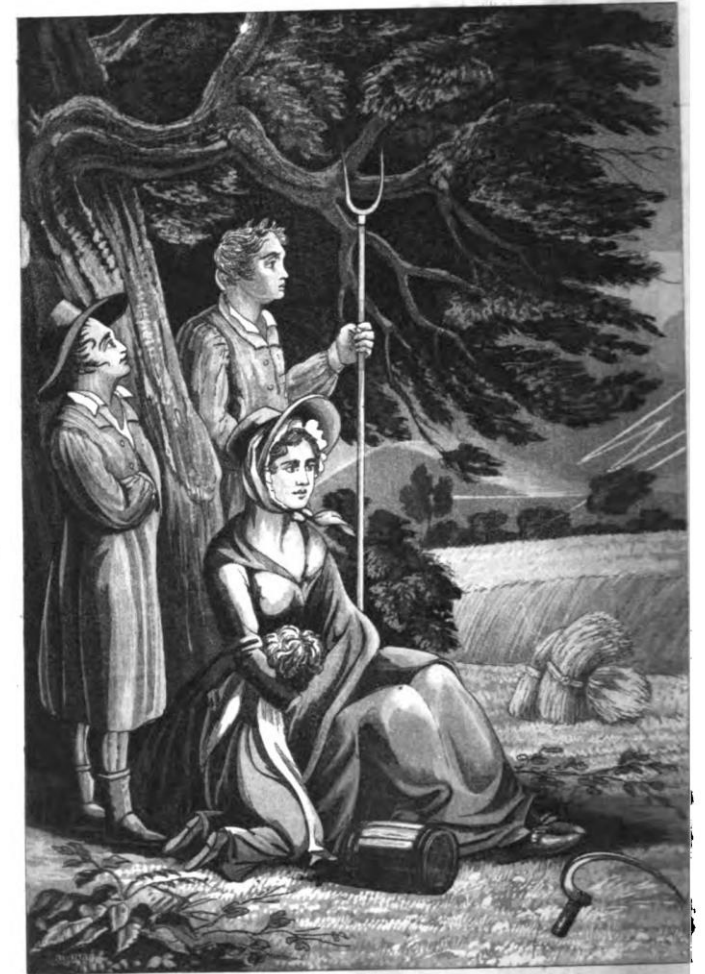
Robert Huish

- 1777–1850
- prolific English author of history books, novels, and miscellaneous other works



Defence

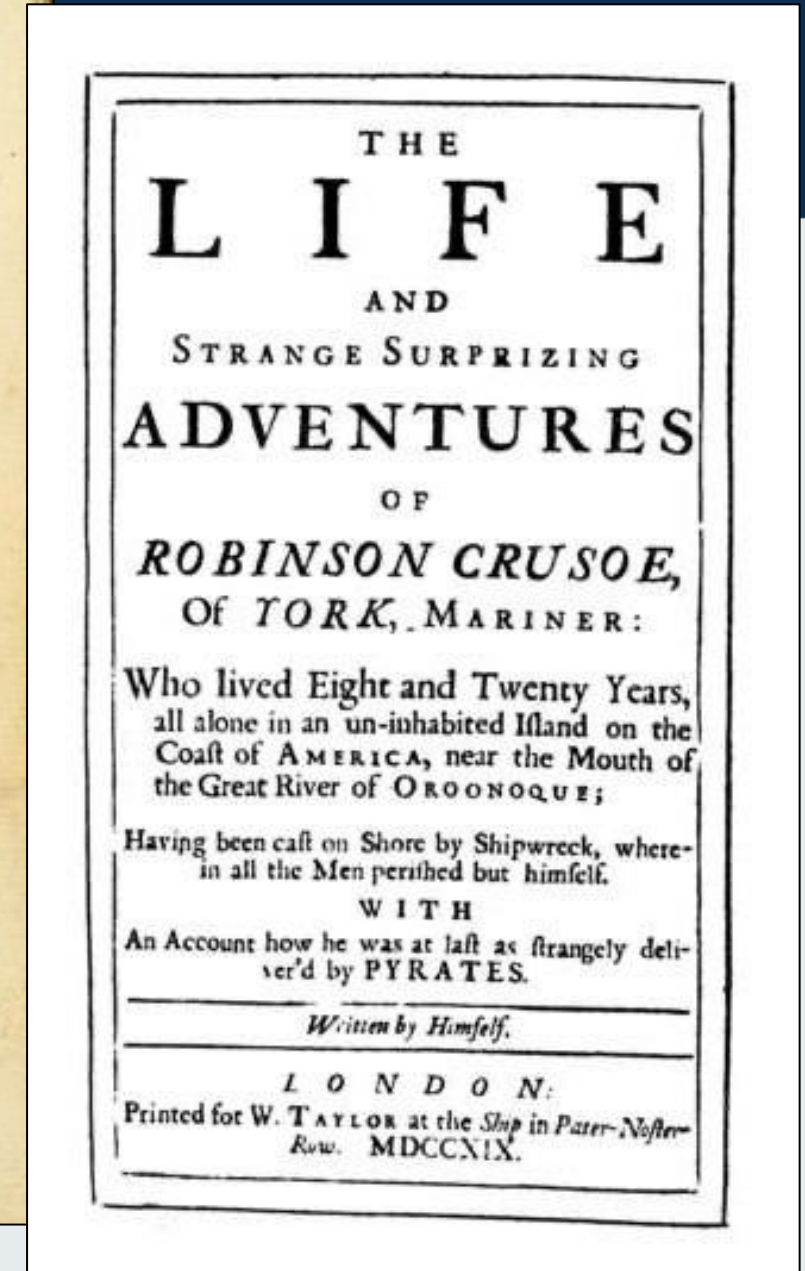
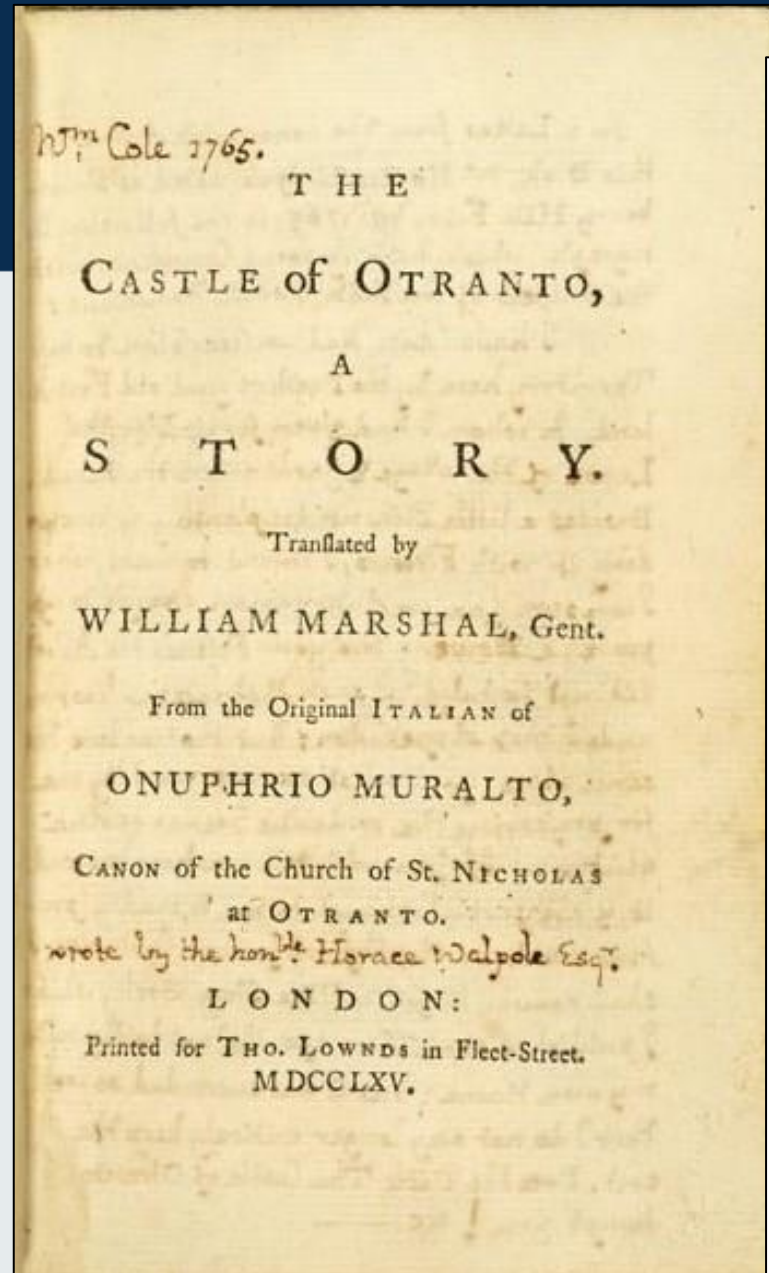
- C.C. Strum enjoyed “a great degree of celebrity amongst a large class of the Christian community”.
- “By the title-page and preface affixed to this book [the public] are led to believe that it is the work of that esteemed writer, and that, if they purchased it, they would thereby be enabled to possess a complete copy of all his works, with the exception of his sermons”.
- “The publication of this book in the manner alleged in the plea is a fraud upon the public, and a fraud upon the reputation of the author whose work it is represented to be”.
- Had Sturm been living, “he undoubtedly could have maintained an action for such an unauthorised use of his name: *Archbold v. Sweet* (1 M. & Rob. 162, 5 C. & P. 217)”



THE GLORY OF THE CREATION OF GOD.

Arguments

- Sir T. Wilde, Serjt: “Could it be said that the copyright in Walpole's ‘Castle of Otranto’ was destroyed by the false assertion that the work was a translation from the Italian?”
- Tindal, CJ: “Or that of De Foe's ‘Robinson Crusoe’, because represented to have been the work of the’ adventurer himself?”
- Cresswell, J: Is “the title-page and preface a sort of warranty”?
- Channell, Serjt. “They form part of the work”



Judgment

Tindal, CJ:

“the present case is perfectly distinguishable from those which have been referred to at the bar, of books of amusement or instruction having been published as translations, whilst they have been, in fact, original works; or having been published under an assumed, instead of a true name. Such was the instance given of the " Castle of Otranto," professing to be translated from the Italian; and such the case of innumerable works published under assumed names—voyages, travels, biography, works of fiction or romance, and even works of science and instruction; for, in all these instances, the misrepresentation is innocent and harmless. **There is not found in any one of those cases, any serious design on the part of the author to deceive the purchaser, or to make gain and profit from him by the false representation: the purchaser, for anything that appears to the contrary, would have purchased at the same price, if he had known that the name of the author was an assumed, and not a genuine name.**”

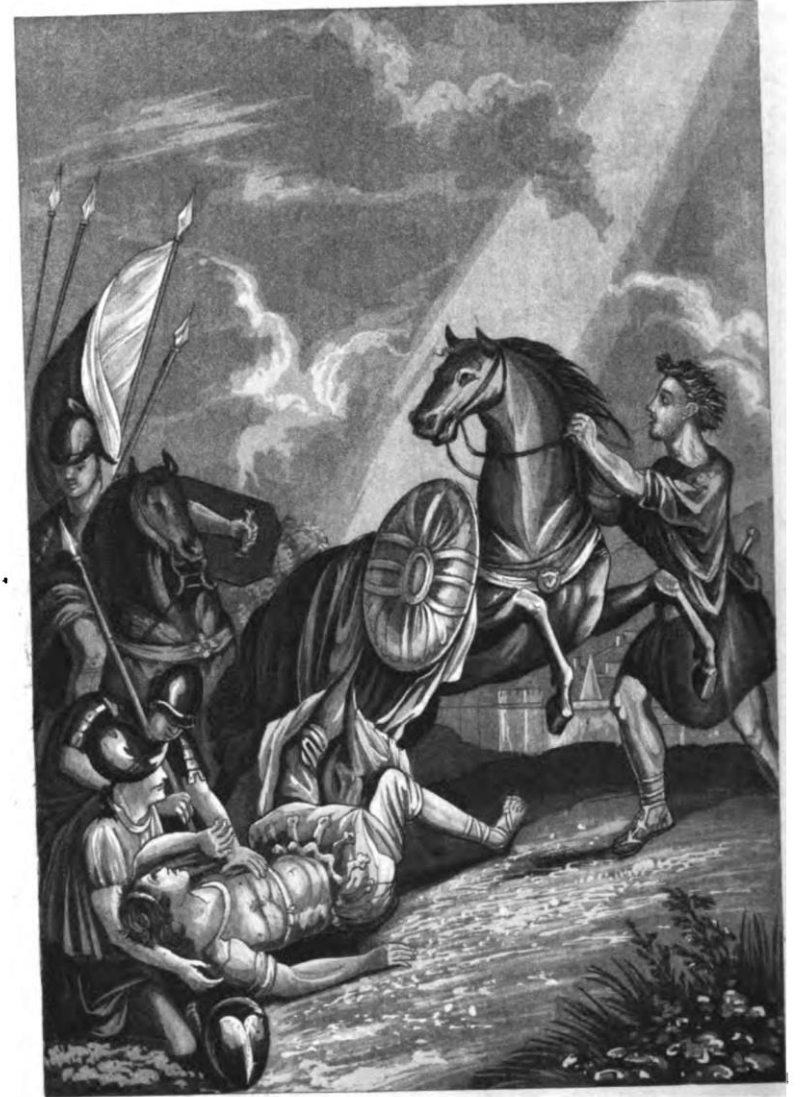


Judgment

Tindal, CJ:

“But, in the case before us, no one of these observations will apply. The facts stated in the plea import a serious design on the part of the plaintiff to impose on the credulity of each purchaser, by fixing upon the name of an author who (once) had a real existence, and who possessed a large share of weight and estimation in the opinion of the public”.

“The object of the plaintiff is, not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise; but to deceive the public, by inducing them to believe that the work is the original work of the author whom he names, when he himself knows it not to be so, to obtain from the purchaser a greater price than he would otherwise obtain. **The transaction, therefore, ranges itself under the head of *crimen falsi*.**”



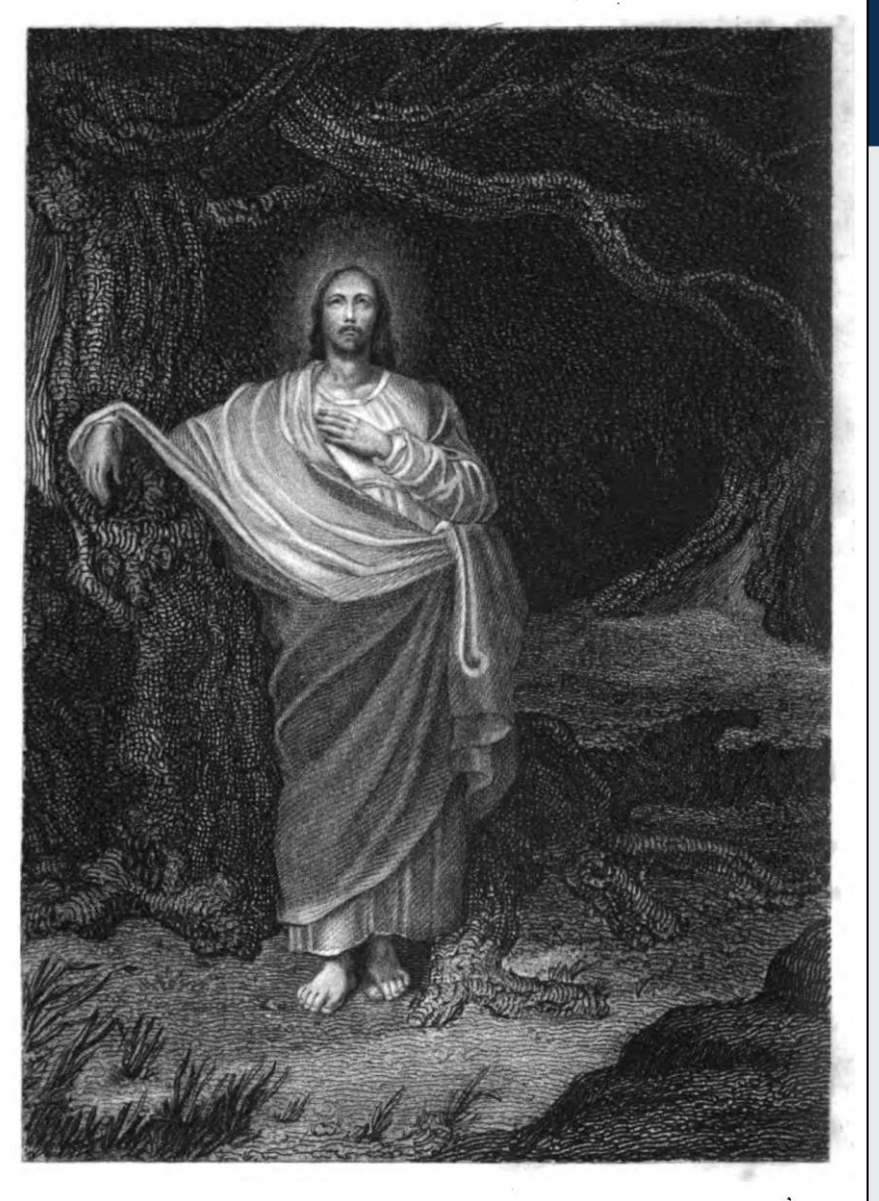
THE CONVERSION OF SAUL.

Judgment

Tindal, CJ:

“The publisher seeks to obtain money under false pretences : and as, not only the original act of publishing the work, but the sale of copies to each individual purchaser, falls within the reach of the same objection, **we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work**, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement.”

“The cases in which a copyright has been held not to subsist where the work is subversive of good order, morality, or religion, [i.e. *Stockdale v Onwhyn* (1826) 5 B & C 173, 108 ER 65 (KBD)] do not, indeed, bear directly on the case before us ; but they have this analogy with the present inquiry—that they prove that the rule which denies the existence of copyright in those cases, is a rule established for the benefit and protection of the public. **And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea, is, to make the practice of it unprofitable to its author.**”



Diolch

James Parish
james.pariah@kcl.ac.uk

THJ v Sheridan – requiem for skill,
labour and judgment?

BLACA Seminar 11 January 2024

Alison Firth

THJ v Sheridan [2023] EWCA Civ 1354

Arnold LJ, Asplin and Moylan LJJ concurring

- CJEU test for originality (“author’s own intellectual creation”) should be applied (*Infopaq*, *Painer*, etc), importance of author’s choices
- Explicitly held that CJEU test differs (*Football Dataco*, *Funke Medien*) from the pre-*Infopaq* UK “skill and labour” test (*Navitaire Inc v easyJet* [2004]; *Nova v Mazooma* [2006]) cited and applied below
- Contrast *Evans v John Lewis Plc* [2023] EWHC 766 (IPEC) at [40]

These cases all seem to me to be examples of the application of the test from *Infopaq* (even in the case of *Baigent*, as although it pre-dates *Infopaq* such a qualitative test existed before *Infopaq*: see, for example, HHJ Birss QC as he then was in *Hodgson v Isaac* [2010] EWPCC 37 at [77])

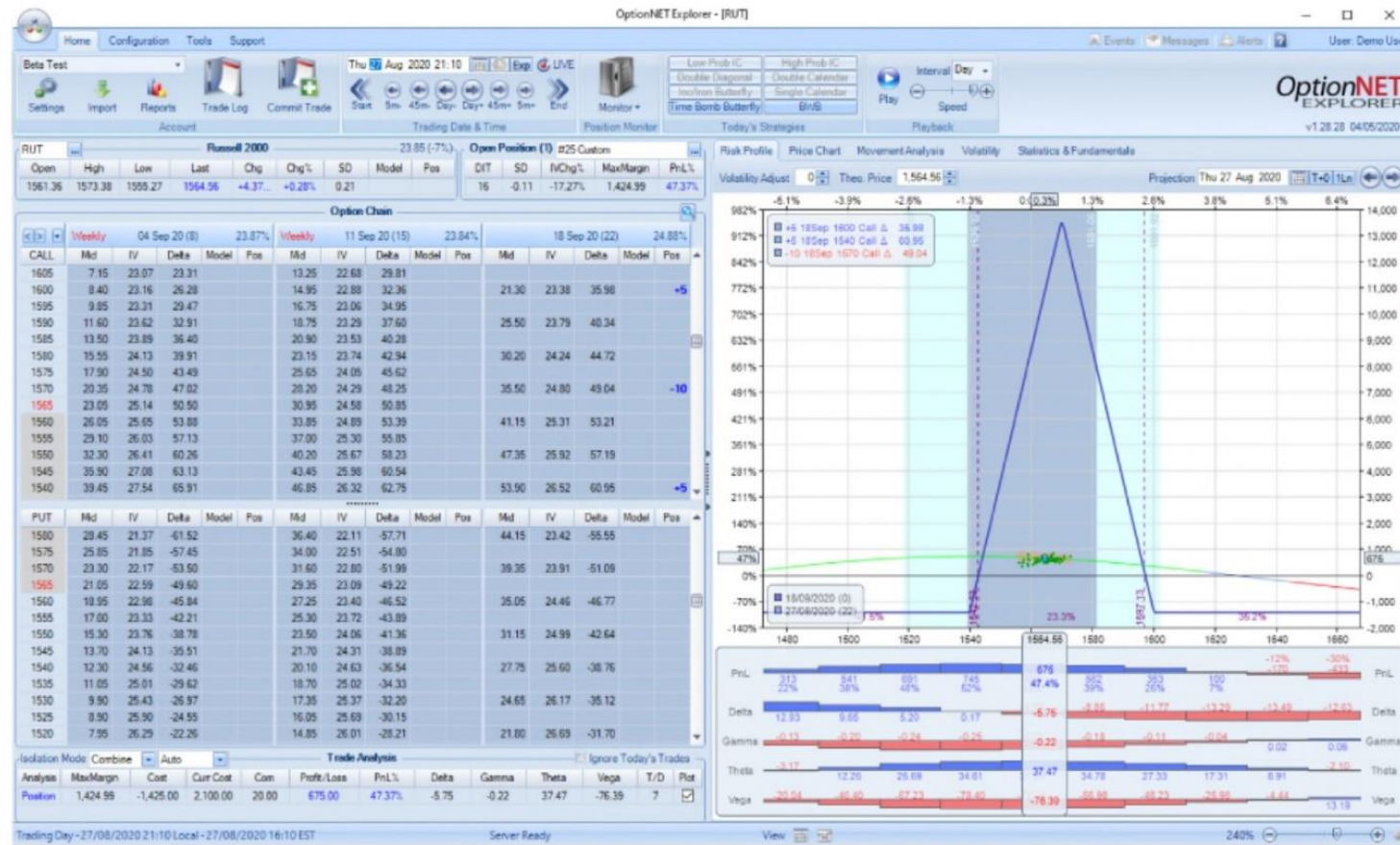
Outcomes and role of EU law

- Both originality tests produced the same conclusion, that copyright subsisted in 'Risk and Price Charts' produced by running the claimant's software with inputted market data; low originality so narrow scope
- Slight difference due to conflation of works
[20] "On the appeal it is not in dispute that there is no material difference between these categories [GUI and images] so far as the R & P Charts are concerned, because both are produced by the Software and the layout is the same. The so-called "screenshots" are the images produced by the graphical user interface when in use and populated by data."
- Relevant as 'assimilated law' Retained EU Law (Revocation and Reform) Act 2023, abolition of supremacy of EU law
- Arnold LJ approved LEGO bricks analogy used by cross-examiner regarding components of charts obtained from (licensed) third party libraries

Background of the case, and other findings at first instance: [2023] EWHC 927 (Ch)

THJ Ltd First Claimant Member of LLP	Optionnet LLP Second Claimant Licensee of software	Sheridan Options Mentoring Corporation (“SOM”) Financial training & mentorship Second defendant Sub-licensee of software
Andrew Mitchell Software developer, sole director & full-time employee of THJ		Daniel Sheridan One-time options trader & financial trainer First defendant

Mitchell's software 'OptionNEt' or ONE' specific graphic works containing financial data – 'Risk & Price Charts'



Other issues

- Duty under partnership agreement on Sheridan and SOM to promote ONE, use logo
- Notice of expulsion of Sheridan for breaches of partnership agreement, under express expulsion provisions, 'serious' and 'persistent' breaches
- Expulsion valid
- Who was author of the 'screenshots' under s9(3) – Defendants claimed they were computer-generated and defendant users 'made the arrangements necessary. Held: Mitchell was the author. Not ultimately disputed on appeal.
- Law cited from *Wright v BCT* [2023] EWCA Civ 868 (leave to serve out of jurisdiction) - Bitcoin file format arguably a work original to software author

Might equivalence of UK and *Infopaq* tests depend on the presence of *judgment* in addition to skill and labour?

- Skill, labour and judgment in different combinations – Andreas Rahmatian ‘Originality in UK Copyright Law: The Old 'Skill and Labour' Doctrine Under Pressure’ [2013] IIC
- Relevant to LEGO analogy in *THJ*: betting coupons in *Ladbroke v William Hill* [1964] 1 WLR 273 at [277]

“To my mind, it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, it has often been recognised that if sufficient skill and judgment have been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright.”
- *University of London Press v University Tutorial Press* (1916) 2 Ch D 601, Peterson J

“...it was admitted that the papers involved *selection, judgment, and experience*.”

Thank you

Bristows LLP
100 Victoria Embankment
London EC4Y 0DH
T +44 20 7400 8000