

# Paradise Lost: The Payment of British Authors' in 19<sup>th</sup> Century America

Stan Liebowitz

August 2, 2015

Preliminary

Abstract: The payment to British authors by American publishers during the mid-19<sup>th</sup> century, when the works of British authors did not have any American copyright protection, is sometimes presented as evidence that authors are well rewarded without the need of copyright protection. The introduction of this evidence to economists and some legal researchers came largely from Arnold Plant's 1934 critique of copyright. Plant relied on evidence gathered in a UK Royal Commission Report published in 1878. In this paper I examine the evidence put forward in the Royal Commission Report as well as data on payments to British Authors from a leading American book publisher during the mid-1800s. The conclusion I reach is that most British authors were not paid at all by American publishers and the majority who were paid received considerably less than they would have received under copyright. Further, a cartel-like agreement among leading American publishers enhanced the payments to British beyond what they otherwise would have been. This result is in contrast to many readings of Plant found in the literature, although a careful reading reveals that Plant claimed less than he seemed to be claiming.

## Introduction

Using copyright to promote the production of creative works has been a contentious issue in many countries and over several centuries. Alternatives to ownership of intellectual property, such as rewards, prizes, or honors, have been and continue to be routinely suggested as being superior to copyright because consumers are not required to pay so-called “monopoly” prices.<sup>1</sup>

One of the central points of contention is whether authors of creative works need to be paid at all, and if they need to be paid, whether the institution of copyright is a particularly good method for paying them.

One of the earliest attacks on copyright by an economist is the 1934 article by Arnold Plant, the mentor of Ronald Coase. That paper, seeing an upsurge in citations since 1985, is a vociferous attack on copyright covering almost all the known criticisms that can be made of it.

Plant planted the claim that authors would be paid something even without the existence of copyright laws. Certainly, one cannot argue that copyright is a necessary condition for authors to be paid for their creative works because there were creative works written before the legal introduction of copyright. So in that limited sense, Plant is clearly correct.

Plant was interested in making this simple and obvious point because at that time, and perhaps even now, some economists were focused on a model of perfect competition that Plant thought was unrealistic and simple-minded and that, when applied to book production, seemed to demonstrate that there would be no money with which to pay authors if copyright did not exist. Plant provides numerous reasons why that would not be so, such as the advantage of being the first publisher, possible side agreements between publishers, the possibility of patrons, and so forth. Plant never addresses the issue of whether the payments that would be made in lieu of copyright would be the efficient level of payments or not. Nor, unfortunately, does Plant seem to directly admit that authors will be paid less in a world without copyright even though I suspect that he would have admitted to this conclusion if pressed.

Plant provides some empirical evidence to support his thesis. His central piece of evidence is of a natural experiment that took place in the U.S. in the mid-19<sup>th</sup> century. He seemed to suggest that copyright had little impact on the payment to authors because, he claimed, American publishers paid similar amounts to British authors and American authors even though the former were not protected by copyright whereas the latter were so protected. If this empirical claim were true, it might support a conclusion that copyright had no impact on the market, but if this were true, there would also be no harm from copyright.

---

<sup>1</sup> Contrary to its common treatment, copyright does not provide a monopoly. It merely provides a property right over a creative work, of which there can be any number of very close substitutes and in principle, there can even be identical works, as long as they are independently created. Every property right can be thought of as a nominal monopoly, although there is generally no monopoly power in this nominal monopoly. Copyright provides the same nominal monopoly, but because it does not restrict competition in the creation of substitute works, it provides no economic monopoly. See Liebowitz, S. J. “A Critique of Copyright Criticisms” *George Mason Law Review*, Summer 2015, 22(4) 43-58.

This paper examines Plant's empirical claim about American publishers, the evidence he used to support his claim, and provides some new evidence to show that authors did not do as well as Plant seemed to imply.

## I. A Natural Experiment: The American treatment of British authors

Plant frames his thesis thus:

A convenient approach to the whole subject is to try to visualise the organisation of production of books, which we select as a typical commodity for the purpose of this inquiry, in the absence of any sort of copyright provisions...Would firstly authors, and secondly publishers, find it possible to make arrangements of a sufficiently remunerative kind to induce them to continue in the business of book production? [168]

He points out that the United States, in the mid-19th century, did not provide copyright protection to British authors and yet, he reports, British authors were paid by American publishers. Surely, this would seem to prove that copyright is unnecessary if it merely mimics what would occur in its absence.

Here is his key statement:

...*many* English authors were regularly receiving payment from publishers in a country which had no copyright law for foreign books. During the nineteenth century anyone was free in the United States to reprint a foreign publication, and yet American publishers found it profitable to make arrangements with English authors. Evidence before the 1876-8 Commission shows that English authors *sometimes* received more from the sale of their books by American publishers, where they had no copyright, than from their royalties in this country. From the economic standpoint it is highly significant that, although there was no legislative restraint on the copying of books published abroad, competition remained sufficiently removed from that abstract condition of "perfection," in which there could exist no margin between receipts and costs for the remuneration of authors, for "handsome sums"<sup>2</sup> in fact to be paid. [172, my emphasis]]

Notice that Plant's claim that "many" English authors were paid by American publishers is actually rather vague, since a small percentage of authors might be all that is required for the term "many" to be technically defensible if there were a large number of authors. Plant does not use the term "most," although some readers will likely read the latter meaning into the former statement. Similarly, Plant's statement that "sometimes" English authors were paid more by their American than by their British publishers might mean no more than this might have happened once or twice, as opposed to having it happen frequently.

---

<sup>2</sup> Plant puts the term "handsome sums" in quotes, implying it was used in the English Commission report he references. He did not have access to the search capabilities modern computers, and terminology similar to "handsome sums" was used in the report. But I have not been able to find the exact term he puts in quotes in the report.

Nevertheless, Michele Boldrin and David Levine reproduce this very quote from Plant in their 2008 book *Against Intellectual Monopoly*, but then replace the word “sometimes” with “often,” in a paraphrase of the quote in their very next paragraph. Similarly, Breyer takes the claim that *sometimes* English authors earned more in the U.S. and converts it to “many English writers” earned more in the U.S. than in England, which is stronger than the term *some* English writers.<sup>3</sup> That these distinguished researchers could make this enhanced interpretation indicates that at least some readers and possibly many, given Plant’s tone, will interpret the “sometimes” to mean “often” and the “many” to mean “most.” Certainly, the critics of copyright are tempted to interpret it in that manner.

Plant also provides some logic to explain why American publishers might be expected to pay British authors, even in the absence of copyright. Plant noted that American publishers would pay British authors or publishers for the ability to have first access to print their books using advance sheets or stereotype plates, provided by the UK author or publisher prior to the book’s publication in the UK).<sup>4</sup> The American publisher contracting with British authors would then have the ability to print the American edition before other American publishers could get copies of the book or manuscript from England, although some researchers have argued that this lead time was merely a matter of a day or two.<sup>5</sup> This head start of over competing American publishers provided a window of market control. Plant also notes that some American readers favored editions of books that were authorized by the author.

## II. Plant’s American Copyright Eden?

Plant’s evidence from the 1878 Commission has been uncritically repeated by other researchers such as Justice Stephen Breyer, Michele Boldrin and David Levine, Ivan Png, Hal Varian, and myself. Plant’s story is still cited in large part because it still seems fresh and counter-intuitive.

Plant’s version of events allows copyright’s critics to argue that because authors without copyright protection have supposedly received large amounts from publishers, copyright is unnecessary. But Plant is somewhat more careful and circumspect than his supporters give him credit for. For example, Plant concludes:

---

<sup>3</sup> Page 300. Breyer references Mallet’s minority report from the 1878 Commission for these facts, although Breyer’s words closely follow Plant, whom he quotes and cites frequently.

<sup>4</sup> Advance (or early) sheets describes the manuscript from the author prior to the printed British book being available. Stereotype plates were materials that a printer could use to directly print a book without having to set the type. Access to these plates obviously lowered the printing costs substantially and were therefore of substantial value to publishers.

<sup>5</sup> I had found Plant’s lead-time argument rather convincing, thinking that it would likely be months before competing editions could be produced and distributed. Other researchers, i.e., Spoo (2013) or Kahn (2004), have pointed out that in the 1800s a book could be very quickly copied, in a matter of days or weeks, by having numerous printers all work concurrently on small but different portions of the book. Typos and other errors were more likely, however, when a book was reproduced in this manner. Spoo in particular quotes various statements by American publishers claiming that their payments for advance sheets would pay for an advantage of only one or two days. I must admit that this information on the speed with which copies could be made contradicts some of the statements I have made in previous writings, although I am skeptical about the veracity of some of these self-serving claims made by American publishers to British authors.

The abolition of copyright need not therefore result in the *complete* abandonment of the business of book production either by publishers or by professional authors. [175, my emphasis].

Notice how careful and tentative Plant's words are compared to the rather confident tone of his discussion in the previous callout of his words. All he is claiming in this conclusion is that book publishing *need not be completely* eliminated if copyright were to be withdrawn. But who would really argue otherwise? Only those who believe that book publishing is perfectly described by the model of perfect competition, as well as believing the corollary that all authors need to be paid *by publishers* to write books, would believe otherwise.

The more extravagant sounding discussion, in which Plant points out how well British authors seem to do even without copyright, is certainly the one that most influences the typical reader. And the more casual reader would certainly get the impression that the book publishing industry will not change much at all, even if copyright were to disappear.

But is this assessment of the treatment of British authors by American publishers correct? It isn't enough to say that *many* British authors whose works were published in the U.S. were paid, or that some were paid *well*. More important is knowing how many of them were paid and how much they were paid.

We can examine these claims by taking a look at the Royal Commission evidence on these points, one of the key sources relied upon by Plant. We can also use data unavailable to Plant, the records of a leading American publisher which paid some of its British authors for the right to publish their works in the U.S. The reader should note, however, that the Royal Commission ("Commission" from now on) hearings took place in 1876-77, whereas the information from the leading U.S. publisher ends in 1860, so there is some difference in time periods. Nevertheless, the legal rules of the American copyright system were the same under both periods.

### III. Evidence from the Royal Commission and a leading American Publisher

What are the specific claims Plant and his followers claim derive from the Royal Commission ("Commission") findings? First, that many British authors received payment from American publishers. Second, that British authors sometimes received more from American publishers than from British publishers. Third, and somewhat implicitly, that the size of the book-reading markets in the two countries must have been similar, in order for comparisons of the payments to British and American authors to be meaningful in the first place.

Actual examination of the Commission report and the transcripts of its testimony which took place in 1876 and 1877, however, indicates differences of opinions on the part of the witnesses and on part of the authors of the main and dissenting reports.<sup>6</sup> Plant, unfortunately, does not mention the

---

<sup>6</sup> There were 15 members of the Royal Commission. The main report, which contained 294 paragraphs, was signed by 14 members with 1 member (Mallet) refusing to sign. However, 9 of the 14 signatories included separate notes where they dissented in some way with the main report. These raw numbers overstate the degree of dissent, however. Of

uncertain aspects of the report, nor the conclusions of the majority of its members, which often run contrary to his conclusions.

In addition, we have some evidence on the payments to British authors by a leading American publisher during the middle of the 19th century. The records of the firm of Ticknor and Fields, which is currently known as Houghton Mifflin Harcourt, were donated to Harvard University and researchers interested in the history of U.S. book publishing have gone through those records at some length. I lean heavily on that research in this section, particularly the work of Michael Winship (1995).

Ticknor and Fields was a leading Boston publisher of literary works in the 19th century, including Nathaniel Hawthorne, Henry David Thoreau, Henry W. Longfellow and Harriet Beecher Stowe in its stable of American writers. It also published the works of some leading British authors. Because it was such a respectable and literary publisher, Ticknor and Fields would be expected to treat all authors, including British authors, better than a more typical American publisher with a less literary emphasis. Thus we can use it as an example of the best treatment that British authors were likely to receive from American publishers.

First, let's see how important the sales of British authors was to Ticknor and Fields. Table 1 indicates that foreign (almost exclusively British<sup>7</sup>) titles played a fairly important role in the early 1840s but a much less important role in the late 1840s. In the early 1850s, however, foreign sales shifted back to being an important share of sales and then to a majority of copies sold in the late 1850s. Clearly, foreign works were of great importance to the firm over most of this period, so its treatment of foreign authors would be more than an afterthought.

<b>Table 1: Number of copies sold</b>			
	American	Foreign	% Foreign
1840-1844	39,106	14,248	26.70%
1845-1849	155,344	16,820	9.77%
1850-1854	349,332	146,040	29.48%
1855-1859	358,879	470,698	56.74%
From Table 3.7 in Winship			

---

these 9 dissenters, 5 objections ( Daldy, Manners, Smith, Trollope and Wolff) were focused on only one or two paragraphs and 3 objections (Jenkins, Rose, Young) were more serious but were based mainly on the idea that the term of copyright should be a fixed number of years and not be related to the death of the author. The final dissenter (Stephen) objected to the breadth of copyright with regard to derivative works and objected to copyright on statues and photographs. Thus there is little dissent in the reports on the main topics of focus in this paper although the discussions during the evidentiary hearings revealed a diversity of opinions.

<sup>7</sup> Winship makes clear that almost all the foreign works published by Ticknor and Fields during the period of his analysis were British.

### A. How likely was it for British authors to get paid by American publishers?

Plant stated that many British authors were paid by American publishers. But the evidence appears otherwise. It appears to be the case that it was *not* typical for British authors to receive payments from American publishers. For example, the Commissioners summary report states:

Great Britain is the nation which naturally suffers the most from this policy [Americans failing to provide copyright to non-American authors]. The works of her authors and artists may be and generally are taken without leave by American publishers, sometimes mutilated, issued at cheap rates to a population of forty millions, perhaps the most active readers in the world, and not seldom in forms objectionable to the feelings of the original author or artist.<sup>8</sup>

This conclusion of the Royal Commission is not indicated by Plant. But Plant was less interested in discussing the average result than he was with demonstrating the fallaciousness of perfectly competitive economic models predicting zero payment to authors in a world without copyright. Thus, for his purposes, showing that some authors were paid could be sufficient to make his point. Unfortunately, the casual reader who thought he was claiming much more could be greatly misled by Plant's discussion.

The Commissioner's summary report did acknowledge that British authors were sometimes paid by American publishers, but apparently only the most well-known authors were paid:

We are assured there are cases in which [British] authors reap substantial results from these arrangements [with American publishers], and instances are even known in which an English author's returns from the United States exceed the profits of his British sale, but in the case of a successful book by a new author it would appear that this understanding affords no protection. Even in the case of eminent men, we have no reason to believe that the arrangements possible under the existing conditions are at all equivalent to the returns which they would secure under a copyright convention between Your Majesty and the United States.<sup>9</sup>

The Commission report and testimony is filled with anecdotes and stray facts about individual authors or books. The evidence from Ticknor and Fields (T&F), on the other hand, provides a view of the entire firm's finances and inventory of titles. T&F paid foreign (mainly British) authors in two different ways, either a royalty on sales revenue, or a lump sum for "early sheets." Early sheets was the term for manuscripts of books not yet printed in England, allowing an American publisher who received the early sheets to have a head start publishing the book in the U.S.

So what can we learn about the treatment of British authors by American publishers, assuming that T&F is in the top tier of publishers with regards to their treatment of British authors? In the 1850s, when Foreign (British) works were of great importance to the firm, a majority of foreign works were not paid at all, as seen in Table 2.

---

<sup>8</sup> Paragraph 238 of the Copyright Commission report, page xxxvii.

<sup>9</sup> Paragraph 242, page e3 of the *Report of the Commissioners*.

No Payment	77
Royalty	10
Early Sheets	51
From Table 5.1 in Winship	

Even for those works receiving payment, over 80% of the average payment was in the form of lump sums for early sheets, with the much smaller set of works receiving payment in the form of royalties. By contrast, American authors were paid almost exclusively by royalty, a rate usually around ten percent.<sup>10</sup>

Winship provides data on T&F's costs of book production for the years 1846, 1851 and 1856.<sup>11</sup> This allows a calculation of the share of total costs going to authors, both domestic and foreign. The results are found in the first two columns of Table 3. In 1851, for example, payments to American authors represented 28.18% of the cost of producing American books. In that year, foreign authors (mainly British) received zero payments. The third column reveals that although foreign authors received nothing, the production cost of foreign books accounted for 28.82% of the production cost for all books. Clearly, foreign books played a significant role in the firm's finances in that year, yet T&F paid nothing to foreign authors.

	Payment to American Authors	Payment to Foreign Authors	Foreign Share
1846	19.39%	0.00%	17.96%
1851	28.18%	0.00%	28.82%
1856	23.40%	10.02%	33.28%
*Author Payments defined as Royalties plus Payments for Early Sheets; Other production costs include paper, composition, presswork, binding, illustration and miscellaneous. Derived from Table 5.3 of Winship.			

The zero payment to foreign authors, in both 1846 and 1851, is certainly contrary to the notion that leading American publishers paid British authors an amount similar to what they would have been paid if copyright existed.

The numbers in Table 2, based on the years 1852-1859, appear to reflect a better treatment of British authors than was the case in earlier years. This might be due to a change in policy of T&F as British books became more important to its sales, or it might be due to a decrease in competition with other American publishers, known as "courtesy of the trade," which I discuss later.

<sup>10</sup> Winship reports this on page

<sup>11</sup> Although information from individual years, as in Table 3, is less informative than information based on longer periods of time, such as in Table 2, it is nevertheless informative.



## B. How much were British authors paid?

Although British authors were frequently not paid, what can we say about the payment to the favored British authors who were paid by American publishers? How much did American publishers pay them?

Winship (p. 21) quotes an article from a 1856 issue of *American Publishers' Circular and Literary Gazette* in which Mr. Fields (the F in T&F) “assured us that English authors were paid by the firm of which he is a member the same percentage which it allowed to American writers. According to actual evidence in Winship (p. 136), the royalties that were paid to foreign authors “in every case” amounted to 10%, which is generally the same amount that the firm paid to its American authors.<sup>12</sup> So Mr. Fields’ statement is correct for the very limited number of works where the author was paid a royalty. As we have seen in Table 2, only a very small minority (less than 10%) of T&F’s foreign authors were paid by royalty during 1852-59.

What about the British authors who were paid for advance sheets? In fairness, it should be noted, as seen in Table 4, that the payments for advance sheets are, on average, lower than average royalty payments, but not so much lower as to provide clear evidence on this point. Since we do not know whether works paid for with early sheets have on average larger or smaller sales than works paid for by royalty, we cannot say whether the implicit royalty rate per copy for early sheet payments are higher or lower than the explicit royalty rates.

	Average \$ for Early Sheets	Average \$ Royalty Amount
1852	\$100.00	\$124.50
1853	\$175.00	
1854	\$243.75	
1855	\$173.75	\$278.00
1856	\$325.00	\$465.00
1857	\$249.67	\$607.00
1858	\$171.43	\$538.00
1859	\$239.06	
From Table 5.1 in Winship		

Let’s return to Table 3 for a moment, however, since those numbers can provide some evidence on the payments to American authors. In 1856, when foreign works were responsible for approximately one third (33.28%) of T&F’s business as measured by production costs, the payments to foreign authors, according to the middle column of Table 3, represented 10% of the costs of producing

<sup>12</sup> Winship gives some instances where the rate was slightly higher or slightly lower than 10%, except for American authors who had invested in their own stereotype plates, which lowered the production costs and generally led to a royalty rate of about 20%.

foreign works whereas the payments to American authors represented 23.4% of the costs of producing American works.

The simple ratio of these numbers would indicate that foreign authors received about 43% of the payments that American authors received, holding production costs constant. But elsewhere (Winship's Table 7.1) we are told that the 1856 markup on foreign books was 22% greater than on American books. Since we are also told that the T&F royalty payments were based on retail sales, foreign authors would be expected to generate a higher royalty rate on costs if the royalty on sales were the same, as Mr. Fields stated (and Winship's calculations confirmed). With this adjustment we find that in 1856, foreign authors on average received approximately 35% of the payments that American authors would have received if they had written the foreign books. Keep in mind that in the years 1851 and 1846 foreign authors received *zero* percent of the payments that American authors would have received for the same books, so for foreign authors to receive 35% of what American authors received 1856 is something of a high water mark for foreign authors.

We can drill down a little bit further with these numbers. Assuming that foreign royalty authors were paid the same as American authors would have been paid for the same works, we can back out the production costs for foreign books where authors received a royalty.<sup>13</sup> We can take the remaining production costs for foreign books paid for with early sheets or not paid at all, and find the average payment for these non-royalty foreign authors relative to American authors. When that calculation is performed, the typical non-royalty foreign author, making up 93% of the foreign authors during 1852-1859 (see Table 2), receives approximately *one twentieth* of the payment that an American author would have received for the same book.<sup>14</sup>

Some of the witnesses provided testimony to the Commission presenting numbers that are fairly similar to these calculations based on T&F (where the payments by British publishers to British authors is thought to be similar to the payments by American publishers to American authors). When I first encountered these exchanges I thought it seemed a little too one sided. After examining the T&F numbers, however, I am not so sure. Here are two exchanges (the questions are in italics, the answers not).

First, a British publisher (John Murray III) was being questioned by a pro-copyright Commission member (the novelist Anthony Trollope):

---

<sup>13</sup> We can take the royalty payments to American authors in 1856 from Table 5.3 in Winship and divide that amount by the share of costs devoted to royalties found in Table 3 above. That value is then divided by the markup differential between American and foreign books. The resulting value represents an estimate of the production costs for the foreign books paid for by royalty.

<sup>14</sup> Various other permutations are possible. For example, Winship's data (his table 5.1) indicates that in 1856 there were 4 books with no author payment, 3 books with royalty payments and 4 books where authors were paid for early sheets. If each of the 8 non-royalty books sold equal quantities, then the authors with early sheets would have been paid one tenth of the amount that American authors received and the other authors of course were paid zero percent of what American authors would be paid. And so forth, with various outcomes as the sales share of the two groups of authors changed. If the authors who were paid had books that sold better than those authors who were not paid at all, then the one tenth value would be the upper limit of the payment to authors with advance sheets.

1304. *I think you said that in your opinion the British author now gets nearly as large a profit from his works in the United States as he could expect to get if an international copyright law were established?*—In saying that I was speaking, perhaps, rather rashly; it is a thing which experience alone could prove. He may obtain a larger profit possibly after an international copyright law is established.

1306. *As a rule do you think that the price that a successful author can get from America amounts to 25 per cent of what he could get in England?*—There, again, I cannot say; I have no experience; I have never made any calculations on the point.

1307. *You would not, perhaps, be surprised to hear that in the case of many popular authors it amounts to about 10 per cent?*—I should not be surprised.

It does seem strange that Murray would accept the 10% figure proposed by Mr. Trollope, given that his answer to the prior question was that he did know the relative sizes of American and British payments to British authors, but that is his testimony. Trollope puts the same question to an American publisher (GH Putnam) who was sensitive to the claim that British authors are badly treated by American publishers:

1855. *Do you think that English authors get 100£ from American publishers for every 1,000£ that they get from English publishers?*—Those authors who are paid for their advance sheets, I suppose, get a larger proportion than that.

1857. *At any rate the proportion paid by American publishers is very much less than the proportion paid by English publishers?*—I suppose so...

I have been unable to determine the basis for Trollope's claims about the relative payments to American and British authors, but the numbers do not appear to be unreasonable if you do not weight the averages of all authors by the sales of the books (presuming that royalty-paid books by British authors sell better than books with no payment).

This leaves one relatively unimportant but highly touted claim to examine. Plant, and in their turn, Boldrin and Levine, claimed that British authors were sometimes (or in Boldrin and Levine's case, "often") paid more in the United States than in Britain. This claim is actually unimportant because it is largely irrelevant to the question of the relative size of American payments to the two groups of authors. After all, even if British authors occasionally were paid more by American publishers than by British publishers, these could easily be the exceptions that prove the rule that American publishers paid British authors very poorly. And there are also other reasons having little to do with the relative payment systems that might cause a British author to get paid more from American publishers.<sup>15</sup> But this point has some prominence in the literature so it is worth investigating.

---

<sup>15</sup> For example, British authors were normally paid an upfront payment and not a royalty. A British publisher who under-predicted a book's success might pay less than a later American publisher who paid by royalty. Additionally, British publishers needed to cover the losses from the majority of books that were flops. American publishers could pick and choose only the historically successful British authors and rely upon British publishers to find new British talent. This would tend to make British books more profitable, *ceteris paribus*, and allow a larger payment to authors.

The one instance in the Commission evidence where I found reference to the claim that American publishers paid more to some British authors occurs when a member of the commission (John Edward Jenkins, a fiction writer and politician) asked some questions to the British publisher Murray:

1282. *Are you aware that there are authors in England who have received more from their American publishers than from their English publishers?*—No, I was not.

1283. *Do you know that a novelist, for instance, got more for his novels from Americans than he would have got in England?*—I am not aware of that.<sup>16</sup>

It appears that the tone of the claim by Plant, with regard to the frequency with which American publishers paid more to British authors than did British publishers, was somewhat exaggerated, and Boldrin and Levine's claim, that British authors often were paid more, was extremely off the mark. The evidence from the report appears to be that there were a few exceptional cases where British authors might have actually been paid more by American publishers than by British publishers. The word "sometimes," although not incorrect, seems inapposite to describe this apparently rare circumstance.

### C. The relative size of the markets

It is also important to put the relative size of the markets in perspective so that the relative size of the payments can be put in perspective. Although historical examination of population sizes and literacy rates can be somewhat revealing, there are other differences between the two book markets that are also important.<sup>17</sup> For example, it appears that purchasing books was much more common among the citizenry in the United States than in Britain.

Although this fact appears at several locations in the testimony, here are a few succinct exchanges. The first comes from Trollope's questions to the American publisher Putnam:

1852. *Your population [U.S.] is greater than ours [UK]?* — I suppose our reading population certainly is.

1853. *Therefore it is natural to suppose that popular English authors will find more readers with you [America] than with us [UK]?* — Yes.

Also Trollope to the British publisher Murray:

1308. *You know what the population of these islands [Great Britain] is?*—Yes.

1309. *You know that the population of the United States is a larger population?*—Much larger.

---

<sup>16</sup> Found on page 62 of the Minutes of Evidence.

<sup>17</sup> Boldrin and Levine provide such evidence for 1850, as does Liebowitz for 1870. Boldrin and Levine claim that the UK had the larger population whereas Liebowitz claims that the U.S. had the larger population. Since they looked at different years, they could both be correct.

1310. *Probably you are aware that the population of the United States is a more reading population?*—Very much more so.

There are various possible reasons for book purchasers to be more numerous in the United States than in Britain, including the fact that “travelling libraries” were much more common in Britain than in the United States.

Finally, there was a witness (politician/businessman Robert Andrew Macfie) who actually provided numbers as to the populations in the two countries:

2774. (Chairman.) *Are there any further observations which you wish to make ?*—...The 42 millions in the United States are much more readers than the 32 millions in this country. Our 32 millions are happily increasing yearly, but the 42 millions are increasing more rapidly....

Because the claims of British authors having greater sales in the U.S. were made in the mid 1870s, the concurrent testimony about the relative size of populations at the time of the hearings is most appropriate. It seems quite clear that the U.S. had a considerably larger population at the time the statements about relative author payments were made. Although the populations might have been closer in size at the time the T&F data were generated, the T&F data compared the payments to authors in a single country, the U.S., even though it looked at authors from different countries. Therefore, the population comparisons that count the most are those closer in time to the Commission hearings in the 1870s. At that time the U.S. market was significantly larger.

#### IV. Courtesy of the Trade: Synthetic or Self-Help Copyright

During the mid-1800s, American publishers were able to limit, to some degree, competition in the publishing of works by leading English authors. This agreement was known by the term “courtesy of the trade.” Works examining the history of publications, such as Groves (2007), Winship, Plant, and especially Johns and Spoo, pointed out that American publishers discussed such agreements. At the Commission hearings, a leading American publisher (GH Putnam) stated:

1858. *An international copyright, if we could get it, would thus serve both parties [publishers and authors]?*—Yes, but I want to say, in defence of our trade, that I know it to be the rule at present with our leading houses, in default of a law, to make an arrangement with English publishers or English authors, paying such prices as may be fixed here, and it is the exception when it is done without paying those prices. The purchase now amounts to very little as far as protection is concerned, but the payments are made. At present we get no protection in making the payment to English authors excepting what is called *the courtesy of the trade*. The leading houses in the trade respect each other's arrangements, although in some cases they quarrel and reprint upon each other. [my emphasis ].

Another leading American publisher of the era (D Appleton) provided the same detail:

3587. *We have been told that there is in America a kind of honourable understanding between the publishers that if one publisher has expended a considerable sum of money in bringing out a*

*book, others will not reprint it?*—Yes, what is called a courtesy copyright, that is an understanding which theoretically exists between all firms in America, but practically only amongst the five or six largest firms. [p 3587, p 181]

Note that, like typical cartels that have to deal with the problems of cheating among its members, courtesy of the trade sometimes worked and sometimes didn't. Even when this cartel worked it only worked among the leading publishers. This is not much of a surprise. Note that Groves suggests that the cartel tended to fall apart if the British author was a leading novelist such as Dickens or Scott.<sup>18</sup> This makes sense because the potential revenues from leading British novelists made the benefits of cheating too great for the chains of courtesy to bear. That implies that the authors receiving payment were likely to be artistic (to bring stature to a publisher) and/or of middling commercial appeal, leaving the top and bottom of the market without payment to British authors. The top of the market is the most commercially important part, so its exclusion of payments is of some importance.<sup>19</sup>

This existence of cartel-like behavior, sometimes referred to as synthetic (or self-help) copyright, can hardly be considered a justification for not needing copyright, however. Even if it could be shown that the payments British authors received from American publishers was closer to the ideal level than the payments American authors received from American publishers, this payment mechanism would have been riddled with uncertainty and imprecision. If a weaker copyright were thought to be superior to a stronger copyright system, then the actual copyright law should be changed in that direction, instead of relying on an imprecise and erratic system.

Further, at the time of this collusion there were not yet strong antitrust laws on the books. Such collusion would almost surely be found to be illegal these days. This type of synthetic copyright could not legally exist without some sort of exemption such as that given to employee unions. One issue that I have not seen examined is whether the courtesy of the trade extended to other courtesies that would have reduced competition in other dimensions, such as the payment to American authors under copyright. Surely, this would have been an expected outcome from the interaction of informal rule settings among the leading American publishers.

## V. Conclusion

Reality is often quite different from the implications of simple economic models. As some economists have pointed out, copyright law is not needed for the production of creative works in spite of a model of perfect competition that seems to suggest otherwise. But in performing the useful function of enhancing our understanding of real markets, some of these economic analyses have presented a misleading and one-sided discussion of an interesting natural experiment that has been used to provide support to the claim that authors can get paid even when there is no property right through copyright legislation.

---

<sup>18</sup>

<sup>19</sup> Although it could be argued that the most successful authors receive mainly rents.

This results in this paper discredit the claim that American treatment of British authors in the 19<sup>th</sup> century was not so different from what it would have been had the U.S. provided copyright protection to British authors. The more complete historical record provided in this paper indicates that even a regime of synthetic copyright paid authors quite differently than a regime with copyright. The difference would have been even greater had synthetic copyright been banned by law, as it would be under modern antitrust laws.

Boldrin, Michele and David K. Levine, *Against Intellectual Monopoly* (2008).

Breyer, Stephen "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs" *Harvard Law Review*, Vol. 84, No. 2 (Dec., 1970), pp. 281-351.

Groves, Jeffrey D. "Courtesy of the Trade." A History of the Book in America. Volume 3. *The Industrial Book 1840-1880* (2007): 139-48.

Johns, Adrian. *Piracy: The intellectual property wars from Gutenberg to Gates*. University of Chicago Press, 2010.

Khan, B. Zorina. *The Democratization of Invention: patents and copyrights in American economic development, 1790-1920*. Cambridge University Press, 2005.

Khan, B. Zorina. *Does Copyright Piracy Pay? The Effects of US International Copyright Laws on the Market for Books, 1790-1920*. No. w10271. National Bureau of Economic Research, 2004.

Liebowitz Stan J., Is Efficient Copyright a Reasonable Goal? 79 *George Washington Law Review* 1692, 1695-97 (2011).

Liebowitz Stan J., "A Critique of Copyright Criticisms," *George Mason Law Review*, summer 2015, 22(4) 43-58.

Plant, Arnold. "The economic aspects of copyright in books." *Economica* 1, no. 2 (1934): 167-195.

Spoo, Robert. *Without copyrights: piracy, publishing, and the public domain*. Oxford University Press, 2013.

The Royal Commission on Copyright, The Royal Commissions and The Report Of The Commissioners (1878)

The Royal Commission on Copyright, Minutes of the Evidence Taken Before The Royal Commission On Copyright, (1878)

Winship, Michael. *American Literary Publishing in the mid-nineteenth Century*. Cambridge University Press, 1995.