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## Cultural Spillovers: Copyright, Conceptions of Authors, and Commercial Practices

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Economists, sociologists, and legal scholars agree that intellectual-property law is fundamental to markets because legal control over copying motivates creative production. But in many markets, such as fashion and databases, there is little or no intellectual-property protection, yet producers still create innovative products and earn profits. Research on such “negative spaces” in intellectual-property law reveals that social norms can constrain copying and support creative production. This insight guided our analysis of markets for American literature before the Civil War, in both magazines (a negative space, where intellectual-property law did not apply) and books (a positive space, where intellectual-property law did apply). We observed similar understandings of authors and similar commercial practices in both spaces because many authors published the same work in both spaces. Based on these observations, we propose that cultural elements that develop in positive spaces may spill over to related negative spaces, inducing changes in buyers’ and sellers’ behavior in negative spaces. Our historical approach also revealed nuances—shades of gray—beyond the sharp distinction typically drawn between negative and positive spaces. In the 1850s, a few large-circulation magazine publishers began to claim copyright, but many still allowed reprinting and none litigated to protect copyright.

**E**conomists, sociologists, and legal theorists adopt disparate assumptions and make different predictions about what sustains markets, but they all agree that property-rights law is essential (e.g., Campbell and Lindberg 1990; North 1990; Polanyi 1944; Posner 2010). Property-rights law determines the technical limitations on markets by defining rules governing ownership and

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control over production, products, and modes of exchange. Such legal-technical effects determine what can be sold, who can sell and buy, who can profit from selling, and under what circumstances products can be sold. Legal scholars and sociologists also argue that property-rights law creates cultural constraints on markets: cognitive schemas about buyers' and sellers' roles, their relative power, and the nature of their exchanges (e.g., Edelman, Uggen, and Erlanger 1999; Fligstein 2001; Gordon 1984). Thus, property-rights law determines both what is feasible (technical constraints) and what is acceptable (cultural constraints). In particular, intellectual-property law gives producers control over the copying of their innovations; such control, in turn, spurs the creative production necessary for markets to thrive.

In addition to culture deriving from law, legal scholars and sociologists recognize that cultural factors, such as norms and value systems, can substitute for formal law. For example, people often eschew formal law and rely instead on informal mechanisms such as customs, norms, and standard practices to guide contract renegotiations (Macauley 1963), resolve property disputes (Ellickson 1991), and safeguard workers' rights (Edelman, Uggen, and Erlanger 1999). Similarly, legal scholarship examining "negative spaces" in intellectual-property law<sup>1</sup>—such as markets for fashion, recipes, and open-source software, all of which thrive in the absence of intellectual-property protection—has shown that social norms can stand in place of formal law (e.g., Raustiala and Sprigman 2006; Buccafusco 2007; Sprigman and Raustiala 2012). In the absence of intellectual-property protection, producers can copy each other's products without legal repercussions. Yet social norms often constrain copying and foster creativity (e.g., Buccafusco 2007; Fauchart and von Hippel 2008).

In this article, we apply negative-spaces theory to analyze markets for literature in America from the mid-eighteenth century, when copyright law and markets for literature were not well developed, to the mid-nineteenth century, when copyright was well understood and markets for literature were thriving. During this period, copyright law applied to part of the market for literature in books: the book industry was a positive space for domestic work but a negative space for foreign work, since American law protected domestic books but excluded foreign books from protection. And although magazines were important forums for literary expression (e.g., Gardner 2012; Okker 2003), the magazine

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<sup>1</sup> In art, the term "negative space" denotes the area around an image; in law, it denotes an area of activity outside the area where formal law applies.

industry was a negative space because copyright law did not cover magazines (Homestead 2005; McGill 2003; McGill in Gross and Kelley 2010; Slaughter 2015). We show that for domestic literature, books and magazines shared cultural conceptions about authors and intellectual-property rights, and they came to share commercial practices. Demonstrating such cultural spillovers extends negative-spaces theory in new directions.

We build on sociological and socio-legal theories holding that law shapes cultural conceptions of market participants (here, authors as producers of literature) and market products (here, literature), which in turn shape how law is used (e.g., Edelman, Uggen, and Erlanger 1999; Fligstein 2001; Macaulay 1963). This work suggests that cultural conceptions of producers and products, which co-evolve with the law inside positive spaces (where the law applies), can spill over to related negative spaces (where the law does not apply) and therefore shape practices in both positive *and* negative spaces. Cultural spillovers may occur when positive and negative spaces are connected through producers present in both spaces or products exchanged in both spaces.

Our historical analysis reveals nuances beyond the sharp distinction typically drawn between negative and positive spaces. Specifically, magazines became an ambiguous space in the 1850s, as a few publishers of mass-circulation magazines began to claim copyright protection. But magazines did not become a purely positive space because magazines were not clearly covered by copyright law and because norms allowing reprinting, even for magazines claiming copyright protection, persisted and no would-be copyright-holders litigated to enforce copyright. This suggests that negative-spaces theory can be improved by being more historically sensitive: (1) spaces can be neither white (clearly positive) nor black (clearly negative), but rather different shades of gray (ambiguous), and (2) the degree of spaces' shading can change over time in response to economic and cultural shifts.

## Negative Spaces in Intellectual Property Law

Property-rights law is essential to markets (Campbell and Lindberg 1990; North and Thomas 1973; Polanyi 1944; Posner 2010). It makes possible market-supporting tools, such as contracts, mediation, and lawsuits. Yet recent research argues that markets can flourish when intellectual-property rights protection is lacking (e.g., Buccafusco 2007; Raustiala and Sprigman 2006; Sprigman and Raustiala 2012). This work focuses on so-called negative spaces, markets in which novel products are not protected by intellectual-property law:

The positive space encompasses all those creative activities that IP law addresses.... The negative space of IP, by contrast, encompasses any other creative art, craft, or act that does not enjoy or at least does not ordinarily rely on IP rights against copyists, either because IP is formally inapplicable or because something – perhaps a social norm against IP enforcement, or a legal or economic barrier that discourages resorting to formal IP – limits its salience. (Raustiala and Sprigman 2017:3)

The problems created by the lack of property rights in negative spaces can be solved by social norms that engender informal substitutes for formal law. Norms constrain copying and sustain creativity by creating “order without law” (Ellickson 1991). For example, in fine food, norms of exclusivity include prohibitions of exact copies and expectations that people will seek permission before passing on information, that innovators will be acknowledged, and that information exchanges will be reciprocal (Buccafusco 2007; Fauchart and von Hippel 2008). These norms are backed by expectations that violators will be excluded from information exchanges. They also protect innovators’ reputations and ensure they receive financial or reputational rewards. In other negative spaces, such as stand-up comedy, social norms spur producers to make their output distinctive, which facilitates detecting and sanctioning imitators (Oliar and Sprigman 2008).

Although socio-legal research on negative spaces has shed much light on how producers of creative or imitative products are conceived, and how they conceive of themselves and their actions, it has focused on negative spaces per se. Yet many negative spaces are in close social proximity to positive spaces. For example, the positive space of trademarked logos and fabric patterns is close to the negative space of fashion designs (i.e., items of clothing) (Sprigman and Raustiala 2012) because the same actors (e.g., Burberry and Adidas) are in both spaces. In such cases, we might expect cultural conceptions, norms, and practices to “spill over” between positive and negative spaces.

To explore such spillovers, we focus on the eighteenth and nineteenth centuries, when copyright law first developed in America. Recognizing that law is dynamic, we conduct a historically sensitive analysis. We examine two related spaces in copyright law: domestic work published in books and in magazines. After 1790, the former was clearly a positive space where copyright law applied. The latter was more complex: until the 1850s, it was a negative space, because magazines, as periodicals composed of multiple items, each written by a different author, were not perceived to be entitled to copyright protection. Copyright was rarely invoked by magazines and never litigated, and

magazines had a “culture of reprinting” that celebrated copying. In the 1850s, a few magazines began to claim copyright to dissuade reprinting, yet some of those still explicitly allowed reprinting and none litigated to protect their copyright claims. This shift was due, in part, to the fact that many authors published work in both spaces, which led to spillovers of material practices from the book industry to the magazine industry. Thus, magazines began to move toward being a positive space, but the transition was not complete until well after our study period. This analysis reveals subtle shades of gray in-between the “white” of positive spaces (where intellectual property-rights law shines) and the “black” of negative spaces. Understanding these shadings becomes important when economic, political, or cultural shifts alter people’s understandings of law.

## **Empirical Strategy**

### **Research Site**

Our analysis begins in the mid-eighteenth century, when intellectual property was governed by English law and American literature was in its infancy. It ends in 1860, the year before the Civil War broke out, when American copyright law was well-established and American literature was flourishing.

### **Analysis: Copyright Law**

We traced the evolution of copyright law in multiple ways, triangulating among data sources. We located all federal Constitutional provisions and debates about copyright. We read all state and federal copyright statutes enacted up to 1860 (Crawford 1975; Library of Congress 1905, 1906). To identify case law, we searched Lexis-Nexis and Westlaw, beginning with the inception of federal courts and the highest state appellate court for 27 of the 33 states admitted to the Union before 1860, and with the first official case report for the other six states. We also consulted the Copyright Office’s digest of decisions from 1789 to 1909 (Library of Congress 1980) and treatises on copyright law published during this period (Curtis 1847; Nicklin 1838).

### **Analysis: The Book and Magazine Trades**

To analyze the book and magazine trades, we began with research by historians and literary scholars (e.g., Dauber 1990; Gross and Kelley 2010; McGill 2003; Remer 1996). These led us to read dozens of books, pamphlets, autobiographies, and collected papers (e.g., Carey 1837 [1942]; Webster 1843), as well as

letters by prominent authors (e.g., Barlow 1783; Irving 1819 in Hellman 1918; Dennie 1795 in Pedder 1936). To chart trends in naming patterns for books (named versus anonymous or pseudonymous author), we used a bibliography of American fiction from the Revolution to 1850 (Wright 1969). To chart debates about literature and copyright, we pored over magazines because those were important forums for such debates (e.g., Gardner 2012; McGill 2003; Okker 2003). We examined magazines published from 1741 to 1825, when archival coverage of magazines was good. We searched the American Periodical Series Online, which contains digitized images of American magazines for articles containing any of the following terms: anonymity, anonymous, author\*, copyright\*, professional author, property right[s], and reprint[ing].<sup>2</sup> We read all available prospectuses, early editorial statements, and second issues of every available magazine (533 out of 902). We also searched for magazines in physical archives (Cornell, Columbia, and Berkeley libraries; New York Public Library) and other Internet archives (Hathitrust and Google Books). To convert prices paid to authors into modern price equivalents, we used a commodity price index developed by McCusker (2001) and a GDP deflator from the U.S. Bureau of Economic Analysis (2017). We also compared historical prices to historical wage rates.

## **The Development of American Copyright Law**

### **The Evolution of Copyright in American Law**

There are two dominant philosophies of copyright: a recognition of perpetual ownership rights for authors in the literary property over which they labored, and a statutorily granted, limited monopoly to authors that motivates them to produce creative works that benefit the public (Abrams 1983; Bracha 2008a). In colonial America, copy privileges granted by colonial courts reflected a conception of copyright geared more toward monopolies for the proprietors who produced and distributed books (printers and booksellers) than toward rights imbued in authors (Abrams 1983; Bracha 2008b,2010b). Proprietors, not authors, usually sought copyright privileges, in part because most authors were gentlemen-scholars who did not seek to profit from their

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<sup>2</sup> We focused on 1741 (when American magazines were first published) to 1825 because editorial statements and prospectuses were available for 59 percent of magazines founded in the eighteenth century and 51 percent of those founded 1801–1825. After that, the industry expanded rapidly and the fraction of magazines with this documentary evidence plummeted, to 13 percent of magazines founded 1826–1840 and 3.3 percent of those founded 1841–1860.

writing (Bracha 2010a; Bugbee 1967). Around the time of the Revolution, however, American law began to frame copyright as rooted in authors more than proprietors. In 1772, the Connecticut colonial assembly was the first to grant copyright privilege to an author rather than a proprietor (Silver 1958). After the Revolution, the shift toward authors gained momentum (Bracha 2008c, 2010a, 2010b). American writers, such as spelling-book author Noah Webster and poets Joel Barlow and John Trumbull, lobbied state legislators for copyright protection (Barlow 1783; Grasso 1995; Webster 1843). They maintained that such protection would unite the nation by promoting a national cultural identity, pointed to authors' rights as justification, and claimed that copyright law was necessary to reach cultural parity with European powers. For example, Barlow argued:

America has convinced the world of her importance in a political and military line by the wisdom, energy and ardor for liberty which distinguish the present era. A literary reputation is necessary in order to complete her national character; and she ought to encourage that variety and independence of genius, in which she is not excelled by any nation in Europe. As we have few Gentlemen of fortune sufficient to enable them to spend a whole life in study, or induce [sic] others to do it by their patronage, it is more necessary, in this country than in any other, that the rights of authors should be secured by law. (Barlow 1783)

Similarly, Trumbull reasoned:

As we have in this country no gentlemen of fortune sufficient to maintain [authors] in the sole pursuit of literary studies, it is certainly necessary for the encouragement of Genius, to secure to every author the profits that may arise from the sale of his writings. ... Surely there is no kind of property, in the nature of things, so much as our own, as the writings which we originate merely [sic] from our own [creative] imagination. (Quoted in Grasso 1995:23.)

After petitioning by Barlow, historian Hannah Adams, geographer Jedidiah Morse, and others who supported themselves at least in part with their writing, the Continental Congress resolved that states craft legislation protecting authors' and/or proprietors' copyright privileges (U.S. Continental Congress 1922 [1783]). With copyright legitimized by the Continental Congress and with continued lobbying by authors, all states except Delaware enacted copyright statutes. These statutes' dominant idea was that



copyright served to protect authors' rights (Abrams 1983; Patterson 1968). For example, all state statutes mentioned "authors" as recipients of protection, while only two also mentioned "publishers" or "purchasers" of copies.

In 1787, the Constitutional Convention adopted, without debate, the Copyright Clause of the U.S. Constitution, which granted Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their Writings and Discoveries" (U.S. Constitution, Art. I, § 8, cl. 8). This pronouncement, embedded in the foundational document of U.S. government, reveals a national interest in promoting learning, while centering copyright squarely on authors (Patterson 1968:193). Three years later, Congress passed the first federal Copyright Act, entitled "An Act for the encouragement of learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned" (U.S. Congress 1790).

To obtain copyright, authors or proprietors had to comply with statutory requirements: before publication, record the title of their work in their local district court and pay 60 cents (about \$15 in 2016 dollars); within two months of registration, publish a copy of the record of deposit in a newspaper for 4 weeks; and within 6 months of publication, deliver a copy of the copyrighted document to the Secretary of State (U.S. Congress 1790). These onerous procedural requirements, combined with the explicit mention of proprietors in the statute, indicate that the Act emphasized copyright as a statutory grant as much as authors' property right (Abrams 1983; Bracha 2010a; Patterson 1968).

No major legal developments occurred until the Supreme Court, in *Wheaton v. Peters* (1834), established that after publication, claims of copyright infringement must be based on the federal statute, as no such claim arises out of common law. *Wheaton* did recognize the existence of common-law copyright (a natural right to perpetual ownership rooted in labor) for unpublished works, but regarding published works, it held that copyright is solely a creature of statute, authors must adhere to statutory requirements to gain protection, and protection is limited to the term specified by statute. Moreover, it held that the purpose of copyright protection is to encourage works that benefit the public (Abrams 1983; Patterson 1968).

These legal developments were driven largely by the economic interest of those who wrote "practical" books, including school books, histories, and geographies, and who earned at least part of their income from their writing. For example, Webster lobbied state and federal authorities for copyright laws because he wanted to safeguard income from his spelling and grammar

books. Others, however, cloaked their interests in the more respectable cloth of civic pride, as Barlow did in the quotation above. As the population grew and the economy expanded, there were more potential readers, with more money in their pockets (more wage-earners, fewer self-sufficient farmers). Thus, there was more reason to support and use copyright law. Technological change also fostered these legal developments. Advances in printing, paper-making, engraving technologies, and improvements in distribution systems (roads, canals, steamships, railroads) all improved the economics of publishing. Easier production and faster, more reliable distribution meant it was easier to profit from publishing books and magazines. These changes, in turn, made it feasible to share publishing profits with authors.

### Positive and negative spaces in American copyright law

Federal law created one positive space in copyright law: it protected the work of American authors, provided their work was first published domestically. This positive space covered only “maps, charts, and books” (U.S. Congress 1790, ch. 15 § 1). In 1802, protection was extended to prints (U.S. Congress 1802), in 1831 to musical compositions (U.S. Congress 1831), and in 1856 to dramatic performances (U.S. Congress 1856). However, even for covered works, the considerable effort and high cost involved in fulfilling the statutory requirements meant that, in practice, many ostensibly covered works by American authors inhabited a negative space in copyright law. This is the main reason why few books published between 1790 and 1820 were copyrighted. Among those published from 1790 to 1800, only 6 percent were copyrighted. Half of these were non-fiction works on law, biography, religion, philosophy, science, medicine, society, or politics, which were the genres most likely to generate profits; less than one-seventh were fiction, plays, or poetry (Khan 2005: 236–37). Despite these practical limitations, the number of copyright filings for domestic book authors grew exponentially, from 1,793 between 1801 and 1830, to 40,000 between 1841 and 1860 (Khan 2005: 237).

Federal copyright law also created two negative spaces. The first was *foreign work*, which was explicitly excluded from protection. The 1790 Act declared: “Nothing in this act shall be construed to extend to prohibit the importation or vending, Reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States” (U.S. Congress 1790, ch. 15 § 5). This provision enabled Americans to reprint and sell foreign work without paying royalties. Starting in the 1820s, large American publishing houses

observed a pale, informal imitation of copyright law—“courtesy of the trade” (Barnes 1974; Everton 2011; Spoo 2013)—and paid foreign writers. But such payments were still far below the economic value of foreign work. Not until 1891, with passage of the International Copyright Act (U.S. Congress 1891), were foreign authors protected. Thus, foreign work was utterly without formal legal protection, even though both American and foreign authors lobbied intensely for such protection for over a half-century (Barnes 1974; Spoo 2013).

The second negative space, *magazines*, is less well-known. Federal copyright law in this period referred to “books” but did not explicitly mention periodicals of any kind until long after the Civil War. The earliest known American treatise on copyright law noted tensions in American copyright law with regard to periodicals (Curtis 1847:227–29). To resolve these tensions, lawmakers debated a bill in 1844 that, among other things, would have clearly brought magazines under copyright protection (H.R. 9 1844, §§ 16–17). That magazines and magazine contents were specifically mentioned in this bill implies that lawmakers recognized the lack of clear copyright protection for magazines. Moreover, that this bill failed to pass indicates that Congress was not yet willing to grant magazines copyright protection as “books.” Indeed, not until a half-century later did federal copyright law include the word “periodical.” The 1891 revision stated that, for purposes of copyright registration, “each number of a periodical shall be considered an independent publication” (U.S. Congress 1891, ch. 565 § 11). Periodicals did not explicitly become their own category of copyrightable text until the 1909 revision of the Copyright Act (U.S. Congress 1909).

In addition, there is no evidence of copyright litigation involving magazine contents before 1850 (Ginsburg 1990; Brauneis 2009). In the 1850s, there were 17 copyright-infringement actions in federal courts; two involved periodicals, but neither clearly indicated that magazine contents were protected by copyright. The first, *Clayton v. Stone* (1829), is most germane to our analysis.<sup>3</sup> There, the court held that a daily newspaper’s commodity price reports were not entitled to copyright protection because their value was “so ephemeral.” But it also held that a work need not follow the form of a conventional (bound) book to qualify as a “book” under the Copyright Act (Brauneis 2009).

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<sup>3</sup> The other case was *Ritchie & Dunnivant v. Wilson* (1856). The owners of the *Virginia Medical Journal – The Stethoscope and Virginia Medical & Surgical Journal Combined* filed for an injunction against the owners of the *Monthly Stethoscope and Medical Reporter*. The plaintiffs claimed exclusive right to the word “*Stethoscope*,” but the court denied the injunction on the grounds that the magazine titles were not exactly same.

This suggested that magazines were protected by copyright, provided their contents were of lasting value. Magazines published creative, literary material; they had long-lasting value, as magazines were printed on higher-quality paper stock than newspapers; they included title pages and indexes for subscribers binding volumes for their bookshelves; and many offered late-arriving readers the opportunity to purchase back issues (Haveman 2015). Yet no-one sued for copyright protection of magazine contents before the Civil War, so in practice, magazines were not conceived of being protected by copyright.

Not until after the Civil War were there were copyright cases involving the content of magazines. Most famously, in 1896 Oliver Wendell Holmes, Jr. lost the copyright to his father's book, *The Autocrat of the Breakfast-Table* (first published as a book in 1858) because the essays it contained were published in the *Atlantic Monthly* without copyright before being published in book form, at which time the author applied for copyright (*Holmes v. Donohue* et al. 1896). Although this decision suggests that articles published in magazines before the Civil War could have been copyrighted individually, the case was heard a half-century later, during a time when the book and magazine industries were fully commercially oriented. It is unclear whether such reasoning would have held sway in the antebellum era.

One reason why copyright law was not used to protect magazines before the Civil War was the onerous procedural requirements for securing copyright, which constituted far more serious obstacles for magazines than for books. If copyright law had treated each issue of a monthly magazine as a book, its publisher would have had to meet these requirements twelve times a year. In practice, these requirements excluded magazines from obtaining copyright (Netanel 1996; Slauter 2015). That may explain why very few of them even claimed it. Between 1790 and 1825, only 7.2 percent of available magazines (39 out of the 546 whose early issues are in the archives) printed copyright notices in their first issues, and one more printed a notice in its third issue. A few others claimed intellectual-property rights in editorial statements, as here:

Printers throughout the United States are requested to observe, that this publication circulates as the Editor's property. . . . Several trespasses upon the property of the Editor, in different parts of the country, have been already committed – and will be passed without further notice. But a repetition of the injuries, will call, before the proper tribunal, a legal question of considerable importance; and produce some trouble and expense, which every man of a specific disposition would wish to prevent. (Webster 1788: 2)

But Webster's admonition was the exception, not the rule. Magazine publishers were generally unconcerned with copyright law. Indeed, some magazines that invoked copyright explicitly allowed others to reprint their contents. For example:

The Copy right is secured that the Association may realize the benefit of a future Edition, if the public favor should justify the measure, but it is not meant to restrain printers of news papers, from making occasional extracts, for the information or amusement of their readers; nor can it be understood as designed to prevent an Author of a Communication to this Work, from publishing the same in any volume of his own. (*Useful Cabinet* 1808: 3)

The situation changed slightly around the 1850s, when a few publishers with large-circulation magazines, such as *Putnam's Monthly*, began to claim copyright because their success made it economically feasible. But this still did not make magazines clearly positive spaces for copyright. Simply claiming copyright for magazines (whether entire issues or individual articles) remained rare (Homestead 2005; McGill in Gross and Kelley 2010; McGill 2003: 197–98; Mott 1930: 504; Slauter 2015).<sup>4</sup> And when magazines did claim copyright, they often allowed reprinting if credit was given, which garnered magazines and their authors valuable publicity. For example: “Each number of *The Musical World & Times* is copyrighted. Editors are at liberty, however, to copy from our columns if mindful of the courtesy of accrediting articles” (quoted by Homestead 2005: 161). Similarly, the *American Agriculturist* invited others to “copy any and all desirable articles,” and stated that “no use or advantage will be taken of the Copy-Right, wherever each article or illustration is duly credited to the *American Agriculturist*” (quoted in Slauter 2015: 77). Moreover, publishers did not sue to enforce copyright. Therefore, at this time, magazines might be characterized as “dark gray”—not purely “black” (negative) but also not “white” (positive).

### Cultural Conceptions of Authors

Cultural conceptions of authors—who authors were, why they wrote, and how they and their writing were evaluated—evolved slowly. There were three successive conceptions (Warner 1990),

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<sup>4</sup> Satisfying pre-publication requirements (e.g., claiming copyright) would not have secured protection unless publishers also satisfied post-publication requirements. In practice, however, even the few magazines claiming copyright usually did the former but not the latter (Patry 1994:32, n.93).

which overlapped in time (Grasso 1995). Up to the mid-eighteenth century, the dominant conception of authors was the *gentleman-scholar*. Although there were notable exceptions, such as poet Phillis Wheatley, a black slave emancipated in 1773, and historian Hannah Adams, during this era, almost all American authors were learned white men who crafted ponderous works about religion, philosophy, political economy, and natural philosophy. Authors such as lawyer-polemicist William Livingston, minister-essayist Aaron Burr, and scientist-poet James Bowdoin sought to further their own political, artistic, religious, or scholarly objectives (Charvat 1968; Dauber 1990; Davidson 1986; Rice 1997; Warner 1990; Wroth and Silver 1952). They viewed writing as an avocation, a byproduct of their learning, made possible by comfortable economic circumstances that afforded them time to think and write. To protect their honor and avoid any taint of “vulgar” mercenary ambition, many shunned publicity and published anonymously or pseudonymously (Charvat 1968; Jackson 1999; Rice 1997; Warner 1990). Perhaps most famous is Thomas Jefferson, who disavowed and threatened to burn the first edition of his only book, *Notes on the State of Virginia*: “Do not view me as an author, and attached to what he has written,” he cautioned James Madison (quoted in Ferguson 1984: 34).

A new conception of authors as *republican citizens*, participants in civic and political debates, developed around the time of the Revolution (Elliott 1982; Grasso 1995; Jackson 1999; Kaplan 2008; Rice 1997; Warner 1990). In this conception, personal values and honor were the most appropriate motivations for writing (see Elliott 1982: 19–54; Grasso 1995). As before, authors were not perceived as part of the economic sphere and their actions were not evaluated in economic terms; instead, authors were perceived as part of the moral sphere and their actions were evaluated in terms of honor and propriety.<sup>5</sup> And as before, anonymity was applauded, but for a very different reason: the quality of the author’s arguments were paramount, not the author’s personal stature. One commentator wrote:

We have never understood that a man is, by any tie of morality or honor, restrained from publishing his sentiments upon a subject or book, unless he will also publish himself, and become an object of personal notice. We conceive his duty to be wholly concerned with the spirit and contents of his book, but whether his name shall be inserted on the title page, or

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<sup>5</sup> Yet there were exceptions, as some of those who wrote prosaic, practical work expected to be paid for their writing, including historian Hannah Adams, spelling and grammar book author Noah Webster, and geographer Jedidiah Morse.



not, is a question resting entirely with his discretion or taste.  
(Wells 1805: 211)

For both cultural conceptions (gentleman-scholar and republican citizen), the view that authors were outside the economic sphere was reinforced by the daunting economics of this era. Printing costs were high: printing presses required skilled manual labor, and paper-making was laborious and dependent on expensive rags. There were few wealthy aristocrats, so there was little patronage support for authors. The reading public was small, and many people lived far from the urban centers where books and magazines were published, making it difficult to find readers. Adding to the problem were the expensive and rudimentary transportation systems needed to deliver printed matter to far-flung readers.

Between the Revolution and the Civil War, however, authorship came to be more deeply embedded in commerce. Authorship therefore came to be conceived of as a *commercial occupation*: authors earned a living from their pens—or at least they tried to do so (Bell 2001; Buell 1986; Grasso 1995; Kaplan 2008; Rice 1997; Tomc 2012; Warner 1990). For example:

The first consideration with a professional author is, what his writings will produce, and how he may must profitably transmute the productions of his genius or talents into the current coin of the realm. (*New York Literary Gazette* 1826: 360)

Literature begins to assume the aspect and undergo the mutations of trade. The author's profession is becoming as mechanical as that of the printer and the bookseller, being created by the same causes and subject to the same laws... The publisher in the name of his customers calls for a particular kind of authorship just as he would bespeak a dinner at a restaurant. (Bowen 1843: 110)

Literature is as lucrative and promising as any other profession, to men who are really qualified to discharge its exacting and lofty functions... It is true that writing is not so productive of money as cotton spinning or merchandise, because...the conditions of literary and ordinary commercial labor, are very different. The latter supplies a constant want, the former ministers only to an intellectual luxury, or wants that do not wear out the supply with such rapidity as to keep up a high and incessant demand. Both must be regulated, to some extent, by the vulgar law of supply and demand, and their profits, by the same law, cannot be forced beyond the natural level of cost and competition. (*Putnam's Monthly Magazine* 1853: 24)

The commercial conception is also evident in Horace Greeley's advice in 1843 to Henry David Thoreau, urging him to publish his work in mass-market magazines rather than elite, small-circulation periodicals:

This is the best kind of advertisement for you. Though you may write with an angel's pen yet your work will have no mercantile value unless you are known as an author. Emerson would be twice as well known if he had written for the magazines a little just to let common people know of his existence. (Quoted in Wood 1949 [1971]: 60.)

Following this prompting, Greeley helped Thoreau place essays in several large-circulation magazines, including *Graham's* and *Putnam's*.

Writers not only began to conceive of themselves as capable of earning a living, some managed to do so. Almost one-quarter of New England authors who wrote between 1820 and 1865 earned most of their living from writing, including Donald Grant Mitchell, Nathaniel Parker Willis, Lydia Maria Child, and Lydia Sigourney, compared with none for those who wrote between 1790 and 1820 (Buell 1986: 375–97). Outside New England, Washington Irving and James Fenimore Cooper also earned handsome livings from writing.

Yet most authors were not commercially successful.<sup>6</sup> For example, Edgar Allan Poe seldom earned anything above the poverty line; he depended on friends and family for financial relief (Ostrom 1982). Similarly, Hawthorne depended on a combination of political patronage (first a position in the Salem customs house, later as U.S. consul in Liverpool) and his wife's family. Willis complained:

How much ought the jeweler to have for buying [the watch] from the maker, warranting it "to go" after examining it, for advertising it, and for selling it across a counter? Suppose the watch to sell for one hundred dollars, and seventy dollars to be the net profit above the cost of material. What would you say, if the maker got but ten or twenty dollars, *and the retailer fifty or sixty?* Yet that is the proportion at which author and bookseller are paid for literary production – the seller of the book being paid *from twice to five times as much* as the author of it! (Quoted in Tomc 2012: 182; emphasis in the original.)

<sup>6</sup> America in the mid-nineteenth century was not much different from America in the twentieth century, when only 5 percent of American authors earned all of their income from writing (Kingston and Cole 1986).



And prominent critic Edwin Percy Whipple protested that “the least lucrative profession in the United States is that of authorship” (Whipple 1850: 38). Finally, blacks, both slave and free, were excluded from the racialized commercial conception of (white) authors, except for a select few like Frederick Douglass and George Moses Horton. Despite rising demand for slave narratives starting in the 1830s, black authors were never placed on par with white authors (Brooks 2012; Goddu 2014).

Authors exchanged literary products for money in many ways: poets and fiction writers entered contests for literary prizes sponsored by magazines, and authors in all genres sold their work to publishers of books and magazines. While these varied exchanges were embedded in different kinds of relationships, they were all embedded in commerce. And despite the increasing commercialization of literature, non-commercial exchanges persisted. For example, poets traded verses in albums and portfolios given as gifts (Jackson 2008), while budding authors “contributed” poems, stories, confessional essays, and other items to magazines (Haveman 2015; Tomc 2012).

The shift in the cultural conception of authors was congruent with (indeed, partly driven by) the shift in economic conditions. The “market revolution” (Sellers 1991) fundamentally transformed work and family life in the early nineteenth century. Conceiving of literature as goods to be exchanged through markets, and authors as imbued with economic rights in literary property and worthy of payment for that property, fit neatly into this new economic system. American society was dividing into specialized occupations, with elite lawyers and physicians, as well as less-prestigious groups such as mechanics and dentists, beginning to claim authoritative expertise as a “means of earning an income on the basis of transacted services” (Larson 1977: 9). Authors came to be equated with the other occupations that were carving out protected domains in the American economy, and thus as a class of economic actor. For example, one magazine writer made this case for the author as a professional occupation:

And shall not the MAN OF LETTERS – he whose occupations more than those of any other class of society, are largely and intimately linked with those qualities and attributes which gave to man his superiority over the brute creation – shall not the man of letters be admitted to the same privilege [as the lawyer and physician]? Shall a profession so manifold in its departments, and in each so important, be unpermitted to the claims of distinction freely granted to the practitioners of sciences, which however honourable and deserving they may

be of the respect of mankind, are nevertheless incalculably more limited in their range, than the almost boundless field within which the literary character pursues his researches? (G. 1818: 402)

This reveals a conception of authors as people who possess specialized expertise, which confers upon them exclusive authority over literature. This conception placed authors squarely in the economic sphere, making it possible to conceive of them and their actions in economic terms: texts as goods to be exchanged for money and authorship as a way to earn a living.

Yet the commercial conception of authors was not universally accepted by 1860. Some prominent authors, such as the Transcendentalists, maintained a stalwartly anti-commercial stance and continued to present themselves as gentlemen (Dowling 2011: 91–96), while Hawthorne viewed himself as a gentleman who wrote for a few discerning friends (Levernz in Gross and Kelley 2010). Moreover, as noted above, authors' economic situation remained precarious. Only those with independent means or easy and remunerative sinecures could indulge in writing.

## Copyright Law and Conceptions of Authors

Understandings of copyright law and cultural conceptions of authors were mutually constitutive (Saunders 1992). Up to the late eighteenth century, most American authors were unconcerned with claiming property rights in their writing. To them, copyright law had nothing to do with the highly personal reasons they wrote. If they considered copyright, it was to maintain their reputations. For example, Thomas Paine wanted to hold the copyright for publication of the second half of his *Age of Reason* because he wanted greater control over his work; he was concerned that “unauthorized” editions of the first half had changed its meaning (Remer 1996: 30).

The emergence of the commercial conception of authors began to change American authors' and the public's legal consciousness (Ewick and Silbey 1998) regarding copyright. Indeed, this conception of authorship was partly responsible for the development of copyright law: lobbying by Noah Webster, Joel Barlow, and John Trumbull, who sought to safeguard their literary earnings, helped persuade state legislators to draft copyright statutes (Amory and Hall 2000: 477–78; Bracha 2008c, 2010a, 2010b; Grasso 1995). And the development of copyright law changed authors' conceptions of themselves (Grasso 1995; Kaplan 2008; Rice 1997; Wroth and Silver 1952).

By the early decades of the nineteenth century, property-rights law and the commercial conception of authors were frequently linked in public discourse, which explicitly described the economics of authorship and the value of copyright. For example:

If there is any kind of property which ought to be protected by law it is [literary property]. If there is any kind of labour that ought to be rewarded, it is the labour of the mind; it is that labour, . . . which more than all others results in benefits to mankind. (*Rhode Island Literary Repository* 1815: 594).

Another writer described the fate of a friend who thought he could earn enough from selling the copyright to his work (G. 1823).

Observers celebrated the few economically successful authors; for example, after Washington Irving moved to England in 1815, over two dozen American magazines described the large royalties paid by his English publisher. American audiences were also exposed to the intertwined understandings of authors and copyright reprinted from foreign media. For example, an American musical magazine demanded that composers, as authors, be accorded copyright, reprinting a piece from the *London Musical Review* arguing that authors of musical compositions were being mistreated, remarking on “the shameful manner in which musical copyright has been invaded” (*Euterpiad* 1822: 86), and describing musical authors as talented men whose property rights merited legal protection.

Importantly, black authors were excluded. Some black authors managed to obtain copyright in their work (Goddu 2014: 154), but they may not have had clear property rights, given that the legal system (at best) left free black authors to struggle for recognition as full citizens or (at worst) stripped black slaves of any legal status other than as property (DeLombard 2014). As McGill (2013: 415) pointed out, we lack a comprehensive study of the property status of slave narratives.

As copyright law and the commercial conception of authors co-evolved, people became more aware of copyright requirements. For example, one editor quoted the notice and deposit requirements of the Copyright Act, saying that it seemed to be the section “less attended to than any other” and urging contributors to secure copyright in their work: “It would be well for authors and engravers to attend to these suggestions, as we understand there are several valuable works, which, through the negligence in relation to the law of copy-right, might be reprinted on the proprietors without incurring a penalty” (*National Register* 1819: 275).

T1 Finally, understandings of copyright and the commercial conception of authors that developed in the positive space of book publishing spilled over to the negative space of magazine publishing, for two reasons: (1) many people were active in both the book and magazine industries, and (2) many works were published in both books and magazines. Table 1 lists a selection of authors from before the Revolution to the Civil War whose texts were published in both forms. For example, the *Columbian Magazine* published an early version of Jeremy Belknap's novel, *The Forresters*, from June 1787 to April 1788. It appeared in book form in 1792. Judith Sargent Murray published a series of essays titled "The Gleaner" in the *Massachusetts Magazine* from 1792 to 1794. A collection of these was published in book form in 1798. The novel *Sarah*, by Susannah Rowson, was published serially in the *Boston Weekly Magazine* from 1803 to 1804, a decade before publication as a book. Most famously, Stowe's *Uncle Tom's Cabin* was published serially in *The National Era* from June 1851 to March 1852 and then in book form later that year. Indeed, almost everything Stowe published in book form first appeared in magazines (Cyganowski 1988). Finally, Hawthorne's novel *Israel Potter* was serialized in *Putnam's* from 1854 to 1855, then published in book form in 1855.

## Impact on Markets for Literature: Naming and Paying Authors

As copyright law became more widely discussed and the commercial conception of authors developed, practices in the book and magazine trades changed in two ways: (1) anonymous authorship (associated with the gentleman-scholar and republican-citizen conceptions) declined and signed authorship (associated with the commercial conception) rose, and (2) authors became more likely to be paid for their contributions.<sup>7</sup> These material practices were made possible—but not inevitable—by the rising value of literary property, which was driven by the growth of the reading public and reductions in material costs of producing literary work.

### Naming Authors

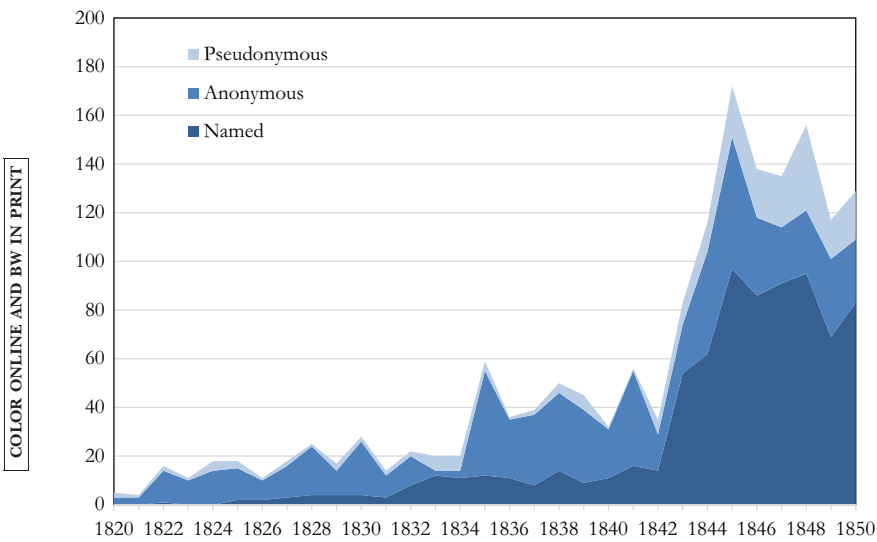
Shifts in cultural conceptions of authors eroded the acceptance of authorial anonymity. Novelists may have been especially

<sup>7</sup> One practice associated with ownership—excludability—did not become universal in either the book or magazine industries, as magazines frequently and freely reprinted material published in books and other magazines (McGill 2003), while different book publishers sometimes issued the same book (Remer 1996; Tomc 2012).

**Table 1.** American Authors Whose Work was Published in Both Book and Magazine Form

Author	Work	Year(s) first published in book form	Year(s) first published in magazine form	Magazine title
Thomas Paine	<i>Common Sense</i>	1776	1787	<i>American Museum</i>
John Trumbull	<i>M'Fingal</i>	1775	1787	<i>American Museum</i>
William Brown Hill	<i>The Power of Sympathy</i>	1789	1789	<i>Massachusetts Magazine</i>
Jeremy Belknap	<i>The Forresters</i>	1792	1787–1788	<i>Columbian Magazine</i>
Richard Bingham Davis	<i>Elegiac Ode</i>	1807	1792	<i>New York Magazine</i>
Anonymous	<i>Amelia, or the Faithless Briton</i>	1798	1787	<i>Columbian Magazine</i>
Judith Sargent Murray ("Constantia")	<i>The Gleaner</i>	1798	1792–1794	<i>Massachusetts Magazine</i>
Charles Brockden Brown	<i>Edgar Huntly</i>	1799	1799	<i>Monthly Magazine &amp; American Review</i>
Susanna Rowson	<i>Sarah; or the Exemplary Wife</i>	1813	1803–1804	<i>Boston Weekly Magazine</i>
William Cullen Bryant	<i>To A Waterfowl (in Poems)</i>	1821	1821	<i>North American Review</i>
Grenville Mellen	<i>The First Glass</i>	1834	1834	<i>Token</i>
Mrs. Sigourney	<i>The Intemperate</i>	1834	1834	<i>Religious Souvenir</i>
Maria W. Stewart	<i>Productions of Mrs. Maria Stewart</i>	1835	1831–1832	<i>Liberator</i>
James Fenimore Cooper	<i>The Pathfinder</i>	1840	1840	<i>New-York Mirror</i>
Henry Wadsworth Longfellow	<i>The Wreck of the Hesperus (in Ballads &amp; Other Poems)</i>	1841	1840	<i>New Yorker</i>
Edgar Allan Poe	<i>The Murders in the Rue Morgue</i>	1843	1841	<i>Graham's Magazine</i>
Donald Grant Mitchell ("Ik Marvel")	<i>Reveries of a Bachelor</i>	1850	1849	<i>Southern Literary Messenger</i>
Harriet Beecher Stowe	<i>Uncle Tom's Cabin</i>	1852	1851–1852	<i>National Era</i>
Sarah Payson Willis ("Fanny Fern")	<i>Fern Leaves from Fanny's Portfolio</i>	1853	1852–1853	<i>Musical World</i>
Herman Melville	<i>Israel Potter</i>	1855	1854–1855	<i>Putnam's Magazine</i>
Nathaniel Parker Willis	<i>Paul Fane</i>	1857	1856	<i>Home Journal</i>
Oliver Wendell Holmes, Sr.	<i>The Autocrat at the Breakfast Table</i>	1858	1857–1858	<i>Atlantic Monthly</i>
Oliver Wendell Holmes, Sr.	<i>The Professor at the Breakfast Table</i>	1859	1859	<i>Atlantic Monthly</i>
Harriet Beecher Stowe	<i>The Minister's Wooing</i>	1859	1858–1859	<i>Atlantic Monthly</i>
George William Curtis	<i>Trumps</i>	1861	1859	<i>Harper's Weekly Magazine</i>
E.D.E.N. Southworth	<i>The Hidden Hand</i>	1888	1859	<i>New York Ledger</i>
Mrs. Ann S. Stephens	<i>Malaeska</i>	1860	1839	<i>Graham's Magazine</i>

prone to hiding their identities because this form of literature was contested up to the 1820s (Baym 1987; Gardner 2012). As Davidson (1986: 40–41) remarked, to condemn novels, "Timothy Dwight took time out from presiding over Yale, Jonathan Edwards from fomenting a religious revival, Benjamin Rush from



**Figure 1. The Number of New Fiction Titles with Named, Anonymous, and Pseudonymous Authors, 1820–1850. [Color figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]**

F1

attending to his medical and philosophical investigations, Noah Webster from writing dictionaries, and Thomas Jefferson and John Adams from presiding over a nation.” We coded data on naming practices for fiction from an authoritative bibliography (Wright 1969). Figure 1 shows that the prevalence of named authorship increased starting in the 1820s, by which time novels were popular and the commercial conception of authors was common (Baym 1987).<sup>8</sup> From 1841 to 1850, named authorship averaged 59 percent of new titles. But even then, some prominent novelists, such as James Fenimore Cooper, withheld their names (Wright 1969: 82–100), while others, such as Ned Buntline (Edward Judson), used pseudonyms (Wright 1969: 201–05).

In the colonial era and the young republic, authors often remained anonymous to preserve their dignity and privacy, two characteristics of gentlemen-scholars and republican-citizens (Charvat 1968; Rice 1997). One magazine essay argued the virtue of anonymity (“the mark of invisibility”) for the budding author: “Should he at length find that he has mistaken his abilities . . . he may at once relinquish his plan, without discredit to himself, and have the satisfaction to know that his performances have defrauded him of but little time” (Quince 1805: 1–2).

<sup>8</sup> We focus on this period because there were very few new fiction titles published before it: only five from 1774 to 1789, 35 from 1790 to 1799, 35 from 1800 to 1809, and 36 from 1810 to 1819.

Indeed, early editors often preferred authorial anonymity: “That we may judge without partiality, we wish to have all original communications intended for publication in the *Mirror*, transmitted to us without the name of the author” (*Boston Mirror* 1808: 1). Given widespread acceptance of anonymity, editors who did reveal authors’ names apologized for doing so: “To the piece entitled ‘Constancy,’ in our last number, the signature of Malvinia was affixed through mistake, it should have stood as anonymous” (*Lady’s Weekly Miscellany* 1807: 363).<sup>9</sup> Even many of those running early magazines preferred to cloak their identities: a “literary society” edited the *Lady’s Magazine* and “Robert Rusticoat” founded the *Wasp*.

As the new commercial conception of authors displaced the older ones, however, the meaning of anonymity changed. Anonymous ideas and opinions came to be denigrated as cowardly and dishonest, while signed ones were valorized as authoritative and honest. One contributor compared signed authors with civilized, upright combatants and anonymous ones with savages who ambushed opponents (*Balance & Columbian Repository* 1803). Such opinions became more common over time. For example:

There can be no secure nor confident reliance on the truth of narratives, resting on the credit not only of no name of respectability, but no name at all. It is inconsistent with the plainest rules of evidence and common sense, to give implicit belief to statements whose authors are unwilling to stamp them with their own character, and to support them by the pledge of their own reputations. (*Analectic Magazine* 1817: 485)

The publication is anonymous, and therefore the pretensions of the writer to personal knowledge and experience are entitled to no weight. (*Masonic Miscellany* 1822: 453)

The value of an anonymous communication [is] *Nothing*. (*New England Galaxy* 1824: 344; emphasis in the original)

It is . . . wrong to give anonymous details of historical facts, while so much depends upon personal authority. (Rafinesque 1824: 202)

Authors became increasingly willing to reveal their identities to assure readers of their integrity. For example, the editor of the *American Register* published “Account of the massacre in St. Domingo [Haiti], in May, 1806” as an anonymous piece, but annotated the article with a caveat:

<sup>9</sup> Yet the “modesty” attached to anonymity did not mean authors felt no pride in their writing. For example, one chided his editor for misattributing to him another anonymous piece, which he deemed inferior (*Portico* 1816: 79–80).



The above narrative is an anonymous performance... Its only claim to credit must arise from the probable nature of the incidents contained in it. Imperfect as this kind of testimony is, it is, in general, the only kind accessible to a minute historian of contemporary events, where official intelligence is wanting. (*American Register* 1807: 137)

The author responded by stating his name and declaring the article truthful:

I have thought proper, in order that its future existence, as a relation of a historical fact, may be placed upon as firm a basis as my veracity will allow, to acknowledge that I was the author of the publication in question.... My presence in Cape Français at the time, enabled me to inform myself fully of every particular that I have stated, and I pledge myself on its correctness, as to date, particularity, and truth, as far as human investigation can extend. (Raguet 1808: iv)

This exchange reveals the growing sensibility that authors could claim to be authoritative only if their names were known. In a similar vein, Joseph Dennie gave up the pseudonym Oliver Oldschool, which he had used for a decade for his contributions to the *Port Folio*, and declared he would henceforth sign his real name:

The appellation of Oliver Oldschool, in the opinion of its foster-father, is no longer expedient or necessary... As the liberal conductor of a liberal work, dedicated to the Muses, the Sciences and the Graces, all mystery and artifice should be disdained. (Dennie 1811: 87)

### Paying Authors

Publishers also became increasingly likely to pay authors well for their work. As Washington Irving wrote to his publisher in 1819: "If the American public wish to have literature of their own they must consent to pay for the support of authors" (Hellman 1918 (vol. 2): 107). He sold 5,000 copies of the *Sketchbook*, earning \$9,000 (\$164,600 in 2016 dollars) (Gross and Kelley 2010: 105). In the 1820s, William P. Dewees earned \$21,000 for his books on midwifery (over \$500,000 in 2016 dollars) (Jackson 2008: 16). James Fenimore Cooper sold the copyright to each of his novels in the 1820s for an average price of \$5,000 (\$118,000 in 2016 dollars) (Green in Gross and Kelley 2010: 106–07). In 1853, Sarah Payson Willis, writing as Fanny Fern, earned \$7,000 for selling 70,000 copies of *Fern Leaves* (\$210,000 in 2016 dollars), while Susan Warner earned \$9,000, (\$260,000 in 2016 dollars) for *The Wide, Wide World*. Finally, for



*Uncle Tom's Cabin*, the best-selling novel of this era, Stowe earned \$20,300 in 1852 (\$610,000 in 2016 dollars) (Williams in Casper et al. 2007:94).

Payments to authors also became more common in the magazine industry. As book authors came to be viewed as economic actors deserving of payment for their work, magazine authors came to be perceived similarly, in part because the same people were active in both industries, and published the same literary work in both, as Table 1 showed. *Columbian Magazine* paid Jeremy Belknap for his contributions as early as 1787 (Wood 1949 [1971]: 17–19).<sup>10</sup> The *Port-Folio* and the *Examiner* began to pay contributors in 1812, with the *Examiner* offering \$2 per page for well-written communications. The *Analectic Magazine* commissioned Gulian Verplanck and James K. Paulding during the War of 1812 (Lanzendörfer 2013: 290–93). One editor explained this shift:

The efforts made to establish and conduct periodical publications ... have been divided. These publications have, therefore, received but a partial support, have been of circumscribed usefulness, and of short continuance. To avoid these evils, an attempt will now be made to attain a concentration of labors. A method in which it is supposed this object may be effected is to allow a compensation to those who contribute to the pages of the proposed work. To make such compensation, is not only necessary, but just. Those who will thus labour for the public good, are not rich, and will need the reward to which they are entitled. (*Christian Spectator* 1819: iii)

Although paying magazine authors was a cultural breakthrough, recognizing as it did an informal property right, the amounts were not enough to earn a living. The average monthly income of white-collar workers at this time was about \$34 (Margo 2000). To earn at this level, a contributor to the *Analectic*, which had 90 pages per monthly issue and paid generously, would have had to sell at least 12 pages of text each month. Net of the short, unpaid items it published, the *Analectic* could offer an “average” income to at most a half-dozen authors.

Despite the small sums involved, this innovation had enormous impact, as large-circulation magazines like the *Atlantic Magazine* also began to pay contributors in 1824. Over the next decade, many others followed suit, notably *Godey's* and *Knickerbocker*. Even literary reviews, whose writers were most likely to

<sup>10</sup> Most previous research (e.g., Mott 1930) dated this practice to 1819.

view themselves as gentlemen-scholars, adopted this market-oriented practice. For example, the august *North American Review* began paying contributors in the mid-1820s, while the *Medical Journal* did so in 1829. As one commentator noted, “The increase in readers has rendered all standard literary property of higher certain value, and must tend to improve literature by heightening the recompense of successful exertion” (*Athenaeum* 1823: 125). Thus, magazines sharply increased the commercial value of literature, which allowed an increasing number of writers to succeed commercially (Cyganowski 1988; Sedgwick 2000).

Prices varied greatly. Between 1837 and 1858, magazines paid contributors \$1 to \$7 per page (\$28 to \$171 in 2016 dollars) (Jackson 2008; Robbins 1949; Sedgwick 2000). By the 1830s, mass-market magazines began to compete intensely for essays, poems, and fiction. As a result, prices escalated, especially for work by popular authors (Jackson 2008; Robbins 1949). For example, in 1840, Longfellow was paid by *Burton's* (later *Graham's*) *Gentleman's Magazine* \$15 to \$20 for each poem (\$404 to \$538 in 2016 dollars); by 1843, his price had risen to \$50 (\$1,571 in 2016 dollars), as the magazine sought to make him a regular contributor (Mott 1930; Robbins 1949). This magazine's prices for essays and fiction ranged from \$4 to \$20 per printed page in the early 1840s, which translates to \$20 to \$100 for a 5,000-word article (\$629 to \$3,144 in 2016 dollars). Average monthly wages for white-collar workers were about \$35 in the late 1820s and about \$43 in the early 1840s (Margo 2000), so by 1843, Longfellow could earn an above-average income by selling a single poem per month, and prose writers could do the same by selling one essay or short story every two months. In 1847, one magazine estimated that popular authors such as Poe and Cooper were paid \$50 per essay, poem, story, or novel chapter (\$1,413 in 2016 dollars) (*Literary World* 1847).

Authors who had earlier opposed this market turn came to understand the importance of being paid (Williams in Casper et al. 2007: 97) and benefitted from the rising prices paid by magazines. For example, the *Atlantic Monthly* paid Ralph Waldo Emerson \$50 for a poem in 1857 (\$1,332 in 2016 dollars) (Bradsher 1920). Some female authors also benefitted; for example, *Graham's Magazine* paid Emma Embury up to \$40 per story in 1843 (\$1,257 in 2016 dollars) (Robbins 1949). Even some beginners were well compensated for contributions: an 1850 essay paid Susan Warner \$50, enough to clothe her family through the winter (Williams in Casper et al. 2007: 92–93).

Yet the vast majority of authors earned little, if anything, from their submissions to magazines (Sedgwick 2000; Tomc 2012). Poe is perhaps the best-known example: between July 1835, when he

became an editor at the *Southern Literary Messenger*, and October 1840, when he died, he earned an average of \$12,000 per year in 2016 dollars (Ostrom 1982). And in 1837, Hawthorne earned only \$108 for eight stories published in *The Token* (\$2,627 in 2016 dollars) (Williams in Casper et al. 2007: 96).

## Conclusion

### Spillovers between Positive and Negative Spaces

Research on negative-spaces theory has shed much light on how producers of creative or imitative goods and services are conceived, and how they conceive of themselves. But it has focused on negative spaces per se. We studied two related spaces: the positive space of domestic work published in books and the negative space of domestic work published in magazines, and demonstrated spillovers between the two spaces. We showed that the positive space for domestic work published in books both promoted and reflected a shift in conceptions of authors, from gentleman-scholar to commercial occupation. The mutual constitution of this positive space and this cultural conception of authors led to two changes in both the book and magazine industries: the movement away from anonymous to named authorship and the rise of the practice of paying authors. These cultural spillovers occurred because many writers were active in both spaces and the same work was published in both spaces.

Our findings support sociological and socio-legal arguments that law and culture are mutually constitutive and jointly drive economic activity. Economic actors' preferences develop through social interaction, including conversations and negotiations that take law into consideration. At the same time, the meaning of law itself, and therefore law's power over economic action, arises from social interaction, as laws governing markets are embedded in webs of social relationships and cultural understandings (Ewick and Silbey 1998; Fligstein 2001). These relationships and understandings are especially important when formal law is ambiguous (Clune 1983; Edelman 1992; Edelman, Uggen, and Erlanger 1999). How buyers and sellers conceive of law and engage in legal disputes is constituted in part by shared understandings that emerge from social interaction. In this way, law engenders cultural institutions that both create opportunities for economic action and constrain it. The most important cultural institutions that co-evolve with law are classification systems that guide strategies of action (Swidler 1986). Thus, law creates and sustains relations between buyers and sellers, not simply by its own authoritative weight, but

by the intrinsic connectedness of law, society, and buyers' and sellers' understandings of both (Gordon 1984).

In positive spaces in intellectual-property law, interactions between buyers and sellers produce shared understandings of actors and products. These understandings solidify into classification systems that define creative producers as economic actors (those who sell what they create), rather than non-economic (those who engage in other forms of exchange, such as gift-giving or status-seeking). They also define creative products as economic objects (things that are bought and sold), rather than non-economic (things that are exchanged for friendship, love, or status) (DiMaggio 1990; Lamont 2012). These classification systems also define creative producers as legal actors (those who have legal rights over what they create) and creative products as legal objects (things whose exchange and use is protected by law). In turn, both economic and legal definitions create constraints on and opportunities for economic action in positive spaces by, for example, making compensation for creative production and control over reproduction (i.e., copying) appropriate, even essential.

These lines of argument suggest that classification systems, which have normative power over economic actors, can spill over between related spaces in intellectual-property law. Positive and negative spaces can be related in two ways. The same actors may be in both spaces, as fashion houses like Burberry and Adidas are in the positive space of trademarked logos and fabric patterns and the negative space of fashion designs (i.e., items of clothing) (Raustiala and Sprigman 2006; Sprigman and Raustiala 2012). Or the same objects may be produced and sold in both spaces, as when, prior to the U.S. recognizing international copyright in 1891, work by British authors who met all statutory requirements for copyright received formal protection in their home country but not in the United States.

When economic actors or objects in a positive space in intellectual-property law are also present in a negative space, the classification systems that develop about those actors or objects in the former may also guide thoughts and actions in the latter, precisely because classification systems have normative power. People rely on classification systems and associated norms to make sense of exchanges of similar goods in similar situations, so norms governing actors' behavior that develop in markets where the law applies may guide behavior in markets where the law does not apply. In this way, cultural conceptions of what is appropriate and acceptable that developed in positive spaces in intellectual-property law can spill over to related negative spaces, taking the place of formal law and thus supporting markets in those spaces. In our case, for example, norms about recognition for work

(reputational or monetary) that developed in positive spaces spilled over to negative spaces. When this happened, behavior in negative spaces came to resemble behavior in positive spaces, as creative producers claimed credit and were paid for their work, sometimes handsomely. Indeed, we expect that, in general, *the closer the relationship between positive and negative spaces, the more likely such spillovers will occur.*

Future researchers could test this argument in other settings, specifically those where negative spaces are connected to positive spaces by the coexistence of producers or products. The space of fashion design (negative) and the spaces of logos and patterns (positive) are connected through the productive organizations that operate in both spaces. Industrial designs are another potentially fruitful research site because they enjoy robust intellectual-property protection under European Union law compared to the few protections afforded under existing U.S. law (see Raustiala and Sprigman 2017).

### **Shades of Gray**

Our historical analysis revealed nuances beyond the sharp distinction typically drawn between negative and positive spaces, by exposing shades of gray in-between the “white” of positive spaces (where intellectual property-rights law shines) and the “black” of negative spaces. Magazines became a gray space in the 1850s, as some publishers of mass-circulation magazines began to claim copyright protection. But magazines did not become a fully white space because magazines were not yet clearly covered by copyright law. No magazine litigated to enforce copyright. And even those magazines claiming copyright protection often allowed reprinting if credit was given, which garnered magazines and their authors valuable publicity. This suggests that negative-spaces theory can be improved by being more historically sensitive: (1) spaces can be neither white (clearly positive) nor black (clearly negative), but rather different shades of gray, and (2) spaces’ shading can change over time in response to economic and cultural shifts, driven by the presence of creative producers and products in multiple spaces.

We expect that in general, *understanding shadings of gray becomes important when economic, political, or cultural shifts gradually alter people’s understandings of law.* For example, consider contemporary publishing. The rise of the Internet has dramatically reduced the costs of reproducing and distributing texts, images, and sounds to nearly zero (Lemley 2015). The extreme ease of copying intellectual property is engendering many new norms about property rights, thus creating spaces with different shades

of gray. And those spaces' shadings are changing over time. How quickly that change unfolds will depend on how common it is for creative producers to publish their work in "real" forums (e.g., paper or film) or "virtual" ones (the Internet).

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