

‘MANACLES UPON SCIENCE’: RE-EVALUATING COPYRIGHT IN INFORMATIONAL WORKS IN LIGHT OF 18TH CENTURY CASE LAW

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Questions over whether and, if so, how copyright law should protect works of fact and information have occupied the courts of several common law countries in recent decades. In Australia, they recently came to the fore in two Federal Court decisions relating to telephone directories. While the Court paid considerable attention to 19th century cases, consideration of the 18th century cases on which these precedents were based sheds greater light on the later development of the law. This article takes a microhistorical legal approach and examines a series of cases relating to road books from the late 18th century to explore some of the earliest legal approaches to works of geographical information, placing them in their social and cultural context.

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I INTRODUCTION

Debates over whether and, if so, how to protect works of fact and information regularly recur in copyright law. The chief reason for this is that such works immediately invoke the tension which lies at the heart of copyright law between protecting the interests of creators in being able to prevent unauthorised uses of their works (sometimes called 'free-riding') and the interests of the public in being able to access a flourishing public domain. A second key area of copyright law which addresses this tension is the existence of various exceptions to copyright protection which are known collectively as the fair dealing exceptions. Both areas of law have recently been the subject of extended debate and discussion in Australia: the former, that is, the question of protecting factual works, arose in a series of cases relating to telephone directories and television guides;¹ the latter, the exceptions to copyright, was the subject of a recent inquiry by the Australian Law Reform Commission.² However, both areas have extensive historical pedigrees. The present article examines some of the earliest cases to deal with works of geographical information. In so doing it draws out some aspects of the way the cases unfolded which pertain to today's discussions surrounding the treatment of factual works and, in the course of doing so, sheds further light on the history of fair dealing.

II THE 21ST CENTURY CONTEXT

The treatment of compilations of facts and information has been examined extensively in the academic literature and is not solely an issue for Australian

¹ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491; *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 194 FCR 142.

² Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report*, Report No 122 (2013).

law.³ Writing in the United States, Jane Ginsburg noted in 1990 that the effectiveness and coherence of United States copyright law were undermined by its misguided application of a unitary approach to works of ‘high’ and ‘low’ authorship.⁴ Subsequently, the United States Supreme Court handed down judgment in *Feist Publications Inc v Rural Telephone Service Co Inc*, a case involving telephone directories which rejected the so-called ‘sweat of the brow’ standard of originality in favour of the ‘minimal degree of creativity’ or ‘creative spark’ approach.⁵ In Canada, the Federal Court of Appeal, when faced with a case involving telephone directories, rejected a ‘sweat of the brow’ approach in favour of finding creativity to support originality.⁶ Seven years later, however, the Supreme Court of Canada laid down a slightly different standard between the two extremes of ‘sweat of the brow’ and ‘creativity’ by finding that an author must exercise ‘skill and judgment’ to establish originality in a work.⁷

Australia had its own telephone directories case in 2002, where the Full Federal Court held in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (*Desktop Marketing*) that copyright did subsist in telephone directories.⁸ In finding that these works met the necessary requirement of originality, Lindgren J invoked a long line of cases, beginning with *Matthewson v Stockdale*⁹ and continuing through the 19th and 20th centuries, as authority for the proposition that labour and expense in collecting, verifying, recording and

³ See, eg, Robert F Brauneis (ed), *Intellectual Property Protection of Fact-Based Works: Copyright and Its Alternatives* (Edward Elgar, 2009); Jane C Ginsburg, ‘No “Sweat”? Copyright and Other Protection of Works of Information after *Feist v Rural Telephone*’ (1992) 92 *Columbia Law Review* 338; Jane C Ginsburg, ‘Creation and Commercial Value: Copyright Protection of Works of Information’ (1990) 90 *Columbia Law Review* 1865; Robert C Denicola, ‘Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works’ (1981) 81 *Columbia Law Review* 516; Alexandra Sims, ‘Copyright’s Protection of Facts and Information’ (2006) 12 *New Zealand Business Law Quarterly* 360. See also the other works cited by Lindgren J in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491, 498–9 [18].

⁴ Ginsburg, ‘Creation and Commercial Value’, above n 3.

⁵ 499 US 340, 345 (O’Connor J for Rehnquist CJ, White, Marshall, Stevens, O’Connor, Scalia, Kennedy and Souter JJ) (1991).

⁶ *Tele-Direct (Publications) Inc v American Business Information Inc* [1998] 2 FC 22, 36–8 [28]–[29] (Décary JA for Denault and Décary JJA and Chevalier DJ).

⁷ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, 356 [23] (McLachlin CJ for McLachlin CJ, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ).

⁸ (2002) 119 FCR 491, 535–6 [166]–[171], 537 [179]–[180] (Lindgren J), 599–600 [431]–[436] (Sackville J).

⁹ (1806) 12 Ves Jr 270; 33 ER 103.

assembling data could establish originality.¹⁰ The Court also explicitly declined to follow the United States and Canadian approaches, citing the ‘long course of Anglo-Australian authority’ to the contrary.¹¹ The situation has since been dramatically altered, as a differently constituted Full Federal Court held in *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (*Phone Directories*) that copyright did not subsist in Telstra’s White and Yellow Pages directories.¹² In doing so, the Court adopted the approach of the High Court in the earlier decision of *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (*IceTV*) requiring authors of works to have employed ‘independent intellectual effort’¹³ or ‘sufficient effort of a literary nature’¹⁴ and that such efforts must be directed at the material form of the work rather than antecedent activities, such as collection of data.

These cases have attracted considerable comment and criticism. One academic commentator has referred to ‘an Australian copyright revolution’,¹⁵ while another has called it a ‘transformation of Australian copyright law’.¹⁶ Much of the analysis has focussed on the various courts’ treatment of the 19th century copyright precedent which was so heavily relied upon in *Desktop Marketing*.¹⁷ In that case Lindgren J and Sackville J gave detailed descriptions of the 19th century cases on factual works,¹⁸ as did Finkelstein J in the first

¹⁰ *Desktop Marketing* (2002) 119 FCR 491, 533–4 [160] (Lindgren J). See also Black CJ’s discussion of the ‘industrious collection’ cases at 496–7 [7], and Sackville J’s examination of ‘pre-1911 English authorities’ at 574–93 [342]–[409].

¹¹ *Ibid* 546–7 [217] (Lindgren J); see also at 598 [427] (Sackville J): ‘policy considerations by no means compel the conclusion that the [United States] approach ... should be followed in Australia.’

¹² (2010) 194 FCR 142, 171 [90] (Keane CJ), 179 [119] (Perram J), 191 [169] (Yates J).

¹³ (2009) 239 CLR 458, 479 [48] (French CJ, Crennan and Kiefel JJ).

¹⁴ *Ibid* 494 [99] (Gummow, Hayne and Heydon JJ).

¹⁵ Justine Pila, ‘An Australian Copyright Revolution and Its Relevance for UK Jurisprudence: *IceTV* in the Light of *Infopaq v Danske*’ (2010) 10 *Oxford University Commonwealth Law Journal* 77.

¹⁶ David Lindsay, ‘Protection of Compilations and Databases after *IceTV*: Authorship, Originality and the Transformation of Australian Copyright Law’ (2012) 38(1) *Monash University Law Review* 17.

¹⁷ *Ibid*. See also Justine Pila, ‘Compilation Copyright: A Matter Calling for “a Certain ... Sobriety”’ (2008) 19 *Australian Intellectual Property Journal* 231; Sam Ricketson, ‘Common Law Approaches to the Requirement of Originality’ in Catherine W Ng, Lionel Bently and Giuseppina D’Agostino (eds), *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (Hart Publishing, 2010) 221, 239–42.

¹⁸ *Desktop Marketing* (2002) 119 FCR 491, 500–12 [28]–[70] (Lindgren J), 574–9 [342]–[357] (Sackville J).

instance decision.¹⁹ Based on these examinations, all three judges considered that authority favoured the principle that originality would be satisfied by labour and expense in the gathering, selection and arrangement of facts.²⁰

In *IceTV* — in what David Lindsay refers to as a ‘breath-taking reinvention of legal history’²¹ — Gummow, Hayne and Heydon JJ responded to the Australian Digital Alliance’s submission that originality should require ‘creative spark’ or the exercise of ‘skill and judgment’ by observing:

It is by no means apparent that the law even before the [*Copyright Act 1911*, 1 & 2 Geo 5, c 46] was to any different effect ... It may be that the reasoning in *Desktop Marketing* with respect to compilations is out of line with the understanding of copyright law over many years.²²

However, as Lindsay further points out, ‘both judgments in *IceTV* singularly failed to engage with the “industrious compilation” line of cases’.²³ The judgment of French CJ, Crennan and Kiefel JJ referred to two 19th century cases which it proposed should not be followed,²⁴ while the judgment of Gummow, Hayne and Heydon JJ mentioned only three 19th century cases, all from the latter half of the century.²⁵ In the most recent phone book case, *Phone Directories*, Keane CJ noted the 19th century cases referred to by

¹⁹ *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* (2001) 181 ALR 134, 143–9 [35]–[58].

²⁰ Finkelstein J held that the United Kingdom cases established that ‘[c]opyright will subsist if there has been sufficient intellectual effort in the selection or arrangement of the facts. It will also subsist if the author has engaged in sufficient work or incurred sufficient expense in gathering the facts’: *ibid* 151 [64]. Sackville J concluded that

the course of authority in the United Kingdom and Australia recognises that originality in a factual compilation may lie in the labour and expense involved in collecting the information recorded in the work, as distinct from the ‘creative’ exercise of skill or judgment, or the application of intellectual effort.

Desktop Marketing (2002) 119 FCR 491, 592 [407]. Lindgren J observed that

[d]ecisively for the present case, there is no principle that the labour and expense of collecting, verifying, recording and assembling (albeit routinely) data to be compiled are irrelevant to, or are incapable of themselves establishing, origination, and therefore originality; on the contrary, the authorities strongly suggest that labour of that kind may do so.

At 533 [160]; see generally at 532–4 [160] (citations omitted).

²¹ Lindsay, above n 16, 34.

²² *IceTV* (2009) 239 CLR 458, 516 [188].

²³ Lindsay, above n 16, 50.

²⁴ *IceTV* (2009) 239 CLR 458, 470 [21].

²⁵ *Ibid* 487 [74]–[76].

Lindgren J in *Desktop Marketing*,²⁶ but concluded that '[t]he reasoning of all the judges in the High Court in *IceTV* requires a revision of the relevance of skill and labour to the subsistence of copyright'.²⁷

Lindsay himself carries out an investigation of the 19th century cases involving 'industrious collection' of facts, concluding that the English common law 'has always' protected the labour and resources invested in informational works by granting copyright protection. He argues that the approach adopted in *IceTV* and *Phone Directories* 'flies in the face of the common law tradition'.²⁸ Kathy Bowrey has similarly examined the 19th century cases in detail, and she has discerned a more nuanced approach taken by courts in that period which treated originality as a 'relational concept' involving questions of public policy as well as private rights.²⁹ Upon her analysis, she considers that the High Court's focus in *IceTV* on the plaintiff's originality as part of the test of infringement 'move[s] the spirit of Australian law closer toward half of the deliberation that may have occurred in infringement proceedings in the nineteenth century'.³⁰ Sam Ricketson, meanwhile, extracts from the pre-1911 case law

a constant, but not always consistent, thread of authority ... that has favoured the confinement of originality to expressive acts of authorship that comprise some element of skill and judgment, although the need for creativity in the sense of invention or aesthetic or artistic achievement has usually been denied.³¹

Justine Pila discerns a difference between the approach of lower courts, which required only labour which resulted in a 'meritorious book', and that of higher courts, which suggested the need for an 'author proper'.³²

In each of these instances, whether decisions of the various courts or critiques of them, the examination of historical precedent goes back only to the

²⁶ *Phone Directories* (2010) 194 FCR 142, 167–8 [78], quoting *Desktop Marketing* (2002) 119 FCR 491, 533–4 [160] (Lindgren J).

²⁷ *Phone Directories* (2010) 194 FCR 142, 168 [79].

²⁸ Lindsay, above n 16, 58.

²⁹ Kathy Bowrey, 'On Clarifying the Role of Originality and Fair Use in Nineteenth Century UK Jurisprudence: Appreciating "the Humble Grey Which Emerges as the Result of Long Controversy"' in Catherine W Ng, Lionel Bently and Giuseppina D'Agostino (eds), *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (Hart Publishing, 2010) 45, 64.

³⁰ *Ibid* 67.

³¹ Ricketson, above n 17, 252.

³² Pila, 'Compilation Copyright', above n 17, 233.

19th century. Indeed, much of it focusses on the latter half of that century.³³ There were, however, a series of English cases involving compilations of information in the latter half of the 18th century and very first years of the 19th century that are not discussed, or not discussed in detail. This article rectifies this omission by focussing on these cases. It pays particular attention to three sets of legal proceedings: *Carnan v Bowles*,³⁴ *Cary v Faden*³⁵ (sometimes called *Cary v Longman*³⁶) and *Cary v Kearsley*.³⁷ These cases all involved, either directly or indirectly, the same work — several editions of the road book popularly known as *Paterson's Roads*.³⁸

Despite these cases being relatively unknown, this article argues that they are significant for several reasons. First, they are important because, when appeals are made to history with a view to establishing continuity or disjunction, it matters not only which cases are selected to tell the story, but also at which point in time the story starts. An earlier starting point may well shift the general shape of the narrative that follows. Secondly, these cases are important because they clearly inform later authorities which have been relied upon as precedent although, as will be seen, some of these influential later cases may have misunderstood the earlier ones. Thirdly, when viewed as a group which includes the final case in the series, *Cary v Kearsley*, they teach us something interesting about the history of the fair dealing exceptions — a matter of some immediate contemporary relevance. In 2013, the Australian

³³ See especially Ricketson, above n 17, 240, who refers to cases post-1866. Cf Bowrey, above n 29, who does refer to some of the earlier cases; see especially at 57–8.

³⁴ (1786) 2 Bro CC 80; 29 ER 45.

³⁵ (1799) 5 Ves Jr 24; 31 ER 453.

³⁶ (1800) 3 Esp 273; 170 ER 613.

³⁷ (1802) 4 Esp 168; 170 ER 679.

³⁸ Daniel Paterson, *A New and Accurate Description of All the Direct and Principal Cross Roads in Great Britain* (T Carnan, 1771) (*Paterson's Roads 1st ed*). I am grateful to Tomás Gómez-Arostegui for drawing my attention to, and providing copies of, two other cases involving road books, one in Scotland and one in Ireland. In *Taylor v Wilson*, a 1776 decision of the Court of Session, the surveyors George Taylor and Andrew Skinner sought an interdict (injunction) to prevent publication of Robert Wilson and Richard Wilson, *The Town and Country Almanack for the Year MDCCLXXVII* (1777), which they alleged copied 14 pages of their lists of distances of Scottish roads: George Taylor and Andrew Skinner, 'Petition', Submission in *Taylor v Wilson*, 18 December 1776, Session Papers, vol 594, no 23 (SL). See below nn 130–40 and accompanying text. In *Wilson v Lewis*, a decision of the Court of King's Bench of Ireland, a jury awarded costs and damages in favour of the bookseller Wilson against Lewis for copying parts of a work called W Wilson, *The Post-Chaise Companion* (first published 1784, 1786 ed). The judges sitting in banc confirmed the award: 'Law Intelligence: King's Bench', *The Dublin Evening Post* (Dublin), 3 July 1787, 3; *The Dublin Chronicle* (Dublin), 5 February 1788, 8.

Law Reform Commission recommended the adoption of a fair use exception, observing that '[t]he principles encapsulated in fair use and fair dealing exceptions ... have a long common law history, traced back to eighteenth century England'.³⁹

This article aims to uncover the evolving doctrine of copyright law not by viewing it as a series of legal precedents appearing to follow some kind of internal logic, but instead by understanding the cases as historical events. It adopts an approach which Michael Birnhack has identified as 'micro-legal history'.⁴⁰ As Birnhack explains, microhistorical analysis

asks about the context of the events surrounding a case, or about a specific person, trying to better figure out the political, social and cultural meanings of the [legal] developments, going beyond the inevitably limited contours of the judicial opinion or legislation.⁴¹

This article will demonstrate that the manner in which the various pieces of litigation unfolded was produced by a multitude of factors, not least of which being the particular processes and procedures of 18th century courts of law and equity, but also the personalities involved and the particular nature of the commercial activity in question.

Paying greater attention to the litigation and its broader context highlights some important points about the cases relied upon as precedent. One such insight is that it becomes clear that words like 'originality' and 'fair use' are simply not being used in the same way that we use them today. While this does not mean that the cases are of no value, it does mean that judicial uses of such words can be less easily deployed as precedent supporting contemporary argument. Other elements, however, are revealed to be more constant — such as the tension that arises in copyright law between the material and the immaterial aspects of the work in copyright. A further cautionary point about precedent lies in the use of the category of 'informational works'. While the road books in question in these early cases were what we might today refer to as 'works of information', because they contained lists of geographical information as well as other factual matters, this was not a category known at the time. In his 1823 treatise on copyright law, Richard Godson placed road

³⁹ Australian Law Reform Commission, above n 2, 93 [4.31].

⁴⁰ Michael Birnhack, 'Copyright Pioneers' (2013) 5 *WIPO Journal* 118, 118.

⁴¹ *Ibid.*

books in the section dealing with ‘compilations,’ alongside chronologies, calendars of names, dictionaries and encyclopaedias.⁴²

In order to draw out these points in more detail, it is necessary to start by telling the story of the road book cases as it happened. Part III examines the first of the cases, *Carnan v Bowles*, tracing the progress of the litigation through the Court of Chancery. Part IV takes a short detour to examine two cases which did not involve *Paterson’s Roads*, but which are nonetheless relevant to the inquiry, as one involved a Scottish publication similar to a road book, and the other involved a work of historical information. Part V returns to the next stage of the *Paterson’s Roads* litigation, examining the dispute between Newbery and John Cary, while in Part VI the trilogy of cases is completed by a discussion of *Cary v Kearsley*. Part VII considers what this detailed examination can tell us not just about the law in the 18th century and the law today, but also about how social, cultural and economic contexts shape the law, as well as the impact on modern uses of historical precedent.

III THE JOURNEY BEGINS: PATERSON, CARNAN AND BOWLES

A *The History of Road Books*

‘The Utility of an Accurate Description of Roads, is so obvious to every Person who travels, that it requires no Recommendation’.⁴³ So wrote Daniel Paterson in the preface to the road book he compiled in 1771. And indeed, as he wrote, there were more and more road travellers to whom such a book could be useful. The enormous and accelerating changes to the British economy and development during the 18th century saw the population booming, manufacturing and industry rapidly expanding, towns and cities growing, and a surge in foreign and domestic trade. These developments were both facilitated by, and themselves encouraged, improvements in the road and transport networks.⁴⁴ In earlier times most of those on the road were travelling for business, although some did travel for pleasure. By the 18th century, improved travelling conditions meant more and different kinds of travellers took to the

⁴² Richard Godson, *A Practical Treatise on the Law of Patents for Inventions and of Copyright: With an Introductory Book on Monopolies, Illustrated with Notes of the Principal Cases* (Joseph Butterworth and Son, 1823) 229.

⁴³ Paterson, *Paterson’s Roads* 1st ed, above n 38, Preface.

⁴⁴ For a detailed examination of the relationship between roads and economic development, see Eric Pawson, *Transport and Economy: The Turnpike Roads of Eighteenth Century Britain* (Academic Press, 1977).

roads, as well as greater volumes of commercial traffic.⁴⁵ Because work was being done to improve the roads (especially through the use of turnpike trusts and, later, legislation⁴⁶), the need for up-to-date information on those roads also grew.⁴⁷

The chief source of such information in this period was the road book. Road books were an early form of road atlas but usually consisted only of written itineraries rather than maps. Such printed itineraries had been around since the 16th century but were issued in growing numbers up to the 19th century.⁴⁸ From around 1571 almanacs became a main source of such lists of roads and routes, although several ‘free-standing’ books were produced, and over the years this information became increasingly corrupted through transmission errors.⁴⁹ However, in the 1670s, with the support of members of the Royal Society and funds raised through subscription enterprises, John Ogilby sent out surveyors to map the roads of Britain. These surveyors were armed only with a perambulator (or waywiser as it was known to contemporaries) to measure distances and a surveyor’s compass or theodolite to measure changes in direction. In 1675, Ogilby published his groundbreaking *Britannia* which provided the most up-to-date and accurate highway information ever available, presented in a series of ‘strip-maps’ which showed sections of the roads with some adjacent landmarks such as geographical features (rivers, hills), important houses and other information of relevance to the traveller, like the location of bridges.⁵⁰ Significantly, it also made consistent use of measurement of 1760 yards to the mile (later, the statute mile). Although the volume represented only a small part of a much larger global cartographical project (which Ogilby had had to abandon due to lack of funds

⁴⁵ See Catherine Delano-Smith, ‘Milieus of Mobility: Itineraries, Route Maps, and Road Maps’ in James R Akerman (ed), *Cartographies of Travel and Navigation* (University of Chicago Press, 2006) 16.

⁴⁶ See, eg, *Turnpike Roads Act 1773*, 13 Geo 3, c 84.

⁴⁷ For example, Boyd Hilton describes how the journey time from London to Bristol was 40 hours in 1750, but down to fewer than 24 in 1783, and under 12 by 1811: Boyd Hilton, *A Mad, Bad, and Dangerous People? England 1783–1846* (Oxford University Press, 2006) 15.

⁴⁸ Delano-Smith, above n 45, 39.

⁴⁹ See Donald Hodson, *The Early Printed Road Books of England and Wales* (PhD Thesis, University of Exeter, 2000) 20–1.

⁵⁰ See John Ogilby, *Britannia* (*Theatrum Orbis Terrarum*, first published 1675, 1970 ed).

and, perhaps, energy), it was the first road atlas in Great Britain and therefore the foundation publication of an enduring cartographic genre.⁵¹

What is of interest to the modern reader, however, is that *Britannia* was not intended to be used for way-finding. Recent scholarship has persuasively argued that *Britannia's* immediate audience was not the commercial or other traveller who needed to find his way from A to B. As Catherine Delano-Smith explains, '[f]rom the traveler's practical point of view there is no need to translate a simple written list into graphic form'.⁵² Rather, Ogilby's audience for *Britannia* was the 'armchair traveller', who wished to experience the world without leaving the comfort of his or her own home. The function of the volume itself was to gain the approval of monarchs and other wealthy potential patrons in the promotion of Ogilby's grander, but unrealised, magnum opus: to represent the entire globe in a series of lavish atlases.⁵³

Although *Britannia* might have been used for way-planning (if not way-finding), it is highly unlikely that the book in its entirety was ever taken on the road, given that it weighed nearly 7 kilograms.⁵⁴ Ogilby himself produced a letterpress reduction in a narrow format suitable for being carried in a pocket in 1676 which was clearly aimed at travellers.⁵⁵ Ogilby's geographic information was almost immediately copied by the London booksellers Thomas Bassett and Richard Chiswell, who converted the maps into typographic word maps, which arranged the place names in order and in their approximate direction on an imaginary map of England and Wales.⁵⁶

By the early 18th century a number of map-makers and booksellers were copying Ogilby's format and adapting it to create their own pocket-sized editions and combining maps and letterpress. The most popular of these was John Owen and Emanuel Bowen's *Britannia Depicta or Ogilby Improv'd*, first

⁵¹ John Brian Harley, 'Introduction' in John Ogilby, *Britannia* (Theatrum Orbis Terrarum, first published 1675, 1970 ed) v, xv. See also E G R Taylor, 'Robert Hooke and the Cartographical Projects of the Late Seventeenth Century (1666–1696)' (1937) 90 *Geographical Journal* 529.

⁵² Delano-Smith, above n 45, 46.

⁵³ Garrett A Sullivan Jr, 'The Atlas as Literary Genre: Reading the Inutility of John Ogilby's *Britannia*' (Paper presented at the 13th Kenneth Nebenzahl Jr Lectures in the History of Cartography, Newberry Library, Chicago, 1999).

⁵⁴ Catherine Delano-Smith and Roger J P Kain, *English Maps: A History* (British Library, 1999) 169.

⁵⁵ Hodson, *The Early Printed Road Books of England and Wales*, above n 49, 504.

⁵⁶ *Ibid* 506.

published in 1720.⁵⁷ By the end of the century there were numerous such works on the market, some of which contained maps and some only letter-press, with new editions appearing every few years.⁵⁸ These books were supplying a growing source of demand and new classes of travellers, who were using them for way-finding as well as way-planning.⁵⁹ Their popularity is further emphasised by some of the details revealed in the litigation to which this article now turns.

B Paterson's Roads *versus* Paterson's British Itinerary

Our story begins in 1771, when Daniel Paterson entered into an agreement with the bookseller Thomas Carnan to print and publish *A New and Accurate Description of All the Direct and Principal Cross Roads in Great Britain* ('*Paterson's Roads 1st ed*').⁶⁰ Of the man Daniel Paterson himself little is known.⁶¹ His first publishing venture was a single engraved sheet which gave a table of distances between the principal cities and towns of England, accompanied by a skeleton map.⁶² His next endeavour was the road book for which he would become known. Then commissioned as Ensign in the 30th Regiment of Foot, Paterson described himself in the book as 'Assistant to the Quarter-Master-General of His Majesty's Forces' and dedicated the book to Lieutenant Colonel George Morrison, the then Quartermaster General.⁶³

⁵⁷ John Owen and Emanuel Bowen, *Britannia Depicta or Ogilby Improv'd: Being a Correct Copy of Mr Ogilby's Actual Survey of All Ye Direct and Principal Cross Roads in England and Wales* (Thomas Bowles, 1720) ('*Britannia Depicta or Ogilby Improv'd*').

⁵⁸ Some of the most well-known publications were Thomas Kitchin, *Kitchin's Post-Chaise Companion, through England and Wales; Containing All the Ancient and New Additional Roads, with Every Topographical Detail Relating Thereto* (John Bowles, Carington Bowles and Robert Sayer, 1767) ('*Kitchin's Post-Chaise Companion*'); Carington Bowles, *Bowles's Post-Chaise Companion; or, Traveller's Directory through England and Wales* (1775) ('*Bowles's Post-Chaise Companion*'); W Owen, *Owen's Book Of Roads: Or, a Description of the Roads of Great Britain; Being a Companion to Owen's Book of Fairs* (W Owen and R Goadby, 1777), which by 1779 was published as W Owen, *Owen's New Book of Roads: Or, a Description of the Roads of Great Britain; Being a Companion to Owen's Complete Book of Fairs* (W Owen and Goadby and Co, 2nd ed, 1779).

⁵⁹ Delano-Smith, above n 45, 39.

⁶⁰ See Paterson, *Paterson's Roads 1st ed*, above n 38.

⁶¹ See Sir Herbert George Fordham, "'Paterson's Roads': Daniel Paterson, His Maps and Itineraries, 1738–1825' (1925) 5 *The Library* (4th) 333, 333.

⁶² *Ibid*; Daniel Paterson, *A Scale of Distances of the Principal Cities and Towns in England* (1766).

⁶³ Paterson, *Paterson's Roads 1st ed*, above n 38, frontispiece.

The book he produced for Carnan was essentially, as its title indicated, a list of the direct roads and principal crossroads of Great Britain, with their various distances calculated from a fixed point (for example, London Bridge or Westminster Bridge). In addition to listing the roads of England, Wales and Scotland, it contained details of the circuits of the judges and an index to the country seats of the aristocracy and landed gentry, as well as short descriptions of some of the great houses and their owners near the particular route described. Over subsequent editions a single map of the country was added, the roads of Scotland were omitted and moved to a separate publication and a list of all the fairs in England and Wales was added.⁶⁴

Despite the claims made in its title, however, *Paterson's Roads 1st ed* was not particularly new (nor is it likely to have been particularly accurate, at least by today's standards). Indeed, it followed a very similar format to numerous other itineraries already on the market. In creating his road books Paterson was drawing upon by then well-established cartographic traditions. He carried out no new surveys but rather gathered and collated information from a variety of sources, many of which were no doubt associated with his employment,⁶⁵ and used them to update the work carried out by Ogilby 100 years earlier (taking Ogilby's information but not his maps). Paterson himself explained that his original motivation had been

a desire of excelling in his profession, and of executing the duties of his staff employment with that degree of accuracy and precision necessary for conducting the movements of an army, in such regularity and good order as is absolutely requisite for the good of the service ...⁶⁶

Considering that 'a thorough knowledge of the Roads, Towns, and even Villages of Note in the Kingdom, must be allowed the first essential towards the wished-for accomplishment'⁶⁷ he began compiling information first for his own use, and then was persuaded by friends to present it to the public. Having done so:

⁶⁴ See, eg, Daniel Paterson, *A New and Accurate Description of All the Direct and Principal Cross Roads in Great-Britain* (Longman and Rees, 12th ed, 1799).

⁶⁵ He also appears to have received assistance from the Post Office in 1790 and 1791, according to Letter from Francis Freeling, Post Office Secretary, to the Postmaster General, 14 May 1801, POST 10/286 (BPM).

⁶⁶ Daniel Paterson, *Paterson's British Itinerary, Being a New and Accurate Delineation and Description of the Direct and Principal Cross Roads of Great Britain* (Carington Bowles, 1785) iii.

⁶⁷ *Ibid.*

The success attending that first Essay (notwithstanding its many imperfections) and the reception it has been honoured with from a generous public, has encouraged the Author to persevere in his favourite pursuit, sparing neither pains nor expence [sic] in procuring such materials as would enable him to improve upon the subject ...⁶⁸

Thomas Carnan was a London publisher and bookseller, famous in the annals of copyright and publishing history as the man who broke the longstanding monopoly held by the Stationers' Company on printing almanacs in the 1770s.⁶⁹ The book Paterson produced for him was certainly successful. In the 10 years after its first publication in 1771, *Paterson's Roads* ran to four further editions; each time Carnan paid Paterson for making additions and corrections. Carnan alleged he disposed of many thousands of copies of the first and second editions, and many hundreds of the third, fourth and fifth editions.⁷⁰ However, it seems that after 1781 he and Paterson had a parting of ways. The next edition, published in 1783, was prepared for Carnan by a hack writer named Richard Johnson⁷¹ while Paterson found a new publisher: the London print and map seller Carington Bowles. For Bowles, Paterson produced a book titled *Paterson's British Itinerary, Being a New and Accurate Delineation and Description of the Direct and Principal Cross Roads of Great Britain* ('*Paterson's British Itinerary*').

Carington Bowles ran a substantial wholesale and retail print business, and he was already involved in publishing some of *Paterson's Roads's* main competitors.⁷² Bringing Paterson and his reputation into his publication list was likely to have been a good business strategy. And while *Paterson's Roads* might have

⁶⁸ Ibid.

⁶⁹ *Stationers' Co v Carnan* (1775) 2 Bl R 1004; 96 ER 590. See also Cyprian Blagden, 'Thomas Carnan and the Almanack Monopoly' (1961) 14 *Studies in Bibliography* 23.

⁷⁰ C12/136/25m1, 5 July 1785 (PRO).

⁷¹ Robin Myers (ed), *The Records of the Stationers' Company* (Chadwyck-Healey, 1985) ser 1, Box O (Richard Johnson, father and son 1734–1860). For more on Richard Johnson, see M J P Weedon, 'Richard Johnson and the Successors to John Newbery' (1949) 4 *The Library* (5th) 25.

⁷² Carington Bowles acquired his uncle Thomas Bowles' share in *Britannia Depicta or Ogilby Improv'd*, presumably after his death when John Bowles purchased Thomas' business for his son Carington (I learnt of John's purchase of Thomas' business through the personal notes of Michael Treadwell). Carington Bowles published a new edition in 1764: John Owen and Emanuel Bowen, *Britannia Depicta, or, Ogilby Improved: Being an Actual Survey of All the Direct and Principal Cross Roads of England and Wales* (Carington Bowles, first published 1720, 1764 ed). He also published *Kitchin's Post-Chaise Companion* (which like *Britannia Depicta* or *Ogilby Improv'd* contained strip-maps) and *Bowles's Post-Chaise Companion*: see above n 58.

used Ogilby's information, it did not employ his maps. *Paterson's British Itinerary*, by contrast, did contain 179 strip-maps of the kind popularised by Ogilby. It is possible that Bowles had access to copperplates and engravers through his other road book ventures based on *Britannia*.

It may be that money lay at the root of Paterson's defection. Carnan had originally paid Paterson the sum of £50 and undertook to provide him with 300 copies of the book for the first edition. For corrections and updates, Carnan had paid him £11 16s 3d, £15 6s 6d, and £10 10s for the second, third, and fourth editions, respectively.⁷³ In 1783, however, he paid Johnson half what he had paid Paterson, namely £5 5s, for corrections resulting in the fifth edition. Bowles, meanwhile, paid Paterson the considerably larger sum of £263 13s 3d to produce *Paterson's British Itinerary and* supplied him with 50 copies.⁷⁴

Carnan was not one to turn a blind eye to such a potential threat. He was known as being 'litigious, cantankerous, a born rebel and fighter against the "establishment", but brave and tenacious of purpose in a high degree'.⁷⁵ In addition to fighting the Stationers' Company, he had also petitioned, successfully, against a bill seeking to reinstate the monopoly in 1779.⁷⁶ By the mid-1780s, therefore, he was an experienced legal player, who had tasted victory in the courts and legislature, and was fully aware of the possibilities offered by the *Statute of Anne 1710*, 8 Anne, c 19 ('*Statute of Anne*'). The *Statute of Anne* provided that authors or their assigns would have the sole right to print and publish books for the term of 14 years, with a second term of 14 years to apply to authors still alive at the expiration of the first period.⁷⁷ Being a book, *Paterson's Roads* fell within its scope. When fighting against the interests of the Stationers' Company, Carnan had extolled the virtues of competition, arguing in the case of almanacs that '[t]heir whole authority depends on their correctness. The way to make them correct is to permit an

⁷³ C12/136/25m1, 5 July 1785 (PRO).

⁷⁴ Paterson, *Paterson's British Itinerary*, above n 66.

⁷⁵ S Roscoe, *John Newbery and His Successors, 1740–1814: A Bibliography* (Five Owls Press, 1973) 18.

⁷⁶ Ronan Deazley, 'Commentary on *Stationers' Company v Carnan* (1775)' on L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450–1900)* (2008) <http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_uk_1775>.

⁷⁷ A second statute was passed in 1734 giving similar protection to engravers: *Engraving Copyright Act 1734*, 8 Geo 2, c 13. A third statute, in 1767, extended this protection to cover maps, charts and plans: *Engraving Copyright Act 1767*, 7 Geo 3, c 38, s 3.

emulation and rivalry'.⁷⁸ Unsurprisingly, he felt differently when it was his property that was invaded.

Carnan engaged several high profile counsel for his battle against Bowles and Paterson, including the Solicitor General Archibald Macdonald and John Scott (later Lord Eldon),⁷⁹ and brought a Bill of Complaint in Chancery on 5 July 1785.⁸⁰ Bowles and Paterson made their Answer 10 days later,⁸¹ and the following week the Solicitor General moved for an injunction to restrain the sale of the book.⁸² Like Carnan, Bowles was not unfamiliar with the courts or the law relating to printing, having been involved on two previous occasions in litigation involving allegations of copying of maps.⁸³ In response to Carnan's suit, Bowles and Paterson also engaged a number of eminent barristers to plead their case in court, including James Mansfield and John Stainsby, both leading Chancery counsel.⁸⁴

The case raised two separate legal issues: first, whether the copyright Paterson had assigned to Carnan had reverted to him, in which case he would be able to make a second assignment to Bowles; and second, whether the book sold to Bowles was an infringement of Carnan's book.⁸⁵ The first question turned on the provisions of the *Statute of Anne*. As mentioned above, s 2 of the *Statute of Anne* provided that the author of any book, or his assigns, had the sole right and liberty of printing and reprinting for the term of 14 years. The final section of the *Statute of Anne* stated that 'after the Expiration of the

⁷⁸ *Stationers' Co v Carnan* (1775) 2 Bl R 1004, 1008; 96 ER 590, 592.

⁷⁹ John Scott, Lord Eldon, was Lord Chancellor from 1801 to 1827 (with a short period from 1806 to 1807 when he was replaced by Lord Erskine) and generally regarded as the greatest lawyer of his age.

⁸⁰ C12/136/25m1, 2, 3, 5 July 1785 (PRO).

⁸¹ C12/136/25m5, 15 July 1785 (PRO); C12/136/25m4, 15 July 1785 (PRO).

⁸² *Carnan v Bowles* (1786) 2 Bro CC 80, 81; 29 ER 45, 46.

⁸³ In 1770, the prominent mapmaker Thomas Jefferys had brought a suit against him in Chancery accusing him of copying a map-based game: *Jeffery v Bowles* (1770) Dick 429; 21 ER 336. See also C12/1318/18m1, 15 February 1770 (PRO); C33/433 f.161^v, 19 February 1770 (PRO); C12/1318/18m2, 7 March 1770 (PRO); C33/433 f.421^v, 7 March 1770 (PRO); C33/433 f.267^v, 17 March 1770 (PRO). In 1780, Bowles himself had brought a suit against the nautical mapmaker Robert Sayer and his partner John Bennett for copying a map of Scotland: C12/1656/12m1, 12 June 1780 (PRO); C12/1656/12m2, 12 June 1780 (PRO); C12/1656/12m3, 29 June 1780 (PRO); C33/455 f.2, 14 November 1780 (PRO); C33/455 f.7, 21 November 1780 (PRO); C33/455 f.497, 25 May 1781 (PRO). The parties settled the case before it came on for a hearing.

⁸⁴ See David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford University Press, 2000) 352–4.

⁸⁵ *Carnan v Bowles* (1785) 2 Bro CC 80, 81; 29 ER 45, 46.

said Term of Fourteen Years the sole Right of Printing ... shall return to the Authors thereof, if they are then Living, for another Term of Fourteen Years'.⁸⁶ Paterson and Bowles were relying on this section, arguing that Paterson's initial assignment to Carnan in 1771 ended in 1785 and returned to Paterson in order that he could reassign his rights to Bowles.⁸⁷

Carnan raised two possible grounds upon which he was entitled to the copyright for the second term of 14 years. The first ground was that Paterson had conveyed to Carnan his rights in the second 14-year term as well as his rights in the first 14-year term in the initial agreement back in 1771. The alternative ground was that the fifth edition, as amended and updated by Paterson and entered in the Stationer's Register on 3 September 1781, was a new work which Carnan had the right to publish for another 14 years (which term still had 10 years to run).⁸⁸

Lord Thurlow LC apparently accepted Carnan's first argument and held that the reversionary term did indeed pass to Carnan, so that he acquired both 14-year terms in 1771. As Lionel Bently has observed, Lord Thurlow LC based his decision on the wording of the agreement and the context in which it was made.⁸⁹ First, Lord Thurlow LC interpreted the word 'interest' as indicating an intention to transfer the contingent right.⁹⁰ However, the Lord Chancellor also looked at the context of the grant. The agreement had been entered into after the case of *Millar v Taylor*, in which the King's Bench had accepted the principle of common law copyright,⁹¹ but before the decision in *Donaldson v Beckett*, in which the House of Lords rejected it.⁹² Therefore, Lord Thurlow LC concluded, the grant 'must have been made upon the idea of

⁸⁶ *Statute of Anne* s 11.

⁸⁷ *Carnan v Bowles* (1786) 2 Bro CC 80, 82; 29 ER 45, 46.

⁸⁸ C12/136/25m1, 5 July 1785 (PRO).

⁸⁹ Lionel Bently and Jane C Ginsburg, "'The Sole Right ... Shall Return to the Authors': Anglo-American Authors' Reversion Rights from the *Statute of Anne* to Contemporary US Copyright' (2010) 25 *Berkeley Technology Law Journal* 1475, 1531. Note that Bently assigns this reasoning to Kenyon MR, but that this is based upon a mistake as to which order is being referred to. The order he cites, C33/465 f.449^v-450^v (PRO), was made on 20 June 1786, and the decision as to the reversionary term was made on 23 July 1785: C33/463 f.696^v-696^v (PRO). There is, however, a discrepancy as to dates in the reported case, which dates this as 22 July 1785: *Carnan v Bowles* (1786) 2 Bro CC 80, 81; 29 ER 45, 46. This could be explained if the hearing occurred over two days. The Master's Report confirms 23 July 1785 as the day on which the order was made: C38/728, 29 May 1786 (PRO).

⁹⁰ *Carnan v Bowles* (1786) 2 Bro CC 80, 83; 29 ER 45, 47.

⁹¹ (1769) 4 Burr 2303, 2334-5 (Willes J), 2354 (Aston J), 2395-9 (Lord Mansfield CJ); 98 ER 201, 218 (Willes J), 228-9 (Aston J), 250-3 (Lord Mansfield CJ).

⁹² (1774) 2 Bro Parl Cas 129, 133; 1 ER 837, 849.

a perpetuity'.⁹³ It is worth noting that, when acting as counsel for the booksellers opposing the perpetual right at common law, Lord Thurlow LC had specifically referred to the contingent term as evidence against the common law right.⁹⁴ However, in *Carnan v Bowles* he took a firm line, stating '[i]f [Paterson] had meant to convey his first term only, he should have said so'.⁹⁵

Once the Lord Chancellor found that Carnan *did* continue to hold the copyright, Bowles and Paterson had to argue that they had not infringed it. The success of the defence would turn on whether the book produced by Bowles was effectively *the same* book as that published by Carnan. The *Statute of Anne* contained no provisions on infringement, nor exceptions or defences; its drafters appear only to have contemplated the situation of a person publishing a book already owned by someone else. However, there had already been a number of cases brought before the courts involving partial copying, rather than wholesale piracy, and the courts had approached them by asking whether the allegedly infringing book was the *same* book with merely colourable (that is, disguising) alterations, or a new and different book.⁹⁶ If the former, it would infringe; if the latter, it would not.

In relation to this part of the case, counsel for Carnan's main argument was that the books were the same, and that Bowles' was copied from his. He contended that the fact that one contained the roads as written description and the other depicted them graphically was immaterial: 'The book contains the same roads; the only difference is, that one is engraved on copperplates, the other is in letter-press'.⁹⁷ Bowles and Paterson responded that, on the contrary, the addition of the maps had varied the whole work, and that

this is as different from the former work as any two works of this nature can be. They must all be considerably alike, as being descriptions of the same places.

⁹³ *Carnan v Bowles* (1786) 2 Bro CC 80, 83; 29 ER 45, 47.

⁹⁴ *Tonson v Collins* (1761) 1 Bl R 301, 309; 96 ER 169, 172; *Donaldson v Beckett* (1774) 2 Bro Parl Cas 129, 142–3; 1 ER 837, 844–6. For a recent reassessment of the common law right as discussed in *Millar v Taylor* and *Donaldson v Beckett*, see H Tomás Gómez-Arostegui, 'Copyright at Common Law in 1774' (2014) 47 *Connecticut Law Review* 1.

⁹⁵ *Carnan v Bowles* (1786) 2 Bro CC 80, 84; 29 ER 45, 47. For more detail on this aspect of the case, see Bently and Ginsburg, above n 89, 1526–31.

⁹⁶ See Isabella Alexander, *Copyright and the Public Interest in the Nineteenth Century* (Hart Publishing, 2010) ch 6.

⁹⁷ *Carnan v Bowles* (1786) 2 Bro CC 80, 82; 29 ER 45, 46.

Ogleby [sic], *Kitchen* [sic], et *Britannia delineata*, must all essentially be the same.⁹⁸

They further complained that, although the book had been published before Christmas, no complaint was made until right before the long summer vacation, ‘the time when books of this kind have best sale’.⁹⁹ Solicitor General Macdonald countered for Carnan that merely making improvements could not make the book a new and different work to the original. It could only be a new work if surveys of different roads were included. He went further and said that the additional parts in Bowles’ book were the maps and that ‘[t]here is no additional mental labour’ in them.¹⁰⁰

The Lord Chancellor appeared unsure as to how to decide whether copying had occurred in such a case. Faced with the issue of whether the book published by Bowles was a new work, and therefore non-infringing, he had to confront the question of how a work that built upon existing works could itself be an original work. In addition, this raised the question whether all of the Carnan editions were new works, or just the latest one. Contemplating this matter, he observed:

In this case it is not an operation of the mind, like the *Essay on Human Understanding*; it lies *in medio*: every man with eyes can trace it; and the whole merit depends upon the accuracy of the observation: every description will therefore be in a great measure original. If this be so, every edition will be a new work; if it differs as much from the last edition as it does from the last precedent work: either all are original works, or none of them.¹⁰¹

After considering the contingent interest question, he went on:

It is an extremely difficult thing to establish identity in a map, or a mere list of distances: but there may be originality in casting an index, or pointing out a ready method of finding a place in a map. In the work Paterson sold to Carnan there seems to be something of this sort of originality.¹⁰²

He referred the case to a Master to examine ‘the originality’ of the books and make a report.¹⁰³

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid 83; 47.

¹⁰¹ Ibid.

¹⁰² Ibid 84; 47.

¹⁰³ Ibid; C33/463 f.696^r–696^v, 23 July 1785 (PRO).

The Master, John Eardley Wilmot,¹⁰⁴ made his report 10 months later, on 29 May 1786. He stated that he had been attended by both the plaintiff and the defendants, and their solicitors, and that he had ‘looked into’ both books.¹⁰⁵ Having done so, he concluded that they were not the same book and that they differed in the following ways: the former book was ‘a description only’ of the roads, while the latter book was also a ‘delineation’, containing 179 maps or charts and therefore a great deal more information.¹⁰⁶ He observed that the books were by the same author, Paterson, and went on to say: ‘with regard to those roads which are in both Books described in Letter Press, I find there are many small differences, additions, corrections, & variations, but that the said Roads are in Substance nearly the same’.¹⁰⁷ Finally, he pointed out that the two books were sold at different prices, Carnan’s book being sold for two shillings, and Bowles’ for two guineas.¹⁰⁸

Kenyon MR awarded Carnan an injunction on 20 June 1786 in respect of the letterpress only. Kenyon MR held that the Master’s report had found the ‘delineation’ to be different in the defendant’s work, but that the letterpress was ‘nearly the same’ and that ‘the mere act of embellishing could not divest the right of the owner in the text’.¹⁰⁹ However, Bowles and Paterson moved to dissolve the injunction in November of that year and, having heard argument, the Lord Chancellor found that the Master’s report was unclear and ordered him to review it.¹¹⁰

Master Wilmot took another six months to deliver his report. This time, he was even more clearly in favour of Bowles and Paterson, stating again that the defendants’ book was not the same as the plaintiff’s book and that it was ‘so essentially different from the last as to render the former a new and original composition in the following respects’.¹¹¹ He then went on to observe that he considered neither book to be new and original except as compared with each other, as there were numerous books both prior to and contemporary with

¹⁰⁴ Later taking the name John Eardley Eardley-Wilmot. His father was Sir John Eardley Wilmot (1709–92), Chief Justice of the Common Pleas (1766–71).

¹⁰⁵ C38/728, 29 May 1786 (PRO).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ C33/465 f.449^v–450^r, 20 June 1786 (PRO); *Carnan v Bowles* (1786) 2 Bro CC 80, 85; 29 ER 45, 48.

¹¹⁰ *Carnan v Bowles* (1786) 1 Cox 283, 285–6; 29 ER 1168, 1168–9 (Lord Thurlow LC); C33/467 f.23^v, 24 November 1786 (PRO).

¹¹¹ C38/736, 19 May 1787 (PRO).

those in question ‘of the same kind but differing in form and execution’.¹¹² Secondly, he noted that the greatest part of Bowles’ book was the delineation of roads on copperplates and it therefore had much more information than Carnan’s book. Thirdly, he found that the letterpress in Bowles’ book contained many additions and corrections and so could not be said to be the same.¹¹³

Lord Thurlow LC accepted the report,¹¹⁴ but Carnan took Exceptions to it and these were argued on 19 July 1787.¹¹⁵ Lord Thurlow LC responded by referring the report back to the Master for a third time. This time, he said, he wished to know specifically in which respects Carnan’s book could be considered an original book and

whether the said Book published by the Defendant Carington Bowles is the same as the Book published by the Plaintiff in any and which of the respects in which he finds the latter is an original Work and it is ordered that the said Master do state the respective particulars in which the said Books are different from each Other.¹¹⁶

From the reported judgment we can detect a certain terseness towards Master Wilmot from Lord Thurlow LC (whose nicknames in court were Tiger or Lion, for his fierceness¹¹⁷). Unfortunately, we can only speculate as to what Master Wilmot would have said in his third report. We know that Carnan continued to pursue the case, perhaps encouraged by the Lord Chancellor’s re-referral, or possibly simply due to his litigious and cantankerous nature.¹¹⁸ However, in July 1788 Carnan died, and I have been unable to locate any further records.

The case was clearly one of broader interest in the publishing world, attracting several mentions in the popular press.¹¹⁹ Some of this reporting was

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ C33/467 f393^r, 19 May 1787 (PRO).

¹¹⁵ C40/5, 4 June 1787 (PRO); C33/467 f.429^v, 4 June 1787 (PRO); C33/467 f.617^v–618^r, 19 July 1787 (PRO).

¹¹⁶ C33/467 f.617^v–618^r, 19 July 1787 (PRO).

¹¹⁷ G M Ditchfield, ‘Thurlow, Edward, First Baron Thurlow (1731–1806)’ in H C G Matthew and Brian Harrison (eds), *Oxford Dictionary of National Biography* (Oxford University Press, 2004) vol 54, 715, 718.

¹¹⁸ Records from the accounts book of Richard Johnson show he was still employed by Carnan to prepare material for the case in January and February 1788: Myers, above n 71.

¹¹⁹ See, eg, Simeon Moreau, ‘Postscript’, *The General Evening Post* (London), 24 June 1786, 4; *The Morning Chronicle, and London Advertiser* (London), 28 June 1786, 3; *The Morning Chronicle*,

incredulous at the resources being devoted to the question, with *The World, Fashionable Advertiser* noting:

Yesterday, there was a second hearing on that *very important* object, the Book of Roads ... There was a vast quantity of talents exercised on this object, small as it is, viz Scott, Hargrave, Mansfield, the Solicitor General, and Madocks.¹²⁰

The newspaper's owner was John Bell, a bookseller and printer whose business was based on cheap reprints of popular books, so his paper might have been expected to take an unsympathetic view of expansive claims towards literary property.¹²¹ Nevertheless, the particular nature of the works in question raised a number of knotty problems for the court.

The first point to note, from a modern perspective, is that the question of whether copyright could subsist in such works was centred on the question of whether the books had been copied from other books, and not because they contained facts per se. The subsistence question was therefore merged with the infringement question, and this is where the real difficulty lay: how was one to ascertain whether there had been infringement in such a case? The various parties involved all had their own approaches, some of which will appear familiar to modern eyes. Carnan's counsel argued for a completely dematerialised approach, and a total protection of information itself. As mentioned above, he argued the two books were the same because they contained the same information: 'The book contains the same roads; the only difference is, that one is engraved on copperplates, the other is in letter-press'.¹²²

The defendants argued that, working within an established genre, they had differentiated their book as much as they possibly could. This approach seemed to resonate best with Master Wilmot. For him, the fact that both books contained the same information based on the same sources led him to focus on the differences between the books. Clearly, they were different in many respects. Most significantly, one contained maps and the other only a written itinerary. However, in some cases the distances also differed and perhaps most importantly they were designed for different sectors of the

and London Advertiser (London), 24 November 1786, 2; *The Morning Chronicle, and London Advertiser* (London), 30 July 1787, 2; *The General Advertiser* (London), 20 July 1787, 2.

¹²⁰ *The World, Fashionable Advertiser* (London), 20 July 1787, 2.

¹²¹ See James Raven, *The Business of Books: Booksellers and the English Book Trade, 1450–1850* (Yale University Press, 2007) 243–4; Thomas F Bonnell, 'John Bell's *Poets of Great Britain*: The "Little Trifling Edition" Revisited' (1987) 85 *Modern Philology* 128, 147.

¹²² *Carnan v Bowles* (1786) 2 Bro CC 80, 82; 29 ER 45, 46.

market. *Paterson's Roads* contained information of use to commercial travellers, such as the fair and market days and circuit dates, with a nod towards those travelling for leisure in the brief descriptions of some of the sights on route, and was sold at the price of two shillings. *Paterson's British Itinerary*, which was sold for two guineas (reflecting the greater cost of the copper-plates), was much more squarely aimed at affluent travellers, with greater printed information on local sights, views and great houses, as well as more such information being included in the maps. As Paterson explained in the Preface, the weakness of previous works (including his own) was that they contained only the line of the road without 'affording the least idea of the circumjacent country, or describing any of those beautiful seats and other remarkable objects which attract the Traveller's attention, and excite a curiosity he cannot get satisfied'.¹²³

When the case came back to the Master of the Rolls after the Master's first report, Kenyon MR sought to apply the approach adopted in the earlier case of *Mason v Murray* (a case in which he had appeared, as Attorney General, for Mason).¹²⁴ In that case, which involved publishing some poems in which the plaintiff alleged copyright alongside some in which he did not, Lord Thurlow LC had awarded a perpetual injunction and an account of profits in respect of the additional poems.¹²⁵ That situation could be distinguished from the present case, in that in the former it was clear which three poems had been copied without permission whereas the precise information copied from *Paterson's Roads* was harder to identify and had in any event been corrected and altered in certain respects. Moreover, as counsel argued in the 1806 case of *Matthewson v Stockdale*:

Lord Kenyon's comparison to the Case of Poems does not hold: in that instance there is no necessity to publish the original work; as there is in the case of a sea-chart, or such a work as this [an East India Calendar]. Additional poems might be published separately, having no connection with the original work.¹²⁶

Nevertheless, Kenyon MR thought 'there was no difficulty in distinguishing what belongs to Mr Carnan; nor does it make any difference that it constitutes

¹²³ Paterson, *Paterson's British Itinerary*, above n 66, iii.

¹²⁴ *The Morning Chronicle, and London Advertiser* (London), 26 June 1777, 2; 'Literary Property Cause', *The Morning Chronicle, and London Advertiser* (London), 3 July 1777, 2; *The Morning Chronicle, and London Advertiser* (London), 14 July 1777, 2. The pertinent order in *Mason v Murray* is at C33/452 ff.486^r-487^r, 13 July 1777 (PRO).

¹²⁵ C33/452 f.487^r, 13 July 1777 (PRO).

¹²⁶ (1806) 12 Ves Jr 270, 272; 33 ER 103, 104.

only a small part of the publication'.¹²⁷ Concluding that the letterpress was nearly the same, Kenyon MR awarded the injunction in respect of that part only.¹²⁸

Lord Thurlow LC, however, seemed to be seeking a compromise between the two polarities offered by Carnan's counsel and Master Wilmot, and a more nuanced solution than that offered by the Master of the Rolls. He stated:

as the roads of Great Britain were open to the inspection and observation of all mankind, every one was at liberty to publish the result of such observation: the subject matter of these books were therefore *in medio*: but the question will be, whether the author has exhibited any new and distinct idea in the exposition of them; and then whether the subsequent editor has in substance adopted the same. ... Now here if the scheme of exhibiting this information to the public is substantially and fundamentally the same in the second work as in the first, and the former is merely reprinted with such differences as not to amount fundamentally to a different project of exhibition, the law ought to interfere and protect the exhibition.¹²⁹

Thus, in repeatedly sending the report back to the Master, Lord Thurlow LC was seeking to ascertain more precisely the similarities between the two books in order to assist him in identifying what Bowles had copied and what was '*in medio*'. This phrase can be translated as 'open to all' which looks rather like today's concept of the public domain. He seemed to consider that there must have been *something* about *Paterson's Roads* which distinguished it from the other publications on the market and which made it so successful: if this was what had been copied by Bowles and Paterson, then the Lord Chancellor thought that should amount to infringement.

The delays associated with Chancery procedure meant that the legal case would not be resolved during Carnan's lifetime. However, had he lived, he would have seen the market provide his victory. A second edition of the expensive *Paterson's British Itinerary* was not published for another 11 years while *Paterson's Roads* notched up a further four editions in that time. This was not, however, the end of its legal wrangles.

¹²⁷ *Carnan v Bowles* (1786) 2 Bro CC 80, 85; 29 ER 45, 47–8.

¹²⁸ *Ibid.*

¹²⁹ *Carnan v Bowles* (1786) 1 Cox 283, 284–5; 29 ER 1168, 1168.

IV A SHORT DETOUR

Before we turn to the next stage of the struggle over *Paterson's Roads*, a short detour must be made to take in two related cases: one in Scotland, involving geographical information; and one in England, involving historical information. Commencing with the first of these, we retrace our steps a little, for it transpires that *Carran v Bowles* was not, in fact, the first instance of litigation involving geographical works. In December 1776, the Scottish surveyors George Taylor and Andrew Skinner had petitioned the Court of Session for an interdict (the Scots law equivalent of an injunction) against the publishers of an almanac.¹³⁰ Taylor and Skinner were inspired by Ogilby to produce a road book for Scotland and had petitioned the Commissioners of the Forfeited Estates for financial help in 1775 and 1776.¹³¹ They carried out a survey at a total cost of £1433¹³² and published the results in 61 copperplate maps.¹³³ Accompanying this publication was a printed index, which listed the distances between places on the roads, as measured by them.¹³⁴ They accused Donald Bayne, a typesetter, and Robert and Richard Wilson, publishers of *The Town and Country Almanack for the Year MDCCLXXVII*,¹³⁵ of copying 14 pages of this list of distances between Edinburgh and various cities and towns on the final pages of their almanac.¹³⁶

The defenders argued that lists of distances were commonly found in such periodical publications and suggested that Taylor and Skinner were attempting to assert 'an exclusive privilege of measuring the roads of Scotland'.¹³⁷ Taylor and Skinner denied they were asserting such a privilege, but insisted that they were 'entitled to reap the fruits resulting from their own labours'.¹³⁸

¹³⁰ George Taylor and Andrew Skinner, 'Petition', Submission in *Taylor v Wilson*, 18 December 1776, Session Papers, vol 594, no 23 (SL).

¹³¹ I H Adams, 'George Taylor, a Surveyor o' Pairs' (1975) 27 *Imago Mundi* 55, 59–60. The Commissioners of Forfeited Estates was the body set up to administer the estates of landowners implicated in the Jacobite Rising of 1746.

¹³² *Ibid* 61.

¹³³ George Taylor and Andrew Skinner, *Taylor and Skinner's Survey and Maps of the Roads of North Britain or Scotland* (1776).

¹³⁴ George Taylor and Andrew Skinner, *The Traveller's Pocket-Book, or an Abstract of Taylor and Skinner's Survey of the Roads of Scotland* (1776).

¹³⁵ Wilson and Wilson, above n 38.

¹³⁶ George Taylor and Andrew Skinner, 'Petition', Submission in *Taylor v Wilson*, 18 December 1776, Session Papers, vol 594, no 23 (SL).

¹³⁷ *Ibid* 4.

¹³⁸ *Ibid* 5.

The Court of Session did not accept the defenders' arguments; indeed, the report claims the court labelled them as '*pessimi exempli*' (the worst example or bad precedent).¹³⁹ It granted the interdict requested.¹⁴⁰

This case also occasioned some discussion in the periodical press. *The Weekly Magazine, Or, Edinburgh Amusement* reported the case in antagonistic terms, calling the decision 'a new species of literary property, and a heavy restraint on the liberty of the press, as well as the instruction of the public'.¹⁴¹ While publishing two further pieces in favour of the defenders,¹⁴² *The Weekly Magazine, Or, Edinburgh Amusement* did, however, give some space to the opposing view, publishing a letter warning readers not 'to be led astray by the empty sound of liberty' and asserting that the almanac makers were 'highly blameable in attempting to copy from the Book of Roads, because, when they were doing so, they were appropriating to themselves what belonged to another'.¹⁴³

The second case to note briefly here was one which came before the Court of King's Bench in 1789, *Trusler v Murray*. This was not a case involving road books, but rather another type of factual work, a book entitled *Chronology; or, the Historian's Vade-Mecum*.¹⁴⁴ This was essentially an alphabetical, chronological list of historical events, which its author, the Rev John Trusler, complained 'was always at press, by the order of some piratical bookseller in town or country'.¹⁴⁵ According to Trusler, he brought an action in Chancery against two such booksellers, and succeeded in getting an injunction against one. The defendants argued that such a work could not be protected because it was

¹³⁹ William Creech, *The Decisions of the Court of Session, from Its First Institution to the Present Time, Abridged and Digested under Proper Heads, in Form of a Dictionary* (1797) vol 3, 388.

¹⁴⁰ *Taylor v Bayne* (Court of Session, 21 December 1776), reprinted in *Decisions of the Court of Session from January 1775 to December 1777: Collected by William Wallace, David Cathcart, John Wylde and William Maxwell Morison* (1810) 345. In addition, there seems to have been an order made for the penalties under the *Statute of Anne* (amounting to £100, half of which would go to the Lords of Council and Sessions and half to the pursuers) as well as damages for £500: see the summons ordering defenders to appear before the Court of Session: CS237/T/1/80, 8 April 1777 (NAS).

¹⁴¹ *The Weekly Magazine, Or, Edinburgh Amusement* (Edinburgh), 19 December 1776, 415.

¹⁴² 'To the Readers of *The Weekly Magazine*', *The Weekly Magazine, Or, Edinburgh Amusement* (Edinburgh), 9 January 1777, 94; 'Thoughts on the Question of Literary Property', *The Weekly Magazine, Or, Edinburgh Amusement* (Edinburgh), 30 January 1777, 165.

¹⁴³ 'Strictures on Literary Property', *The Weekly Magazine, Or, Edinburgh Amusement* (Edinburgh), 27 February 1777, 297, 298.

¹⁴⁴ John Trusler, *Chronology; or, the Historian's Vade-Mecum* (1782).

¹⁴⁵ John Trusler, *An Essay on Literary Property Containing a Commentary on the Statute of Anne and Animadversion on that Statute* (1798) 8.

merely a list of dates copied from other histories. According to Trusler, Sir Thomas Sewell MR, however, ‘admitted that every man might publish a Chronology, but made the following distinction: that a chronology, like other subject-matter of books, was a work of labour, of course it came under the denomination of property’.¹⁴⁶

In December 1789, Trusler brought another action, this time in the King’s Bench against the publisher John Murray. It was heard by the recently ennobled Lord Kenyon, now Lord Chief Justice of the King’s Bench, who once again referred to *Mason v Murray* (the two cases sharing the same defendant). According to the report in *The Times*, Lord Kenyon CJ observed:

Any man might look into universal history, and might make a chronology, but no man had the right to avail himself of the industry and labour of another. It was certain if two publications agreed in language and sentiments, and in the order and arrangement of facts, the one must be a copy.¹⁴⁷

The case was referred to an arbitrator, George Holroyd of Gray’s Inn, who found in Trusler’s favour.¹⁴⁸

Murray was not happy and sought to contest the finding, but without success.¹⁴⁹ Once again, there is a response in the popular press which displayed bemusement and even hostility to the notion that factual works could be subject to proprietary claims. On 7 December 1789, a week after the case was heard by Lord Kenyon CJ, a short satirical sketch was published in *The Times*:

Messrs *Alpha* and *Omega* present their compliments to Doctor TRUSLER, and request to know whether he will prosecute them for their HORNBOOK, as they find that in that hornbook there are exactly the TWENTY FOUR LETTERS, which the Doctor not only used in the sermon burned behind St Clement’s Church, but likewise in that incorrect fluff for which his Reverence brought his PUFFING action the other day against a bookseller in Fleet-Street.

Alpha and *Omega* wish to be informed whether the whole alphabet is the exclusive literary property of his reverence.¹⁵⁰

Further accusations of collusion between Murray and Trusler followed the next day:

¹⁴⁶ Ibid 16.

¹⁴⁷ ‘Law Intelligence’, *The Times* (London), 2 December 1789, 3.

¹⁴⁸ ‘Law Intelligence’, *The Diary; or, Woodfall’s Register* (London), 6 March 1790, 4.

¹⁴⁹ Ibid.

¹⁵⁰ ‘A Card’, *The Times* (London), 7 December 1789, 3.

PUFFING

A DIALOGUE

Doctor Sapskull: Well, Master Calves-skin, how does your Chronology sell?

Calves-Skin: Very badly indeed, notwithstanding it is so close a copy of your's [sic]. How does your's [sic] go off?

Sapskull: As slow as my Sermons — something must be done. Suppose I commence an action against you for pirating my edition. It will make a noise, and be much better than any thing I can write by way of puff. ... If we don't take this step, both Chronologies will be a drug: for, between you and me, there is at this time a much better than either in print — the very one from which I stole all that is good in mine.¹⁵¹

In a different column a further satirical fictitious report appeared of Trusler being pickpocketed by 'street pirates' and losing 'a very valuable memorandum book, in which was inserted a calculation of the age of the sun and moon from the birth of Christ to the 25th of December, 1790'.¹⁵² Reports of the case between Trusler and Murray were picked up as far away as Jamaica, where the Kingston-printed *Daily Advertiser* of 3 March 1790 republished *The Times*' 2 December 1789 report of the case.¹⁵³ It is clear that such cases struck a chord with the broader print trade, and not necessarily a sympathetic one.¹⁵⁴

V BACK TO THE MAIN ROAD:

JOHN CARY AND THE POST OFFICE

Following Carnan's death his stepbrother, Francis Newbery, inherited his copyright in *Paterson's Roads*.¹⁵⁵ The brothers had been in business together until they quarrelled and Francis left to concentrate on the patent medicine

¹⁵¹ 'Puffing: A Dialogue', *The Times* (London), 8 December 1789, 2. In 18th century slang, to smack calves' skin was to take an oath and a sapskull was a simple fellow, sappy or foolish: see Francis Grose, *A Classical Dictionary of the Vulgar Tongue* (S Hooper, 1785).

¹⁵² *The Times* (London), 8 December 1789, 2.

¹⁵³ 'Literary Property', *The Daily Advertiser* (Kingston), 3 March 1790, 2.

¹⁵⁴ However, once again, the interests of the newspaper publisher may not have been entirely impartial in this matter. John Walter, publisher and printer of *The Times*, appears to have collaborated with Trusler to produce a clerical almanac until they fell out in or before 1790. Walter placed an advertisement in *The St James's Chronicle; or, British Evening-Post* explaining this, and warning potential purchasers against a piracy of his own clerical almanac: 'Clerical Almanack for the Year 1792: Caution to the Publick', *The St James's Chronicle; or, British Evening Post* (London), 19–22 November 1791, 4.

¹⁵⁵ Roscoe, above n 75, 27.

business.¹⁵⁶ Now, with his nephew, Francis Power, Newbery arranged for the printing of several further editions.¹⁵⁷ However, in 1798 the road became rocky once again. The cause of the trouble was a new competitor: John Cary. Cary had set up his own London business engraving, publishing and selling maps and prints around 1783.¹⁵⁸ In 1784 he issued his first road book¹⁵⁹ and by 1786 Cary's maps were recognised as being of higher quality than the usual offerings. The *Monthly Review* noted that Cary's surveys were the 'most accurate and elegant of any that have appeared since the days of Roque'.¹⁶⁰

In 1793 or 1794, Cary entered into an agreement with Thomas Hasker, the Superintendent of the Mail Coaches, upon the order of Lord Walsingham, one of the Postmasters General, to make a survey of the roads of England and Wales.¹⁶¹ This would be the first comprehensive road survey since Ogilby's in the 1670s. The Post Office's motivation for carrying out such a survey was to settle the many disputes that were arising over the prices charged by the mail coach contractors, which were calculated by mileage.¹⁶² The Post Office agreed that Cary should receive payment of 9d per mile but, as this was the actual amount he had to pay his surveyors, this would only cover his costs.¹⁶³ It was

¹⁵⁶ For other litigation involving the patent medicine business (James' Fever Powders), see Lionel Bently, 'Patents and Trade Secrets in England: The Case of *Newbery v James* (1817)' in Rochelle Cooper Dreyfuss and Jane C Ginsburg (eds), *Intellectual Property at the Edge: The Contested Contours of IP* (Cambridge University Press, 2014) 295.

¹⁵⁷ Roscoe, above n 75, 27.

¹⁵⁸ David Smith, 'The Cary Family' (1988) 43 *Map Collector* 40, 42. See also Laurence Worms and Ashley Baynton-Williams, *British Map Engravers: A Dictionary of Engravers, Lithographers and Their Principal Employers to 1850* (Rare Book Society, 2011) 130–2; Sir Herbert George Fordham, *John Cary, Engraver, Map, Chart and Print-Seller and Globe-Maker, 1754 to 1835* (Cambridge University Press, 1925).

¹⁵⁹ Donald Hodson, *County Atlases of the British Isles Published after 1703: Atlases Published 1764–1789 and Their Subsequent Editions* (British Library, 1997) vol 3, 173.

¹⁶⁰ *Ibid* 175.

¹⁶¹ *Cary v Longman* (1800) 3 Esp 273, 273; 170 ER 613, 613. See also the affidavit of John Cary: C31/294, 18 November 1799 (PRO).

¹⁶² Hodson, *County Atlases of the British Isles Published after 1703*, above n 159, 181. See also *Cary v Longman* (1800) 3 Esp 273, 273; 170 ER 613, 613; C31/294, 18 November 1799 (PRO) (John Cary's affidavit). Cary's association with the Post Office probably began in relation to his production, John Cary, *Cary's New and Correct English Atlas: Being a New Set of County Maps from Actual Surveys* (1787), published 1787–89, in the preface of which he thanks the Comptroller General of the Post Office for permission to consult important documents.

¹⁶³ Or so he claimed. Newbery later alleged that the going rate was only 6d per mile, suggesting Cary was making an adequate profit without the copyright: Paterson, *A New and Accurate Description of All the Principal Cross Roads in England and Wales, and Part of the Roads of Scotland* (Longman and Rees, 13th ed, 1803) xiii ('*Paterson's Roads 13th ed*').

therefore agreed he would also receive the exclusive right to publish his survey which would allow him to make a profit through sales.¹⁶⁴

Cary began to sell the results of his survey under the title of *Cary's New Itinerary* in 1798.¹⁶⁵ Newbery immediately accused him of having copied the 'plan and design' of *Paterson's Roads*.¹⁶⁶ According to his own account, Newbery decided not to bring legal proceedings, but

instead of the slow warfare of legal restraints and prosecutions, [he] determined upon the bolder measure of reprisals: for two reasons, — one, that retaliation was more summary; — and the other, that the Public would probably be the gainers by the establishment of a competition.¹⁶⁷

He therefore published a new edition of *Paterson's Roads* containing additions and corrections copied from Cary's book.¹⁶⁸ Newbery's retaliation spurred Cary to legal action and he brought a Bill in Chancery against Newbery's printers and publishers, the well-connected cartographer and engraver William Faden, Geographer to the King, and the prominent booksellers Thomas Norton Longman and Owen Rees.¹⁶⁹

Newbery was not Cary's only threat. One of his surveyors, a Nathaniel Coltman, was also attempting to undercut Cary's publication by publishing his own book, called *The British Itinerary, or Travellers Pocket Companion throughout Great Britain Exhibiting the Direct Route to Every Borough & Commercial Town in the Kingdom with the Principal Cross Roads*, which would be sold at 3s.¹⁷⁰ Coltman advertised the book as written by 'Nathaniel Coltman, Surveyor, employed by the Post-Master General to measure the Roads of Great Britain'.¹⁷¹ Cary wrote crossly to the Post Office, asking the Postmasters General to declare publicly that no person other than himself had

¹⁶⁴ *Cary v Longman* (1800) 3 Esp 273, 273; 170 ER 613, 613.

¹⁶⁵ John Cary, *Cary's New Itinerary; or, an Accurate Delineation of the Great Roads, Both Direct and Cross, throughout England and Wales; with Many of the Principal Roads in Scotland* (1798).

¹⁶⁶ Paterson, *Paterson's Roads* 13th ed, above n 163, vi.

¹⁶⁷ *Ibid* viii–ix.

¹⁶⁸ See Paterson, *Paterson's Roads* 12th ed, above n 64.

¹⁶⁹ C12/256/9m1, 14 November 1799 (PRO).

¹⁷⁰ Nathaniel Coltman, *The British Itinerary, or Travellers Pocket Companion throughout Great Britain Exhibiting the Direct Route to Every Borough & Commercial Town in the Kingdom with the Principal Cross Roads* (William Dickie and Nathaniel Coltman, 1799).

¹⁷¹ See, eg, *The Star* (London), 6 July 1799, 1.

been appointed Surveyor of the Roads to the Post Office.¹⁷² The request occasioned some embarrassment, as the Post Office could find no evidence that Cary had ever been appointed to such a position, and consequently did not wish to make a public declaration that he had. However, it did not wish to show a lack of appreciation to Cary (particularly in light of the fact that Cary had been styling himself under that title in the book).¹⁷³ The correspondence does not reveal a resolution and Cary may have chosen to focus his attention on the more significant threat presented by Newbery, Longman, Rees and Faden.

Cary sought an injunction in Chancery to restrain the defendants from printing their book, which he alleged was a copy of his work, in part or in whole.¹⁷⁴ Cary alleged that Newbery could only offer the book so cheaply because he had copied it.¹⁷⁵ Seeking to obtain his injunction without waiting for the defendants' Answer, Cary put in an affidavit further setting out his case. A significant grievance was that Newbery's work was being offered at 4s 6d, which was cheaper than Cary's book at 7s.¹⁷⁶ Newbery responded with an affidavit, in which he claimed that

the general plan or design of the said Complainant's Book is not new or original but is the same as that of the said Original book published by this Defendant and that the additions or improvements made by the said Complainant form but a very small part of the said Complainant's Work the remainder being copied in some instances almost page for page from this Defendant's said Book.¹⁷⁷

On 21 November 1799 the case came on before Lord Loughborough LC. Cary was represented by the Solicitor General, Grant, while Newbery had retained the Attorney General, Mitford. In response to the accusations of copying by Newbery, Mitford countered that Cary had copied from *Paterson's Roads* so closely he had even copied a road which did not exist.¹⁷⁸ The Lord Chancellor inspected the works himself and found them to be very different. According to the report in Vesey Junior's Reports, Lord Loughborough LC complimented Cary, stating '[h]e has made a very good map; with which it is very

¹⁷² Letter from John Cary to Francis Freeling, 18 July 1799, POST 10/286 (BPM).

¹⁷³ See the notes made on the back of John Cary's letter: *ibid*.

¹⁷⁴ C12/256/9m1, 14 November 1799 (PRO).

¹⁷⁵ C31/294, 18 November 1799 (PRO).

¹⁷⁶ *Ibid*.

¹⁷⁷ C31/294, 20 November 1799 (PRO).

¹⁷⁸ 'Law Report', *The True Briton* (London), 22 November 1799, 3.

pleasant to travel' but added that if he were to do 'strict justice', he would order the defendants to take everything out of their book that they took from the plaintiff and the plaintiff to take out everything he took from the defendants.¹⁷⁹ According to Newbery's account, the Lord Chancellor also observed that 'as they were useful publications, rather than reduce them as it were to skeletons, both Books should be left to take their chance with the Public'.¹⁸⁰ Upon Newbery's counsel observing that only Mr Cary's book would be a skeleton, the Lord Chancellor added '[t]hat Mr Cary might think himself well off, if Mr Newbery, the Proprietor of [*Paterson's Roads*], did not file a Bill against him'.¹⁸¹ He did not grant the injunction and, according to Newbery, awarded costs against Cary.¹⁸²

The remaining defendants, Longman, Faden and Rees, put in their Answer on 29 January 1800, admitting that they had sold the book, but stating they only did so as the agents of Newbery who had the sole right to print and publish the work.¹⁸³ In the meantime, Cary commenced an action in the King's Bench. On 6 November 1800, the Court of Chancery ordered him to elect in which court he wished to proceed.¹⁸⁴ He elected the courts of law but, according to Newbery's account, after the day of the trial was fixed Cary withdrew the case and approached Newbery through intermediaries with a proposal. He told Newbery that he had heard that, as the copyright term in *Paterson's Roads* was about to expire, the booksellers were about to publish their own version of it but suggested that the two of them join together in a new publication as 'from the command they had over the trade, they would be able to supersede or annihilate both *Paterson's Roads* and *Cary's Itinerary*'.¹⁸⁵ Again, according to his own account, Newbery reacted with righteous indignation:

To a proposal, so repugnant to the [*Statute of Anne*], (which was intended to limit such monopolies) and so hostile to the Booksellers, the Proprietor of *Pat-*

¹⁷⁹ *Cary v Faden* (1799) 5 Ves Jr 24, 26; 31 ER 453, 454.

¹⁸⁰ Paterson, *Paterson's Roads* 13th ed, above n 163, ix.

¹⁸¹ *Ibid* x.

¹⁸² See *Cary v Faden* (1799) 5 Ves Jr 24, 26; 31 ER 453, 454; Paterson, *Paterson's Roads* 13th ed, above n 163, ix.

¹⁸³ C12/256/9m2, 29 January 1800 (PRO).

¹⁸⁴ C33/512 f52^v, 6 November 1800 (PRO).

¹⁸⁵ Paterson, *Paterson's Roads* 13th ed, above n 163, x–xi.

erson's *Roads* sent the following reply:— 'That neither his character nor his feelings would allow him to enter into any such compromise or coalition.'¹⁸⁶

Cary therefore renewed his case in the King's Bench, now only against Newbery, Longman and Rees.¹⁸⁷ Here he was represented by Thomas Erskine, along with James Mingay and George Holroyd (the arbitrator in *Mason v Murray*). One of the witnesses who appeared was one of Newbery's compositors and, according to Cary, he gave evidence that, in setting up the new edition of *Paterson's Roads*, '[t]he major part of it was printed Copy from Cary. Pieces were cut out of Cary's Book and interwoven Manuscript put between'.¹⁸⁸ On further questioning he confirmed that 'there were Eight or Ten times as much Print as Manuscript'.¹⁸⁹ A particularly inculpatory admission by the compositor was that 'fractional parts' were inserted in order to deviate from Cary's book.¹⁹⁰ When asked, '[w]as this done to disguise it?', the answer was: 'I suppose so'.¹⁹¹

Newbery responded, as he had before the Court of Chancery, that Cary's work was itself a piracy of *Paterson's Roads*, and his counsel adduced evidence of errors in *Paterson's Roads* that Cary had copied. Similar evidence was led on behalf of Cary. Newbery further argued (at least in his publication if not before the Court) that Cary could have no such exclusive right in it. Knowing that the survey was paid for by the Post Office, 'he naturally concluded, that after it was delivered out for publication, it was the property of that Public for whose use and at whose expense it had been made'.¹⁹²

It was once again Lord Kenyon CJ who heard the case. As in *Carnan v Bowles*, Lord Kenyon CJ had no difficulty in finding that copyright subsisted in Cary's book, notwithstanding that he might have copied parts of it from *Paterson's Roads*. Relying again on the decision in *Mason v Murray*, he commented that '[i]t is not necessary that a plaintiff who brings an action of

¹⁸⁶ Ibid xi.

¹⁸⁷ John Cary, *Cary's New Itinerary: Or, an Accurate Delineation of the Great Roads, Both Direct and Cross, throughout England and Wales; with Many of the Principal Roads in Scotland* (2nd ed, 1802) 862 ('*Cary's New Itinerary 2nd ed*'). Note that this report says that Erskine described Longman and Rees as being 'only nominal Defendants', the real defendant being Newbery.

¹⁸⁸ Ibid 865.

¹⁸⁹ Ibid 866.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Paterson, *Paterson's Roads 13th ed*, above n 163, xvi.

this sort should have the whole property in the work which he publishes'.¹⁹³ He continued:

Lord Walsingham, by whose direction the survey was made, has given the copy-right of that part of the work arising from Mr Cary's survey to him, and as it has been used by the defendant's assignee, in his last publication of [*Paterson's Roads*], without his consent, I think the copy-right has been infringed.¹⁹⁴

Perhaps unsurprisingly, given the overwhelming evidence of copying, the jury found in favour of Cary. However, in recognition of Cary's own copying, Lord Kenyon CJ observed that 'under all the circumstances, nominal damages will perhaps satisfy the justice of the case' and Cary was awarded 1s.¹⁹⁵

Encouraged by this, Newbery's counsel brought a motion for a new trial in the King's Bench, arguing that Cary could not be considered the author of his book, as the greater part of it had already been published by Newbery.¹⁹⁶ However, the motion was refused by Lord Kenyon CJ, who emphasised that although

the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr Patterson's [sic]; ... it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable ...¹⁹⁷

Cary then returned to Chancery seeking an injunction and an account of profits from Newbery, Longman and Rees.¹⁹⁸ In their Answers to the Chancery Bill, they first argued that Cary had no right to any aid in equity, having earlier elected to proceed at law.¹⁹⁹ However, on being ordered to put in further Answers, they all confirmed that they had ceased to sell the 12th edition of *Paterson's Roads* after the King's Bench judgment. Newbery stated that overall he had sustained a loss of £238 12s 5d, having printed 10 000 copies, of which 4500 remained unsold.²⁰⁰ Once again, the case petered

¹⁹³ *Cary v Longman* (1800) 3 Esp 273, 275; 170 ER 613, 614. See also *Carnan v Bowles* (1785) 2 Bro CC 80, 85; 29 ER 45, 47–8 (Kenyon MR).

¹⁹⁴ *Cary v Longman* (1800) 3 Esp 273, 275; 170 ER 613, 614.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Cary v Longman* (1801) 1 East 358, 360; 102 ER 138, 139.

¹⁹⁷ *Ibid.*

¹⁹⁸ C13/2/37m1, 15 May 1800 (PRO).

¹⁹⁹ C13/2/37m2, 3 June 1800 (PRO).

²⁰⁰ C33/513 f807^r, 2 July 1800 (PRO); C33/516 f.172^r, 26 January 1802 (PRO); C13/14/46m3, 22 March 1802 (PRO); C13/14/46m4, 22 March 1802 (PRO).

out²⁰¹ — or at least was taken out of the courts — as Cary and Newbery continued the battle in the pages of their respective publications. Newbery, Longman, Rees and Faden produced a 13th edition of *Paterson's Roads* in 1803, which included an 'Advertisement' at the front describing the legal proceedings and accused Cary of plagiarism.²⁰² Cary rebutted the allegations in *Cary's New Itinerary 2nd ed* and included a transcript of the King's Bench cases as proof.²⁰³

Newbery, moreover, was not content with simply reasserting his own innocence. His next action was to write to Francis Freeling, the Secretary to the Post Office, who also happened to be his son-in-law.²⁰⁴ In this letter Newbery asked for the same assistance as that given to Cary in the form of requests being sent to the Post Office's surveyors and Postmasters to supply him with local information on such things as the turnpikes, milestones, river and canal crossings, gentleman's seats, inns supplying post horses and so on. Newbery's particular concern was with the milestones, for, as he explained to Freeling, 'I mean to pursue our old Plan of marking the Distances by the Mile Stones; which I find, from various correspondents, is much more agreeable to the Traveller and I shall therefore discard all Mr Cary's Admeasurements'.²⁰⁵ Freeling referred the request to the Postmasters-General, who were happy for him to supply such information to Newbery.²⁰⁶

However, matters were less straightforward when Newbery requested a copy of Cary's actual survey. Although Newbery emphasised again that he only wished to use the survey to ascertain the positions of the milestones, which Cary had not used in his measurements of roads, Freeling sought legal advice on this point from a barrister, John Leach (who had been Newbery's counsel in 1799), and the Attorney General, Sir Edward Law. Leach advised that:

Mr Carey [sic] having by his agreement with the Post Office expressly reserved the copyright in the Survey, it appears to me that the Post Office is only entitled

²⁰¹ The final records I have located were the further Answers of Newbery, Longman and Rees: C13/14/46m3, 22 March 1802 (PRO); C13/14/46m4, 22 March 1802 (PRO).

²⁰² Paterson, *Paterson's Roads 13th ed*, above n 163, v–xx.

²⁰³ Cary, *Cary's New Itinerary 2nd ed*, above n 187, 862–8.

²⁰⁴ Letter from Francis Newbery to Francis Freeling, 12 May 1801, POST 10/286 (BPM).

²⁰⁵ *Ibid.* Note that Cary's measurements had used the General Post Office as their starting point.

²⁰⁶ Letter from Francis Freeling to Postmasters-General, 14 May 1801, POST 10/286 (BPM). See also notes made on the back of the letter.

to the use of it for their particular information and that they cannot authorise Mr Newbery to avail himself of it in any manner in his intended publication.²⁰⁷

The Attorney General came to the same conclusion, but with a greater emphasis on protecting Cary against competition. He considered that Freeling could not supply to Newbery the survey to be used ‘in any manner which may deprive [Cary] of the Benefit of the exclusive publication of his admeasurement and survey, according to the terms of his bargain with the Post Office’.²⁰⁸ He proposed that since Cary had made no use of the milestones in his book, he might be considered to have abandoned that information to the public. However, he thought that if

Carey [sic] has indicated or is supposed to entertain any purpose of giving this information to the Public in any new edition of his Work, or if even the immediate publication by any one else of a book of Roads with the addition and improvement in question would materially affect the Sale of Mr Carey’s [sic] Work as at present published, I think it would be in some degree a violation of good faith on the part of the Post Office to communicate this Survey to any body else in such manner as that the materials furnished by Carey [sic] himself should be converted to his present or future prejudice.²⁰⁹

The result appears to be that Newbery was not furnished with a copy of Cary’s survey but was given the same assistance in the form of enquiries and information. In the preface to the 13th edition, Newbery thanked Freeling and the Post Office for their assistance.²¹⁰

VI JOURNEY’S END: THE CASE OF KEARSLEY

Even after his action against Newbery failed to achieve all his aims, Cary was not finished defending his work against copiers. In June 1802, Cary brought an action in the King’s Bench against the bookseller George Kearsley for infringing copyright in *Cary’s New Itinerary*.²¹¹ The allegedly infringing work, *Kearsley’s Traveller’s Entertaining Guide through Great Britain; or, a Description*

²⁰⁷ Notes made on ‘Case’, 27 June 1801, POST 10/286 (emphasis in original) (BPM).

²⁰⁸ Sir Edward Law, ‘Copy Attorney-General’s Opinion’, 10 August 1801, POST 10/286 (BPM).

²⁰⁹ Ibid.

²¹⁰ Paterson, *Paterson’s Roads* 13th ed, above n 163, xvii.

²¹¹ *Cary v Kearsley* (1802) 4 Esp 168; 170 ER 679.

of the Great and Principal Cross-Roads,²¹² was not a direct competitor to Cary's *New Itinerary*, as it was more akin to a guidebook. Alongside the roads and their distances it included short descriptions of sites of interest, the names of local landowners and historical facts and anecdotes. As Kearsley explained in his Preface, despite many 'Tours' having been published describing the roads of Great Britain, '[t]here yet, however, seemed to be wanting a Compendium of Topography; an Itinerary, comprehending as well what is amusing and instructive, as what is necessary and useful'.²¹³

Edward Law, who had advised the Post Office on Cary's survey the previous year, was now Lord Ellenborough CJ. The argument before him once again focussed on whether a person who both copied a work and made additions could be guilty of piracy. Cary was represented again by Erskine, who was accompanied once more by Holroyd, as well as by William Garrow. Cary's counsel began by seeking to establish copying by pointing to various errors that Kearsley had transcribed verbatim into his own book. Lord Ellenborough CJ was not sympathetic to this argument, if it were to be the basis for a declaration of copying, considering this was akin to 'using an erroneous dictionary'.²¹⁴ He gave similarly short shrift to Kearsley's argument that, since the survey had been made at the expense of the Post Office, copyright in it belonged to the public. To this argument, Lord Ellenborough CJ responded that a first publisher has a right to a copy and to bring an action against anyone else who publishes it without authorisation, even if the first publisher obtained the copy through abuse of trust. This might give rise to an action between the first publisher and the person entitled, but does not destroy the right of the first publisher to sue.²¹⁵

It is his approach to infringement, however, that holds most interest for present purposes. Erskine presented Lord Ellenborough CJ with an example involving the Lord Chief Justice's friend William Paley: 'Suppose a man took Paley's *Philosophy*, and copied a whole essay, with observations and notes, or additions at the end of it, would that be piracy?'²¹⁶ The Lord Chief Justice responded:

²¹² George Kearsley, *Kearsley's Traveller's Entertaining Guide through Great Britain; or, a Description of the Great and Principal Cross-Roads* (1801).

²¹³ *Ibid.*

²¹⁴ *Cary v Kearsley* (1802) 4 Esp 168, 169; 170 ER 679, 679.

²¹⁵ *Ibid.*

²¹⁶ *Ibid* 170; 680.

That would depend on the facts of, whether the publication of that essay was to convey to the public the notes and observations fairly, or only to colour the publication of the original essay, and make that a pretext for pirating it; if the latter, it could not be sustained.²¹⁷

For Lord Ellenborough CJ there were two types of copying: on the one hand, there was impermissible copying, in which any new material added was merely 'colourable' or intended to disguise the copying; on the other hand, there was permissible copying, which was 'fairly done'.²¹⁸ As he famously explained:

a man may fairly adopt part of the work of another, he may so make use of another's labours for the promotion of science and the benefit of the public, but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*? ... while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science.²¹⁹

The Lord Chief Justice's reference to *animus furandi*, or the intention to steal, must be seen in the context of his bifurcated approach to copying, in which the defendant's objectives determined whether or not his copying was culpable. The question he phrased for the jury made this clear: it was for them to decide whether

what so taken or supposed to be transmitted from the plaintiff's book, was fairly done with a view of compiling a useful book, for the benefit of the public, ... — or taken colourable, merely with a view to steal the copy-right of the plaintiff ...²²⁰

When the question was posed this way, Cary's counsel consented to be nonsuited.²²¹

²¹⁷ Ibid.

²¹⁸ Ibid 171; 680.

²¹⁹ Ibid 170; 680.

²²⁰ Ibid 171; 680.

²²¹ A judgment of nonsuit was given where it appeared that there was insufficient evidence to establish a cause of action and terminated a lawsuit.

VII CONCLUSION: PAVING THE WAY FOR TODAY'S COPYRIGHT LAW?

A detailed investigation of the road book cases of late 18th century England demonstrates that courts have been grappling with the difficulties posed by the unauthorised copying of fact-based and informational works for over 200 years.²²² In the recent cases on telephone books and television guides, the approach of the courts has been to ask whether copyright protects such factual compilations and, if so, on what basis. Appeals were made to precedent in order to answer this question. In *Desktop Marketing* (and the first appeal in *Nine Network Australia Pty Ltd v IceTV Pty Ltd*²²³) the Full Federal Court answered that such compilations were protected, due to the labour, skill, judgment and expense invested in gathering the information. In the High Court decision of *IceTV* and the subsequent Full Federal Court decision of *Phone Directories*, this approach was rejected.²²⁴

Subsequent commentators have also examined the 19th century cases on factual compilations and have discerned differing lines of authority emerging during that period, some of which might be said to confirm the approach in *Desktop Marketing*, others of which might not.²²⁵ The general approach of contemporary commentators, along with the courts, has been to look back at cases decided from that time on and, if their subject matter was factual, to ask whether the courts considered them to fall within the scope of copyright law. If this is the question, the answer is: 'usually, but not always'. However, if one looks instead at *how* the courts protected such works, one may come up with a different answer. This is what Kathy Bowrey does in her careful examination of the 19th century cases. She observes that the question of originality was relevant not to the question of subsistence, but rather to the question of infringement. Moreover, she argues,

[w]hen originality and infringement used to appear together as a matter of legal inquiry, policy considerations in drawing the balance either way were transparent. The originality of one party was generally considered in light of the originality of the other. The worth of both efforts was considered in relation to each

²²² Sackville J made a similar observation in *Desktop Marketing* (2002) 119 FCR 491, 591–2 [404].

²²³ (2008) 168 FCR 14.

²²⁴ See Part II above.

²²⁵ Pila, 'Compilation Copyright', above n 17, 233–4; Lindsay, above n 16, 49–51; Ricketson, above n 17, 221–8.

other, and reference to the community interest often explicitly informed that evaluation.²²⁶

By going back one step further, to the 18th century cases on road books, we find the origin of this approach. In the road book cases it is clear that the courts were not so much interested in the question of whether the first work was protected by the law of copyright despite being factual, and in that sense 'original', but rather whether it was 'original' in the sense of being more than just a copy of a work already published. The same question was then applied to the defendant's book, vis-a-vis the plaintiff's book, as well as any other books already on the market. As Lord Thurlow LC had observed in *Carnan v Bowles*, 'either all are original works, or none of them'.²²⁷ While 'works of fact or information' may not have been recognised as a specific category of works at that time, that is not to say that the courts were not attuned to the particular difficulties such works posed in terms of assessing copying.

Furthermore, as we examine the various documents produced in the course of litigation, it becomes clear that labour and expense are referred to in various contexts. Often it is not employed in a way which would suggest it is the labour itself founding the proprietary right. In *Carnan v Bowles*, it is the defendant Paterson who alleged that he composed *Paterson's British Itinerary* for Bowles 'with great labour pains and study'.²²⁸ John Cary, as plaintiff, referred to labour several times. For example, in his Bill of Complaint, he commenced by stating that in 1798 'with great labour and application and at a considerable expence [sic]' he made a 'very extensive and minute survey' of the great roads of England and Wales.²²⁹ Having invested the labour in the survey, he then entered the book in the Stationers' Register 'and thereby acquired the sole and exclusive right and priviledge [sic] of publishing and selling the same'.²³⁰ It therefore appears that Cary invoked labour and expense in relation to the carrying out of the survey only; the proprietary right arose from his having entered the title in the Register of the Stationers' Company.²³¹

²²⁶ Bowrey, above n 29, 65.

²²⁷ (1786) 2 Bro CC 80, 83; 29 ER 45, 47.

²²⁸ C12/136/25m2, 1, 15 July 1785 (PRO).

²²⁹ C12/256/9m1, 14 November 1799 (PRO).

²³⁰ Ibid.

²³¹ Although it is worth noting that the Court of King's Bench had only recently held, in *Beckford v Hood* (1798) 7 D & E 620; 101 ER 1164, that it was not necessary to enter the book at Stationer's Hall in order to claim damages under the *Statute of Anne*: see Ronan Deazley, 'Commentary on *Beckford v Hood* (1798)' on L Bently and M Kretschmer (eds), *Primary*

Lord Kenyon CJ referred to labour in *Trusler v Murray*, but this was in relation to infringement, not subsistence: ‘Any man might look into universal history, and might make a chronology, but no man had a right to avail himself of the industry and Labour of another’.²³² However, in Chancery, Sewell MR did seem to emphasise labour as being relevant to granting property rights.²³³ The petitioners in the Scottish case of *Taylor v Wilson* were still more explicit in founding their claim on labour: indeed, they even linked their labour to authorship, stating that both books ‘have been the result of a very laborious and very expensive survey; they are separate and distinct works, and without having actually made the survey, no person could possibly have been the author of either’.²³⁴ They went on to sum up their argument in forceful terms:

Upon the whole: The petitions humbly apprehend, that if the [*Statute of Anne*] applies with particular energy to any case, it applies to this; for the labour and trouble that it has cost the petitioners, in collecting materials for the publication, is beyond any idea that can be formed from its size; and as they have been at a very great expence [sic], as well as much trouble, of which they are as yet far from being indemnified, it is reasonable they should have the protection of the law for their indemnification; and altogether contrary to equity, that others should be allowed to step in, and for the sake of a very trifling advantage to themselves, totally to spoil the sale of a work that has cost them so much.²³⁵

It is not known whether the Court of Session approved of such reasoning, but they did grant the interdict. The case, however, was not referred to in any of the subsequent road book cases, either explicitly or implicitly, so we cannot know to what extent the parties or their legal advisers were in fact aware of it.

As the century wore on, references to labour, expense, exertion, judgement and so on multiplied. The road book cases, as well as *Trusler v Murray*, were clearly influential in this respect. *Matthewson v Stockdale*,²³⁶ the earliest decision referred to in *Desktop Marketing*, was decided by Lord Erskine LC who had, in fact, appeared for Cary in his King’s Bench action. The Lord Chancellor discussed *Cary v Longman* in some detail, mentioning also the

Sources on Copyright (1450–1900) (2008) <http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_uk_1798a>.

²³² ‘Law Intelligence’, *The Times* (London), 2 December 1789, 3.

²³³ See above n 146 and accompanying text.

²³⁴ George Taylor and Andrew Skinner, ‘Petition’, Submission in *Taylor v Wilson*, 18 December 1776, Session Papers, vol 594, no 23, 4 (SL).

²³⁵ *Ibid* 7.

²³⁶ (1806) 12 Ves Jr 270; 33 ER 103.

case of *Trusler v Murray*.²³⁷ The case reports also fostered the idea that this was a discrete body of authority by the custom some reporters employed of listing relevant cases at the end of each report. The footnote for *Cary v Faden*, in Vesey Junior's Reports,²³⁸ for example, lists not only *Cary v Longman*,²³⁹ but also *Southey v Sherwood*,²⁴⁰ *Hogg v Kirby*,²⁴¹ *Matthewson v Stockdale*,²⁴² *Longman v Winchester*,²⁴³ *Wilkins v Aikin*,²⁴⁴ *Platt v Button*,²⁴⁵ *Wyatt v Barnard*,²⁴⁶ *Whittingham v Wooler*,²⁴⁷ *Barfield v Nicholson*,²⁴⁸ *Rundell v Murray*,²⁴⁹ *Butterworth v Robinson*²⁵⁰ and *Canham v Jones* (which actually related to a patent medicine).²⁵¹

Their influence can also be discerned later in the century, in particular in the case of *Kelly v Morris*,²⁵² which both Lindgren J and Sackville J quoted from at length in *Desktop Marketing*.²⁵³ In *Kelly v Morris*, although Page Wood V-C did not explicitly refer to *Cary v Longman* or *Carnan v Bowles*, he clearly had one or both of them in mind when he stated, '[i]n case of a road-book, he must count the milestones for himself'.²⁵⁴ As we now know from our examination of the road book cases, this could only have been an erroneous interpretation of the cases, as none of the plaintiffs or defendants in any of those cases created their book solely by carrying out their own surveys.

However, as noted above, if one is looking solely at the question of whether factual compilations were protected by copyright law other considerations may be overlooked. One particular insight that gets lost relates to the origins

²³⁷ Ibid 273–5; 104–5.

²³⁸ (1799) 5 Ves Jr 24, 26; 31 ER 453, 454.

²³⁹ (1801) 1 East 358; 102 ER 138.

²⁴⁰ (1817) 2 Mer 435; 35 ER 1006.

²⁴¹ (1803) 8 Ves Jr 215; 32 ER 336.

²⁴² (1806) 12 Ves Jr 270; 33 ER 103.

²⁴³ (1809) 16 Ves Jr 269; 33 ER 987.

²⁴⁴ (1810) 17 Ves Jr 422; 34 ER 163.

²⁴⁵ (1815) 19 Ves Jr 447; 34 ER 583.

²⁴⁶ (1814) 3 Ves & B 77; 35 ER 408.

²⁴⁷ (1817) 2 Swans 428; 36 ER 679.

²⁴⁸ (1824) 2 Sim & St 1; 57 ER 245.

²⁴⁹ (1821) 1 Jac 311; 37 ER 868.

²⁵⁰ (1801) 5 Ves Jr 709; 31 ER 817.

²⁵¹ (1813) 2 Ves & B 218; 35 ER 302.

²⁵² (1866) LR 1 Eq 697.

²⁵³ (2002) 119 FCR 491, 502 [35] (Lindgren J), 574–5 [343]–[344] (Sackville J).

²⁵⁴ *Kelly v Morris* (1866) LR 1 Eq 697, 701.

of the doctrines of fair use and fair dealing. In general, discussions of the origin of fair use and fair dealing focus on the abridgment cases of earlier in the 18th century, and trace the use of the language of fair use as a discrete topic of investigation.²⁵⁵ By contrast, considering the cases as a series that ends with *Cary v Kearsley* reveals that fair use was not just about finding a specific use that could be said to be fair (as an abridgment, or later quotation and so on). Rather, fair use was considered to be the corollary, or alternative, to ‘piratical copying’: copying could be fair or it could be unfair, and only the latter would be a breach of copyright. This is also where the notion of *animus furandi*, or intention, is relevant. If the intention was to create a new work then that was fair; if the intention was simply to ‘steal’, then it would not be fair.

As a brief exercise in counterfactual history, let us ask what would have happened in our three contemporary cases if the 18th century logic had been applied. In *Desktop Marketing*, I would suggest that Telstra’s White and Yellow Pages would have been found to fall within the *Statute of Anne*, as being a book. The question then would be whether the phone directories produced by Desktop were new works, which added something further to the existing publication. Upon such an approach, Desktop’s arguments relating to the different ‘look, feel and arrangement’²⁵⁶ of their CD-ROMs would have played a greater role in deciding the case, as well as any consideration of what their products offered the public that Telstra’s directories did not. While this might still have led to a finding of infringement in that case, the result might have been different in *IceTV*, where the defendants copied some of the information (the time and title information in the television guides) but accompanied it with new work (program synopses), created by their employees.²⁵⁷ Likewise, in *Phone Directories*, the inquiry would have focussed on the copying of the defendant and whether it was ‘fair’ or otherwise — an issue which was not even raised as the case was decided on subsistence alone.²⁵⁸

There is a certain symmetry in juxtaposing cases involving road books and phone books, separated by over 200 years. Road books are, in a sense, the

²⁵⁵ See, eg, David Bradshaw, “‘Fair Dealing’ as a Defence to Copyright Infringement in UK Law: An Historical Excursion from 1802 to the *Clockwork Orange Case* 1993” (1995) 10 *Denning Law Journal* 67; Robert Burrell, ‘Reining in Copyright Law: Is Fair Use the Answer?’ [2001] *Intellectual Property Quarterly* 361; Matthew Sag, ‘The Prehistory of Fair Use’ (2010) 76 *Brooklyn Law Review* 1371; Alexandra Sims, ‘Appellations of Piracy: Fair Dealing’s Prehistory’ [2011] *Intellectual Property Quarterly* 3.

²⁵⁶ *Desktop Marketing* (2002) 119 FCR 491, 568 [321] (Sackville J).

²⁵⁷ See *IceTV* (2009) 239 CLR 458, 497–501 [110]–[123], 501 [126] (Gummow, Hayne and Heydon JJ).

²⁵⁸ See *Phone Directories* (2010) 194 FCR 142.

18th century equivalent of telephone directories. Both of them are tools which assist people in communicating and doing business with each other. In the days before telephones and the internet, roads (along with rivers and oceans) were a key communications technology, central to delivering information and goods from one end of the country to the other. Directories to these technologies are therefore key items of commerce and of great value to those who control the information therein.

Of course, the similarities between road books and phone books must not be overplayed; there are important differences in how road books were created, and in particular the level of investment that went into producing them. However, in relation to their legal treatment, an examination of the cases reveals that the courts were attuned to both the value of the information and the need to develop rules flexible enough to protect such works against direct piracies but at the same time allow for imitation, competition, dissemination (in alternate forms like pocket editions) and improvement.

Thus in each of our road book cases, the plaintiff was generally unsuccessful in asserting copyright to defeat the rival publication which built upon and improved their works. Even Cary, who did get a judgment in his favour, got little joy from it in the shape of one shilling. However, in each case, competition and the consumer were the winners. Although Carnan died without seeing a legal victory, *Paterson's Roads* was clearly the more commercially successful production. Bowles waited 11 years before publishing a second edition of *Paterson's British Itinerary* and then published only one further edition. Meanwhile, both *Paterson's Roads* and *Cary's New Itinerary* continued to be published in new editions well into the 19th century.²⁵⁹ Consumers were the beneficiaries, as each new edition strove to outdo the other in terms of accuracy, currency and additional information included.

The detailed historical examination of the road book cases reveals many interesting facets of early copyright law. Some things remain the same; many things have changed. It is the nature of the common law to develop by accretion and in response to particular social, economic and political developments, and we should rather be surprised to find that the precedents of the 18th century could be easily applied to the cases of the 21st than otherwise. As Brian Simpson famously observed, '[g]reater understanding of cases does not

²⁵⁹ The 18th and final edition of *Paterson's Roads*, completely revised by Edward Mogg, was published in several successive issues from 1826 to 1832. *Cary's New Itinerary* ran to 10 further editions, the last of which was published in 1828: Sir Herbert George Fordham, *Studies in Carto-Bibliography, British and French, and in the Bibliography of Itineraries and Road-Books* (Clarendon Press, 1914) 52.

generate general theories; instead it brings out the complexity of affairs and the extreme difficulty of producing generalizations which have any empirical validity'.²⁶⁰ We ought therefore to be wary of statements which purport to have traced a constant line of authority across 200 years, just as we should of claims to describe 'the true history'²⁶¹ of the protection of informational works. Perhaps the only true lesson history offers is that as long as information remains a valuable commodity, and new technologies open up new ways of creating and disseminating it, rival traders will seek to use the law to protect their investment. In doing so, questions will inevitably arise as to the extent to which this should be allowed. In part this is a matter of balancing incentives and questions of fair competition. But it is also a question of fairness — to traders and to the public — and it is this question which needs to be addressed directly once again.

²⁶⁰ A W Brian Simpson, *Leading Cases in the Common Law* (Oxford University Press, 1995) 12.

²⁶¹ Lindsay, above n 16, 49.