Paradise Lost? The Payment of British Authors in 19th Century America’s Copyright Wilderness

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Abstract: The payment by American publishers to British authors during the mid-19th century, when the works of British authors did not have any American copyright protection, has been presented as evidence that authors can be well paid without the need of copyright protection. The empirical support for this claim putatively comes from a UK Royal Commission Report published in 1878. In this paper I examine the evidence put forward in the Royal Commission Report, as well as data on payments to British Authors from a leading American publisher during the mid-1800s. This reexamination of the Royal Commission Report, combined with the examination of publishing costs, lead to a conclusion that most British authors were not paid by American publishers and the majority of those who were paid received considerably less than they would have received under copyright. Further, two additional historical factors, a cartel-like agreement among leading American publishers and an American market that was larger than the British market, make the instances of American payments to British authors an overestimate of the likely author payments that would exist in a world without copyright.
Introduction
Society’s reliance on copyright to promote the production of creative works has been a contentious political issue since the Statute of Anne, over three centuries ago. The economic debate regarding copyright has traditionally focused on the price that consumers of creative works would pay under different legal regimes. Alternatives to copyright’s provision of ownership rights over creative works, such as rewards, honors, lead time to market, or patronage, were thought to possibly be superior to copyright because, according to proponents of these alternative mechanisms, consumers would not be required to pay so-called “monopoly”\footnote{Contrary to its common treatment, copyright does not provide a monopoly. It merely provides a property right over a creative work, of which there can be any number of very close substitutes and in principle, even be identical works, as long as they are independently created. Note that every property right can be thought of as a nominal monopoly, although there is generally no monopoly power in this nominal monopoly. Copyright also provides this nominal monopoly, but because it does not restrict competition in the creation of substitute works, by itself it provides no economic monopoly. See Kitch (2000) or Liebowitz (2015).} prices, at least not for very long.\footnote{Being first to market is a substitute to copyright because it provides temporary “ownership” over the work until other publishers can bring copies to market.} The focus of most policy debates was on whether it was possible to find a mechanism that would continue to provide incentives to encourage the supply of creative works while imposing a smaller negative impact on the consumption of copyrighted works.

Recently, however, the focus has turned to the supply of creative works, with questions being raised about whether copyright actually performs its traditionally assumed positive inducement on the quantity of works created.\footnote{A different relatively recent concern has been copyright’s increased costs to those follow-on creators who incorporate the prior works of others in their new works. This concern was explored in the seminal model of Landes and Posner (1989).} Modern critics tend to question whether there is a positive linkage between the existence of copyright and the payments to creators, or even if the supply of creations is upward sloping with respect to payments.\footnote{Those who argue that the markets for creative works do not have the normally assumed upward sloping supply curves, tend to rely on singular examples, such as Giuseppe Verdi possibly reducing his output of operas after he was granted copyright over his earlier operas, an example repeated by Boldrin and Levine (2008) and Lunney (2014), with each relying on Scherer (2004).}

This paper examines the question of whether copyright has a significant positive impact on the payments to creators. It has been claimed that creators may “often” be better paid when they do not have any copyright protection than when they do have such protection, although it is difficult to understand why ownership over the creative work would be a handicap to revenue generation.

This claim that copyright has little impact on the revenues to creators is an empirical one and generally seems to originate, for economists at least, with one of the earliest attacks on copyright made by an economist. I refer to the 1934 article by Arnold Plant, who is perhaps best known as the mentor of Ronald Coase. Plant’s paper provided a vociferous and erudite attack on copyright, although it was also lopsided and at times logically questionable. That article, although seemingly ignored for its first forty years, has been resurrected in the literature, perhaps because it was a precursor to much recent
literature, providing something of a template for virtually all the known criticisms that can be made of copyright, while including a detailed history of the subject.

Notably, Plant planted the thesis that publishers would pay authors for their works even in the absence of copyright protection. This could, and has been, taken to imply that copyright had at best a small positive impact on the revenues earned by authors. Plant provided some explanations for why publishers might be expected to pay authors even when there was no legal obligation to do so. Publishers, for example, should have been willing to pay authors for the ability to have first access to print their books, either through the use of “advance sheets” or stereotype plates. This would give the “authorized” early edition a lead time before other publishers could obtain copies of the book from which to publish their own competing copies. Such a head start could provide a window of market control for the initial publisher although some researchers have claimed that such lead time was merely a matter of a few days, even with the technology of the 19th century. Plant also noted that some readers favored editions of books that were “authorized” by the author.

The most compelling empirical evidence provided by Plant to support his thesis came from a natural experiment that took place in the U.S. in the mid-19th century. At that time, only American authors were protected by American copyright, meaning that books written by British authors, which often were very popular in the U.S., received no American copyright protection. Plant’s investigation of that natural experiment consisted of his examination of the evidence presented to a UK Royal Commission on Copyright (“Royal Commission”), conducted in the late 1870s. Plant concluded, or seemed to conclude, that American publishers paid amounts to British authors similar to those they paid to American authors, even though the British authors had no copyright protections. If this empirical

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5 It is not clear that Plant, if pushed, would go as far as his followers have gone. Plant admits (p. 192) “More authors write books because copyright exists, and a greater variety of books is published,” although he suggests that this larger quantity of books might be detrimental to society. He also states (p. 175) “The abolition of copyright need not therefore result in the complete abandonment of the business of book production either by publishers or by professional authors.” Both statements seem at odds with the view that copyright has only a tiny effect on the market.

6 The term “advance sheets” (or early sheets) indicates a manuscript from the author prior to the printed book being available. Authors could also provide stereotype plates, which were materials that a printer could use to directly print a book without having to set the type. Access to these plates obviously lowered the printing costs and were therefore of substantial value to publishers.

7 I had found Plant’s lead-time argument rather convincing, thinking that it would likely be months before competing editions could be produced and distributed. Other researchers such as Kahn (2004), Johns (2010), or Spoo (2013) have provided evidence that in the 1800s a book could be very quickly copied, in a matter of days or weeks, by having numerous printers all work concurrently on small but different portions of the book, although misprints and other errors were more likely when a book was reproduced in this manner. Spoo and Johns quote various statements by American publishers to British authors claiming that the authors’ provision of advance sheets would give publishers an advantage of only one or two days. In spite of this evidence I am still somewhat skeptical about the stated speed of the piracy. This skepticism is based on the self-serving nature of the correspondence between American publishers and British authors, where the former would benefit from exaggerating the limitations of the advantages from being first, so as to lower the payments for advance sheets.

8 “The Royal Commissions and The Report Of The Commissioners” and “Minutes of the Evidence Taken Before the Royal Commission on Copyright,” The Royal Commission on Copyright, (1878).

9 Plant’s tone seems to support a more compelling case than the actual words that he uses, as discussed in footnote 5.
claim were true, it would seem to support a conclusion that copyright has little impact on the creation of works.

In this paper I scrutinize these empirical claims about the treatment of British authors by American publishers by re-examining the Royal Commission report and by introducing some evidence on the payments to British authors by a leading American publisher. This new investigation shows that the copyright held by American authors made a large difference in the payment they received relative to the payments received by British authors.

I. Was the American treatment of British authors a Copyright Eden?

Here is Plant framing the thesis:

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

He answered this question by pointing out that the United States, in the mid-19th century, did not provide copyright protection to British authors, who wrote many of the books popular among American readers. He concluded that British authors were paid by American publishers, even without the benefit of copyright protection. Here is his key statement:

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

Plant’s claim that “many” English authors were paid by American publishers is actually rather vague, since a small percentage of all English authors with works published in America might be all that is required for the term “many” to be technically defensible. Plant does not use the term “most,” although some readers will likely read that meaning into his statement. Similarly, Plant’s statement that “sometimes” English authors were paid more by their American than by their British publishers might

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10 Plant puts the term “handsome sums” in quotes, possibly implying it was used in the English Commission report that he references (that was how I interpreted the use of quotes). He did not have access to the search capabilities modern computers, and terminology similar to “handsome sums” was used in the report. But I have been unable to find this exact term in the report.
mean no more than that this might have happened once or twice, although some readers might interpret it to mean that it happened frequently.

As evidence that these possibly exaggerated interpretations of Plant are not just possible, but have actually taken place, note that Michele Boldrin and David Levine reproduce this very quote from Plant in their 2008 book Against Intellectual Monopoly, but then change the word “sometimes” to “often,” in their very next paragraph, where they reprise the claim in their own words (“the amount of revenues British authors received up front from American publishers often exceeded the amount they were able to collect over a number of years from royalties in the UK”).11 Similarly, Justice Breyer’s (1970) reading of the Royal Commission evidence converts Plant’s claim that sometimes English authors earned more in the U.S. than in England to say instead that “many English writers” earned more in the U.S. than in England, which again lends itself to an interpretation that it was a common event.12 That these distinguished researchers could interpret Plant’s claims in this inflated manner implies that at least some readers, and possibly many, will interpret Plant’s “sometimes” to mean “often” and his “many” to mean “most.” Certainly, the modern critics of copyright are tempted to interpret it in that manner.13

Not only have Plant’s words been interpreted rather liberally, but the representation of the Royal Commission evidence that Plant provided has been taken to be a correct representation. Plant’s interpretation of the evidence from the 1878 Commission has been uncritically accepted and repeated by other researchers including Justice Stephen Breyer (1970), Michele Boldrin and David Levine (2008), Kai-Lung Hui and Ivan Png (2002), Hal Varian (2005), and myself (Liebowitz 1985) in some of my earlier writings.

Plant’s rendition of the American publishers’ treatment of British authors is cited in large part because it still seems vibrant, fresh, and counter-intuitive, and because Plant supports his claims by providing numerous footnotes to specific text found in the Royal Commission report. Still, it is fair to ask whether Plant’s overall representation of the Royal Commission evidence was accurate.

We can answer this question by taking an independent look at the Royal Commission evidence. Note that the Royal Commission was concerned with copyright overall, and that the treatment of British authors by American publishers was only a small fraction of its overall examination of copyright.

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11 This quote can be found on their pages 22-23 of Chapter 2. The italics are mine.
12 See page 300 of Breyer (1970) “many English writers earned more from the sale of advance proofs to American publishers (despite lack of copyright protection in America) than from the copyright royalties on their English sales.” Breyer references this claim to Louis Mallet’s minority statement contained in the Royal Commission report, and indeed Mallet does make a related but somewhat weaker claim “it is the interest of [American] publishers to make arrangements with British authors of eminence, by which they receive a remuneration which, if not equal by way of a percentage on profits to that which they receive from the publishers of this country [England] under the copyright law, is, nevertheless, of a substantial kind, and sometimes, in consequence of the larger circulation of their works at a cheaper price, larger even in amount than that which they derive from their copyright editions at home” [my italics]. Mallet does not provide an exact source for his claim.
13 I am not including Justice Breyer as a modern critic of copyright. But Professors Boldrin, Levine, and Lunney are only a small representation of a rather large group of current researchers who are extremely critical of copyright.
Further, we can broaden our examination of this issue by using the financial records of a leading American publisher which paid British authors upon publishing their works in the U.S. The reader should note, however, that the Royal Commission hearings took place in 1876-77, whereas the information from the leading U.S. publisher ends in 1859, so there is some difference in time periods. Nevertheless, the legal rules of the American copyright system were the same in both periods.

II. Evidence from the Royal Commission and a leading American Publisher

There are three specific claims to be investigated. First, we wish to determine the proportion of British authors who received payment from American publishers, so as to be able to judge whether most British authors or only a small share were paid. Second, we wish to determine the frequency with which British authors received more from American publishers than from British publishers. Third, and related to the second claim, it is useful to compare the size of the book-reading markets in the two countries in order for comparisons of the relative monetary payments to British and American authors to be put in perspective.

The Royal Commission report and the transcripts of its testimony contain many different voices and perspectives on the part of the witnesses, on the part of the questioners, and on the part of the authors of the main report (who did not have unanimous opinions on all the conclusions reached). Plant, unfortunately, does not discuss the overall conclusions found in the report, which often run contrary to the evidence he presents. Instead, he tends to focus on particular testimony conducive to the views he espouses in his article. In trying to remedy what I believe to be a shortcoming in Plant’s analysis, I will tend to overemphasize the evidence contrary to Plant’s views, as something of a corrective, and the reader should keep this in mind.

In addition, I rely upon the account books of a leading American publisher to provide evidence on the relative payments to British and American authors. The records of the firm Ticknor and Fields, which is currently known as Houghton Mifflin Harcourt, were donated to Harvard University, and researchers interested in the history of U.S. book publishing have evaluated and transcribed those records at some length. I lean heavily on that research, particularly the work of Michael Winship (1995).

Ticknor and Fields (T&F) was a leading Boston publisher of literary works in the 19th century, whose stable of authors included Nathaniel Hawthorne, Henry David Thoreau, Henry W. Longfellow and

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14 Throughout this paper I will refer to the payments made by Ticknor and Fields for foreign works as payments to authors when in fact the payments may have gone entirely to the foreign publisher instead of the author.

15 There were 15 members of the Royal Commission. The main report, which contained 294 paragraphs, was signed by 14 members with 1 member (Mallet) unwilling to sign. However, 9 of the 14 signatories included separate notes where they dissented in some way with the main report. These raw numbers overstate the degree of dissent, however. Of these 9 dissenters, 5 objections (Daldy, Manners, Smith, Trollope and Wolff) were focused on only one or two paragraphs and 3 objections (Jenkins, Rose, Young) were more serious but were based mainly on the idea that the term of copyright should be a fixed number of years and not be related to the life of the author. The final dissenter (Stephen) objected to the breadth of copyright with regard to derivative works and objected to copyright on statues and photographs. Thus there is little dissent in the Commission Reports on the main topics of focus in this paper although the discussions during the evidentiary hearings revealed a strong diversity of opinions.
Harriet Beecher Stowe. It also published the works of some leading British authors. Because it was such a respectable literary publisher, with a readership likely to care more about its treatment of authors, Ticknor and Fields would be expected to treat all authors, including British authors, better than a more typical American publisher with a less literary emphasis. There is also evidence that it was one of a handful of American publishers to pay British authors. Thus we can use it as an example of the best treatment that British authors were likely to receive from American publishers.

<table>
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<tr>
<th>Table 1: T&amp;F Number of copies produced</th>
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<tr>
<td></td>
<td>American</td>
<td>Foreign</td>
<td>% Foreign</td>
</tr>
<tr>
<td>1840-1844</td>
<td>39,106</td>
<td>14,248</td>
<td>26.70%</td>
</tr>
<tr>
<td>1845-1849</td>
<td>155,344</td>
<td>16,820</td>
<td>9.77%</td>
</tr>
<tr>
<td>1850-1854</td>
<td>349,332</td>
<td>146,040</td>
<td>29.48%</td>
</tr>
<tr>
<td>1855-1859</td>
<td>358,879</td>
<td>470,698</td>
<td>56.74%</td>
</tr>
</tbody>
</table>

From Table 3.7 in Winship

Before we begin examining the evidence, it is informative to illustrate how important British books were to T&F. Table 1 indicates that the production of foreign (almost exclusively British) titles played an important role in firm’s finances (less so during 1845-49 but more so during 1855-59). Clearly, foreign works were of sufficient importance to the firm over this period that its treatment of foreign authors would be more than an afterthought.

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

Plant stated that “many” British authors were paid by American publishers and they were “regularly” paid lump sums for advance sheets. The tone of Plant’s article makes it easy to conclude that British authors were likely to be paid by American publishers based on his reading of the evidence put forward in the Royal Commission hearings.

But a fuller view of the evidence indicates that most British authors whose works were published in the U.S. were not paid anything by American publishers. For example, the Royal Commission summary report states:

Great Britain is the nation which naturally suffers the most from this policy [Americans failing to provide copyright to British authors]. The works of her authors and artists may be and generally are taken without leave by American publishers, sometimes mutilated, issued at cheap rates to a population of forty millions, perhaps the most active readers in the world, and not seldom in forms objectionable to the feelings of the original author or artist.\(^{17}\)

\(^{16}\) Winship makes clear that almost all the foreign works published by Ticknor and Fields during the period of his analysis were British. On page 66, for example, he states “almost all of the firm’s foreign works were by British authors.”

\(^{17}\) Paragraph 238 of the Copyright Commission report, page xxxvii.
A statement mentioning this conclusion of the Royal Commission, seemingly in direct contradiction to Plant's claims, does not seem to exist in Plant's article. But for his purposes, merely showing that some British authors were paid by American publishers could be sufficient to support a narrow reading of his point. Unfortunately, the casual reader who thought Plant was claiming much more could be greatly misled by Plant’s omission of the Commission’s conclusions.

The Royal Commission report did acknowledge that British authors were sometimes paid by American publishers, sometimes even well paid, but apparently these payments were not thought to be close to the levels made possible by copyright:

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

The Commission report and testimony is filled with interesting anecdotes and various facts about eminent authors, famous titles, and the publishing industry of the time, but not in a methodical manner. The evidence from Ticknor and Fields (T&F), on the other hand, provides an organized view of one firm’s treatment of American and British authors, although that treatment of British authors is likely to be considerably better than the typical American publisher.

T&F paid foreign authors in two different ways: either a royalty on sales revenue, or a lump sum for “early sheets.” Early sheets allowed an American publisher who received the early sheets to have a head start publishing the book in the U.S.

<table>
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<tr>
<th>Table 2: T&amp;F Treatment of New Foreign Works, 1852-1859</th>
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<tr>
<td>No Payment</td>
</tr>
<tr>
<td>Royalty</td>
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<tr>
<td>Lump Sum for Early Sheets</td>
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</table>

Table 2 contains details of the form of the payment to foreign authors for books new to T&F (although not necessarily new to the publishing world), during the period 1852-1859, when foreign works were of great importance to the firm and when, as we will see, foreign authors seemed to be

18 Plant seems to believe that the Commission was biased. He favorably quotes (p. 168) H. C. Carey to the effect that many of the Royal Commission witnesses were authors, naturally favoring copyright. Perhaps he considered this a justification not to mention the conclusions in the Commission’s Report based on those proceedings.
19 Found in paragraph 242, page e3 of the Report of the Commissioners.
especially well treated. It shows that the authors of a majority (77 out of 138) of new foreign works were not paid at all.\(^{20}\)

Even for those foreign works receiving payment, over 80% of the titles received payment in the form of lump sums for early sheets, with a much smaller set of works receiving payment in the form of royalties, a distinction that will soon be seen to be quite important. By contrast, American authors were paid almost exclusively by royalty, with varying royalty rates that generally clustered around ten percent.\(^{21}\)

Winship also provides data on T&F’s costs of book production for the years 1846, 1851 and 1856.\(^{22}\) These data allow a calculation of the share of production costs (separated for domestic and foreign books) going to authors, and allows us to draw inferences about relative payments to American and British authors that should be correct if these years are representative of the firm’s behavior in other years (and the behavior of other publishers) for which we do not have this data. These numbers, found in Table 3, are based on both old and new book titles.

The results of such calculations are found in the first two columns of Table 3. In 1851, for example, foreign authors received zero payments, accounting for, obviously, zero percent of the cost of producing foreign authored books. The third column reveals that although foreign authors received nothing in 1851, the production cost of foreign books accounted for 28.82% of the production cost for all books. Clearly, foreign books played a significant role in the firm’s finances in that year, yet T&F paid nothing to foreign authors.

<table>
<thead>
<tr>
<th>Year</th>
<th>Share Paid to American Authors</th>
<th>Share Paid to Foreign Authors</th>
<th>Foreign Share of Market (by costs)</th>
</tr>
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<tbody>
<tr>
<td>1846</td>
<td>19.39%</td>
<td>0.00%</td>
<td>17.96%</td>
</tr>
<tr>
<td>1851</td>
<td>28.18%</td>
<td>0.00%</td>
<td>28.82%</td>
</tr>
<tr>
<td>1856</td>
<td>23.40%</td>
<td>10.02%</td>
<td>33.28%</td>
</tr>
</tbody>
</table>

*Author Payments defined as Royalties plus Payments for Early Sheets; Other production costs include paper, composition, presswork, binding, illustration and miscellaneous. Derived from Table 5.3 of Winship.

\(^{20}\) Winship points out that 25 of the new works receiving no payment were publications of a series of books by a single British author that had already been published by other American publishers. Thus the share of new foreign books with zero payment might be thought to be overestimated in Table 2.

\(^{21}\) Winship reports on page 133 that “with few exceptions” payments to American authors were royalty payments. On page 134 he reports several royalty rates that tend to be in the vicinity of 10% except when the author provided his own stereotype plates, in which case the royalties tended to double.

\(^{22}\) Whereas the information in Table 2 was based on new titles only, the information in Table 3 is based on all books other than commissioned publications. That means that older American titles might have lost their copyright, although it seems unlikely that very many such titles would have suffered that fate. On his page 133, Winship lists several reasons that Ticknor and Fields might have not paid a royalty to authors, but never mentions the possibility of copyright having expired.
The zero payment made to foreign authors in both 1846 and 1851 is certainly contrary to the notion that American publishers paid British authors an amount similar to what they would have paid if copyright existed. By way of contrast, American authors, the beneficiaries of copyright, were paid 19% and 28% of the production costs for American books, in those two years.

In 1856, foreign authors were paid positive amounts by T&F. Nevertheless, the amounts seem considerably smaller than the amounts (as a share of costs) paid to American authors. I will return to this point in the next section.

Table 3 reveals, for 1846 and 1851 at least, when no British authors were paid, an inferior treatment of British authors by T&F than was indicated for the years 1852-1859 as found in Table 2. Assuming that this is not just a bad draw of years, it appears that the later years of these data, those after 1851, reflect a better treatment of British authors than was the case in earlier years. This improved treatment of British authors might have been due to a change in policy of T&F, perhaps due to foreign books becoming more important to the firm, or perhaps due to a stronger implementation of an agreement restricting competition among American publishers, known as “courtesy of the trade,” which I discuss in a later section.

B. How much were British authors paid?

Although most British authors appear to have received no remuneration by T&F, what can we say about the payment to those favored British authors who were paid? How much did they receive?

Winship (p. 21) quotes an article from an 1856 issue of *American Publishers’ Circular and Literary Gazette* in which Mr. Fields (the F in T&F) “assured us that English authors were paid by the firm of which he is a member the same percentage which it allowed to American writers.” According to Winship (p. 136), the royalties that T&F paid to British authors “in every case” amounted to 10%, which is generally the same amount that the firm paid to its American authors. So Mr. Field’s quoted statement matches the financial records of T&F for those British authors paid by royalty. As we have seen in Table 2, however, only a very small minority (less than 10%) of T&F’s publication of foreign works were paid by royalty during 1852-59, and these T&F royalty based foreign works comprised less than 20% of all foreign works receiving payment by T&F. The main form of payment was lump-sums for early sheets.

What do the T&F data tell us about the size of payments to British authors receiving a lump sum for advance sheets relative to the size of payments to British authors based on a royalty? Table 4 indicates that the yearly payments per book title for advance sheets were, on average, lower than average royalty payments per title. Because advance sheet payments were lump sums presumably paid in a single year, whereas royalties could presumably be based on sales in multiple years, these numbers are not ideal for comparing the relative size of payments in a given year, although it should average out over a period of years.23

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23 The fact that there are no royalty payments in 3 of the 8 years would seem to imply that royalty payments for individual titles are often not reported as lasting many years.
The average lump sum payments are, in every year where they can be compared, lower than the average royalty payment. It should be noted that the averages are not so different as to provide clear evidence on this point. Since we do not know whether the works of foreign authors with early sheets are, on average, larger or smaller sales than works of foreign authors paid by royalty, we cannot say with certainty that the seemingly lower absolute payment for books based on early sheets translates into a lower payment rate per copy, compared to books paid for by royalty.

<table>
<thead>
<tr>
<th>Table 4: T&amp;F Royalty versus Lump Sum Payments to Foreign Authors</th>
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<tbody>
<tr>
<td>Average $/title for Early Sheets (Lump sums)</td>
</tr>
<tr>
<td>1852</td>
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<td>1853</td>
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<tr>
<td>1854</td>
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<td>1858</td>
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<td>1859</td>
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Derived from Table 5.1 in Winship

Let’s return to Table 3 for a moment, however, since those numbers can provide some evidence on the relative payments of foreign and American authors. In 1856, the payments to foreign authors, according to the middle column, represented 10% of the costs of producing foreign works whereas the payments to American authors represented 23.4% of the costs of producing American works.

The simple ratio of these numbers would indicate that foreign authors received about 43% of the payments that American authors received, relative to production costs (the ratio allows us to control, somewhat, for the number of copies per title). But elsewhere (Winship’s Table 7.1) we are told that the 1856 markup on foreign books was 22% greater than the markup on American books, although Winship cautions (p. 174) that this is something of an overstatement because foreign author payments are not included in those numbers. Since Winship also tells us that the T&F royalty payments were based on retail sales (therefore inclusive of markup), foreign authors would be expected to generate a higher royalty rate relative to costs (ceteris paribus) due to the higher markup, if the royalty rate on sales were the same for domestic and foreign works, which appears to be the case (as supported by Mr. Fields statement and the numbers in T&F’s account books).

Reducing the markup differential from 22% to 10%, in order to roughly account for the foreign author payments, and controlling for these higher foreign markets implies that foreign authors, on average, received approximately 39% of the payments that American authors would have received if American authors had written the foreign books. Keep in mind that in the years 1851 and 1846, foreign authors received zero percent of the payments that American authors would have received for the same books,
so for foreign authors to receive 39% of what American authors received in 1856 might represent something of a high water mark for foreign authors.

We can drill down a little bit further with the numbers for 1856. Winship’s data (his table 5.1) indicates that in 1856 there were 4 foreign book titles with no author payment, 3 foreign book titles with royalty payments and 4 foreign book titles where authors were paid for early sheets. Therefore, in 1856, books without any payment were strongly under represented compared to the entire 1852-59 period and books with royalty payments were strongly overrepresented (see Table 2). This provides additional evidence that 1856 was an unusually good year for the treatment of British authors by American publishers, even relative to the post 1851 period, and certainly during the full period of Winship’s analysis. Yet foreign authors only received 39% of what American authors received.

Finally, we can try to draw out some more detailed implications about the relative payments to foreign authors. Because foreign authors receiving royalties were paid at the same rate as American authors, one can assume that the author payments for these books represented the same share of publishing costs for both groups except for the fact that foreign books had markups higher than books by American authors. Thus it is natural to assume that the four foreign titles paid by royalty generated author payments that were 110% of the payments to American authors, relative to publishing costs. The foreign authors of the four books lacking any author payment obviously earned 0% of the payment relative to American authors. Given these two sets of data points, if we make assumptions about the relative sales of the 11 foreign books in 1856, we can calculate the relative payments to authors with advanced sheets.

If each of the 11 books sold equal quantities, then the authors with early sheets would have been paid about 24% of the amount that American authors received and the typical non-royalty author would receive about 12% of what an American author would receive. Admittedly, this calculation is only for a single year, and the assumption of equal sales is a strong one, yet the general range of these numbers is instructive.

These calculations are of particular interest given some of the discussion provided in testimony to the Royal Commission about relative payments of British authors by British and American publishers. I initially thought that some of these claims seemed a little too one sided against American publishers’ treatment of British authors, but after examining the T&F numbers from 1856 these claims no longer seemed so far-fetched. I refer to a claim repeatedly made by a pro-copyright Commission member (the novelist Anthony Trollope) about the relative payments made to English authors by English and American publishers.

\[24\text{ The author payment share of costs for books with advanced sheets will rise when the relative sales of royalty based books fall or when the relative sales of zero payment books rises.}\]

\[25\text{ This shift from comparing the treatment of British authors and American authors in America to comparing British authors’ payments in America and Britain is reasonable if the typical payments by British publishers to British authors is assumed to be somewhat similar to the typical payments by American publishers to American authors. As we will see shortly, the American market was larger but not so much so as to make such a comparison meaningless.}\]
I include two exchanges (the questions are in italics, the answers are not italicized, and the paragraphs are numbered the same as in the Commission testimony). First, a British publisher (John Murray III) was being questioned by Trollope:

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

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

Trollope puts the same question to an American publisher (GH Putnam) who was naturally sensitive to the claim that British authors were badly treated by American publishers:

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

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

I have been unable to determine the basis for Trollope’s claim that British authors received from American publishers about ten percent of what they received from the British publishers, which he makes several more times during the hearings, but the numbers do not appear to be unreasonable given the relative payments to British and American authors by T&F and given that T&F are likely to treat British authors better than most other American publishers. The lack of specific evidence to support Trollope’s claim in the Royal Commission testimony is rather like the lack of specific evidence to support the claim, also found in the Royal Commission testimony, that some British authors received greater payment from American publishers than from British publishers, a claim to which we now turn.

Plant, and in their turn, Boldrin and Levine, state that British authors were sometimes (or in Boldrin and Levine’s case, “often”) paid more by American publishers than by Britain publishers. As already noted, the Commission report also stated that British authors were sometimes paid more by American publishers. Note that this claim is economically unimportant because it is largely irrelevant to the question of whether copyright typically has a large impact on the revenues of creators. After all, even if some British authors occasionally were paid more by American publishers than by British publishers, these cases could merely be flukes and their existence would hardly disprove the claim that American publishers typically paid British authors very poorly, especially if American publishers treat various categories of British authors very differently from one another, as appears to be the case for T&F. And there are also other reasons that might cause an occasional British author to get paid more from
American publishers for reasons unrelated to average payments. Yet one searches in vain for any detailed evidence in the hearings about British authors receiving greater payments in America than they did in England. Plant, referring to the testimony and book sales of the famous polymath, Herbert Spencer, states “that his receipts from sales in America (where he had no copyright to keep up prices) were apparently greater than from those in England.”

Except that, having searched Spencer’s testimony, I can find no basis for Plant’s claim. Spencer does state, with regard to rates, that his American publisher “pay[s] me as well as American authors are paid.”

His publisher, Appleton, was, like Ticknor and Fields, a leading literary publisher known for treating British authors well. And as we have seen, T&F also gave their (few) royalty-based British authors royalty rates equivalent to American authors. Could these copyright-equivalent American royalty rates for British authors have led to some British authors being paid more in the U.S. than in Britain? It is certainly possible, and it even seems likely, but actual hard evidence to support this specific claim appears to be missing.

One instance in the Royal Commission evidence containing a direct reference to the claim that American publishers paid more (seemingly in monetary amounts, not rates) to some British authors occurs when a member of the commission (John Edward Jenkins, a fiction writer and politician) asked some questions to the British publisher Murray:

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

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

But even here, the greater payment by American publishers is treated as a rather unusual event.

In conclusion, there seems to be some evidence, ephemeral with regard to specifics, that some English authors were paid more by American publishers than by their English publishers. But it appears that the tone of the claim by Plant, with regard to the frequency with which American publishers paid more to British authors than did British publishers, was exaggerated, and Boldrin and Levine’s claim, that British authors often were paid more, appears to be extremely off the mark. The tone of the

26 For example, Winship claims on page 139 that British publishers frequently purchased the copyright from British authors with a lump-sum upfront payment, and not a royalty. MacGarvie and Moser (2013) support this claim by reporting that earlier in the century, British publishers used royalties for new authors but tended to pay seasoned authors lump sums. Therefore, a British publisher who under-predicted the success of a seasoned author’s book, might pay less than a later American publisher who paid by royalty. Additionally, British publishers needed to cover the losses from the many books that were flops, lowering overall returns. American publishers could pick and choose only the successful British authors and rely upon British publishers to find new British talent. This would tend to make American publishing of books by British authors more profitable, ceteris paribus, and allow a larger payment to British authors.

27 Found on page 188 of Plant.

28 Question 5269, page 287 of the Royal Commission testimony. Spencer stated that he was paid the same very high royalty rate as American authors in the “Kings International Series” of books and this was mentioned several times in the Commission report.

29 Found on page 62 of the Minutes of Evidence.
evidence from the Royal Commission report indicates that there were a few exceptional cases where British authors might have actually been paid more by American publishers than by British publishers, but it does not seem to have been particularly common.

C. The relative size of the markets

Examining the relative payments to British authors by the U.S. and Britain only makes sense if the relative size of the markets is similar, or differences between the markets are controlled for in some manner. Although historical examination of population sizes and literacy rates can be somewhat revealing, there are other differences between the two book markets that are also important. For example, it appears that purchasing books was much more common among the citizenry in the United States than in Britain in part because “travelling libraries” were much more common in Britain than in the United States.

The raw population of the U.S. was also larger than that of Britain. Although this fact appears at several locations in the testimony, here are a few succinct exchanges. The first comes from Trollope’s questions to the American publisher Putnam:

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

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

Also Trollope to the British publisher Murray:

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

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

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

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

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

Because the claims about British authors having greater sales in the U.S. were made in the mid 1870s, the concurrent testimony about the relative size of populations at the time of the hearings is most appropriate. It seems quite clear that the U.S. had a somewhat larger population with a higher  

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30 Boldrin and Levine (2008) provide such evidence for 1850, as does Liebowitz (2015) for 1880. Boldrin and Levine, looking at population and income concluded that the UK had the larger market whereas Liebowitz concluded that the U.S. had the larger market. Since each looked at different years, the seemingly inconsistent results could both be correct.
percentage of book purchasers (but no mention of relative incomes or prices) at the time the statements about relative author payments were made. But the differences in population were not so large as to make comparisons meaningless.

This means that British authors, if they had been protected by American copyright, very well could have expected to earn more in the U.S. than in Britain due to its greater reading population. These population differences also make it less surprising that some British authors received more revenue from the U.S., particularly since at least a few British authors received the market royalty rate in the U.S., as if they had copyright protection.

III. Courtesy of the Trade: Not a Good Facsimile of Copyright

During the mid-1800s, some American publishers were able, at times, to limit competition among themselves in the publishing of works by British authors. When a leading American publisher reached an agreement with a British author to publish a particular work, it would announce this agreement and, in response, other leading American publishers would refrain from publishing competing versions of the same work although there was no legal requirement restricting the publication of a competing version.

This agreement among publishers was known by the term “courtesy of the trade” and it has sometimes been referred to as “synthetic copyright” (Kahn, 2004). Scholars examining the history of publishing, such as Groves (2007), Winship (1995), and especially Johns (2010) and Spoo (2013), noted that American publishers participated in such agreements, as did Plant in his 1934 article. Such an agreement sounds very much like a cartel, although a somewhat strange one.31

Even when this cartel operated, it apparently only did so among the leading publishers. A leading American publisher of the era (D Appleton) provided this detail when testifying before the Royal Commission:

3587. We have been told that there is in America a kind of honourable understanding between the publishers that if one publisher has expended a considerable sum of money in bringing out a book, others will not reprint it?—Yes, what is called a courtesy copyright, that is an understanding which theoretically exists between all firms in America, but practically only amongst the five or six largest firms. [p. 181]

31 One might expect a cartel to have tried to limit price competition in book titles, or perhaps to have attempted to limit author payments (mimicking a monopsonist). Refusing to poach each other’s foreign authors is an interesting and rational form of cartel behavior, but agreeing to pay the foreign authors runs counter to the behavior that we would expect. It is possible that the payment for advance sheets, or royalties, might reflect little more than the actual market value to the publisher of those sheets (against a possibility that copies would be sold by other publishers) or an advertising-type action earning goodwill from American readers. If so, the cartel may in fact have largely attempted to prevent poaching for the gain of its members, but with the claim that these members made uneconomic author payments (above that required in the market) being largely an illusory part of the agreement.
As is typically the case with cartels, cheating among its members is always a potential problem and courtesy of the trade sometimes worked and sometimes didn’t. This is not much of a surprise. For example, another leading American publisher (GH Putnam) stated:

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

Note that Groves (2007) reports that the cartel tended to fail if the British author was a leading novelist such as Dickens or Scott. This makes sense because the potential revenues from best-selling British novelists seem likely to make the benefits of cheating too great for the chains of courtesy to bear. This implies that the authors receiving payment were likely to be artistic (to bring stature to a publisher) and of middling commercial appeal, leaving the top and bottom of the market without payment to British authors. Because the top of the market is the most commercially important part, the failure of the cartel to hold for the most successful books is of particular interest. 32

If 1856 can be taken as a cartel high point (certainly it was relative to the earlier years) then it seems reasonable to conclude that even with “synthetic copyright,” British authors, on average, earned considerably less than they would have earned had copyright existed for their works. Further, the evidence from both T&F and the Royal Commission make clear that courtesy of the trade was a hit or miss proposition for authors, with many authors receiving little or no protection and a few authors receiving quite strong ownership rights.

Even if it could somehow be divined that the average payments British authors received from American publishers were closer to the ideal copyright level than the payments American authors received from American publishers, this ramshackle payment mechanism that developed for British authors was riddled with uncertainty and imprecision. If a less remunerative copyright system were thought to be superior to a stronger copyright system, then it would be far preferable to change the copyright law in that direction, instead of relying on an erratic system such as the 19th century one for (British authors) in the U.S.

Further, at the time of this collusion there were not yet strong antitrust laws on the books. Such collusion would almost surely be found to be illegal in the presence of modern antitrust laws. This type of behavior among publishers could not legally exist without some sort of antitrust exemption,

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32 Although it could be and has been argued that the most financially successful authors receive far more money (i.e., economic rent) than is required to induce the creation of their works. In principle, consumers would still have access to these works even if the author was not paid by Americans (merely reducing the author’s rents).
such as that given to employee unions. Thus, for this reason in addition to those already discussed, this natural experiment most likely overstates the payments that authors would receive in a modern economy without copyright.

IV. Conclusion

The treatment of British authors by American publishers, when those British authors were paid even though they had no American property rights over their works, appears to be shocking to someone taking the textbook model of perfect competition as a good descriptor of reality. Some economists have used this empirical observation to correctly point out that copyright law is not necessary to provide some reward to some authors of creative works. But many of these economic analyses have gone too far, appearing to claim that the historical evidence supports a view that authors can get paid almost as much, or even more, whether or not they hold a property right (copyright) over their works.

The results in this paper discredit the claim that American treatment of British authors in the 19th century was not so different from what it would have been had the U.S. provided copyright protection to British authors. Instead, the more complete historical record indicates that many and perhaps most British authors were not paid at all by American publishers, and those British authors who were paid were generally paid far less than similarly situated American authors protected by copyright.

Even this more complete historical record overstates the payments that authors would receive in a world without copyright. That is because the 19th century U.S. experience occurred under a regime of limited competition, when leading American publishers agreed not to republish a British author’s work that had already been published by a different American publisher, and because the U.S. book market was larger than the British book market. The large financial disadvantage of British authors documented in this examination of this 19th century historical episode would likely have been even greater if the markets were more equal in size and if the coordination among American publishers had not taken place.

Finally, none of this should be surprising. Without the ownership rights that copyright provides, the ability of creators to extract payments from publishers should be severely limited. Economic models of markets, where product sellers, such as authors and book publishers, are assumed to have ownership rights over the products they sell, are the building blocks upon which the entire foundation of economic analysis rests. We should expect to see larger payments for items (e.g., book titles) that convey ownership rights than for items that do not convey ownership rights. To expect otherwise is more a case of Fantasy Island than one of Paradise Lost.


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

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