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

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Abstract

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 those 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 magazines publishers began to claim copyright, but many still allowed reprinting and none litigated to protect copyright.

Economists, sociologists, and legal theorists adopt disparate underlying assumptions and make different predictions about what sustains markets, but they all agree that property-rights law is essential (e.g., Polanyi 1944; North 1990; Campbell and Lindberg 1990; Posner 2010). Property-rights law determines the technical possibilities of and limitations on markets by defining the rules that govern ownership and control over the means of production, the products themselves, and modes of exchange. Such legal-technical effects on markets cover 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 opportunities for and constraints on markets: new cognitive schemas about the roles buyers, sellers, and intermediaries play; novel understandings of their power vis-à-vis exchange partners; and innovative conceptions of the nature of their exchanges (e.g., Gordon 1984; Edelman, Uggen, and Erlanger 1999; Fligstein 2001). Thus, property-rights law determines both what is feasible (technical opportunities and constraints) and what is acceptable (cultural opportunities and 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 them in renegotiating contracts (Macauley 1963), resolving property disputes (Ellickson 1991), and safeguarding workers' civil rights (Edelman, Uggen, and Erlanger 1999). Similarly, legal scholarship examining "negative spaces" in intellectual-property law[1] – such as markets for fashion, furniture design, stand-up comedy, databases, and open-source software, all of which thrive in the absence of intellectual-property protection – has shown that social norms can take 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 in such markets can

[1] 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.

copy each other's products without legal repercussions. Yet social norms often constrain copying; they may even foster creative production by allowing innovators to benefit from their efforts (e.g., Buccafusco 2007; Fauchart and von Hippel 2008).

In this paper, 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 copyright law explicitly protected domestic books but explicitly excluded foreign books from protection. And although magazines became important forums for literary expression in this era (e.g., McGill 2003; Okker 2003; Gardner 2012), the magazine industry was a negative space because copyright law's legal protections did not extend to magazines (McGill 2003; Homestead 2008; McGill in Gross and Kelley 2010; Slauter 2015). We show that for domestic literature, books and magazines shared cultural conceptions about the nature of authors and of authors' rights in their intellectual products, and they came to share commercial practices. Demonstrating such cultural spillovers extends negative-spaces theory in new directions.

To make sense of these cultural spillovers, we build on sociological and socio-legal theories of law and markets, which hold that law shapes cultural conceptions of market participants (in this case, producers of literature) and market products (in this case, literature), which in turn shape how law is used (e.g., Macauley 1963; Edelman, Uggen, and Erlanger 1999; Fligstein 2001). With regard to negative spaces in intellectual-property law, 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 are likely to happen when positive and negative spaces are connected through economic actors (producers, intermediaries, and consumers) that are present in both spaces or through products that are exchanged in both spaces.

Our historical approach reveals nuances beyond the sharp distinction typically drawn between negative and positive spaces. Specifically, magazines became a "dark gray" space in the 1850s, as a few publishers – those whose magazines had large, nation-wide circulations – began to claim copyright protection because their success made it economically feasible to do so. But magazines did not become purely "white" (i.e., a positive space) at this time because norms allowing reprinting (even for magazines claiming copyright protection) persisted and publishers did not litigate to protect copyright. This finding suggests that negative-spaces theory can be improved by taking a more historically sensitive approach: (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.

We begin by reviewing the negative-spaces theory of intellectual-property law. After explaining our empirical strategy for applying this theory to our research site, we detail the evolution of copyright law in America from the mid-eighteenth to the mid-nineteenth century, describe the evolution of cultural conceptions of authors and markets for literature, and explain interdependencies between copyright law and cultural conceptions of authors. We show how a commercially focused conception of authors as deserving of reputational credit for, control over, and remuneration for their work, developed in both the book and magazine industries. We further show that similar commercially oriented practices developed in both spaces, specifically authors' signing their work and publishers paying authors for that work. We suggest that these cultural spillovers were facilitated by the presence of many authors and their literary products in both spaces. We conclude by suggesting other venues where scholars might test the arguments developed here.

1. Negative Spaces in Intellectual Property Law

Property-rights law is essential for markets to function (Polanyi 1944; North and Thomas 1973; Campbell and Lindberg 1990; Posner 2010). It makes possible the creation of the tools and forums buyers and sellers need to accomplish their goals, such as contracts, lawsuits, and mediation. Notwithstanding the fundamental importance of property-rights law, recent research argues that

creativity and innovation can occur even when intellectual-property rights protection is lacking (e.g., Raustiala and Sprigman 2006, 2009; Buccafusco 2007; Rosenblatt 2011; 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, such as novels, poems, films, television shows, music, software, painting, and video games. 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)

There are two ways the problems created by lack of property-rights law in negative spaces can be solved. First, social norms can engender informal substitutes for formal law that constrain copying and sustain creative production, creating "order without law" (Ellickson 1991). For example, in fine food, norms of exclusivity include the prohibition of exact copies as well as the 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 the threat that those who violate market norms will be excluded from information exchanges. These norms constrain imitation by pushing it along some pathways and not others; 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 imitation and sanctioning imitators (Oliar and Sprigman 2008).

Second, first-mover advantages may be large enough to generate sufficient benefits for innovators that they continue to innovate, even in the face of copying. First-mover advantages can deter copying if innovators can sell many units of their products before imitators flood the market with copies. In such circumstances, innovators will earn the vast majority of the profits from selling products (Burk and Lumley 2003). But this would happen only if copying did not occur before some time passed – a time lag equal to a large fraction of the sales lifecycle of the products in

question (Raustiala and Sprigman 2006). First-mover advantages can also benefit innovators if they develop valuable reputations and can brand their products. If those who innovate are held in higher esteem than those who copy, and if innovators' products are valued more highly than those of copiers (even if copiers are nimble), then markets will thrive without formal intellectual-property protection (Burk and Lumley 2003; Rosenblatt 2011).

Although research on negative-spaces theory 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) (Raustiala and Sprigman 2006, 2009; Sprigman and Raustiala 2012), because the same actors (fashion houses like Burberry and Adidas) are in both spaces. In such cases, cultural conceptions, norms, and practices may "spill over" between the positive and negative spaces.

To explore such possible spillovers, we focus on the eighteenth and nineteenth centuries, when copyright law first developed in America. Recognizing that law is dynamic, shifting with legislation, regulation, and court decisions, we conduct an historically sensitive analysis. We examine two closely related spaces in copyright law: domestic work published in books and in magazines. We find that 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 the copying of their contents by other magazines. But in the 1850s, a few magazines began to claim copyright to dissuade reprinting, yet some of those still explicitly allowed reprinting and none of those litigated to protect their copyright claims. Thus, magazines began to move toward being a positive space, but the transition was not complete before the Civil War. This historically sensitive 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 (where it does not shine). Understanding these shadings become important when economic, political, or cultural shifts alter people's understandings of law.

2. Empirical Strategy

Research site. Our study period 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 copyright law was well understood and American literature was flourishing. Our analysis focuses primarily on what people in this era termed "polite literature" or literature produced for "amusement," meaning belles lettres (poetry, plays, fiction, and elegant essays on theology, ethics, law, literature and the arts, philosophy, and politics) because cultural understandings of those literary forms and of the men and women who created them changed greatly during this period. We pay less attention to prosaic, practical, and didactic writing (biography, popular history, travelogues, scientific reports, legal and medical treatises, religious tracts, and school books) because cultural understandings of those genres and their creators were more stable throughout this period.

Analysis: copyright law. We traced the evolution of copyright law in multiple ways, triangulating among data sources. We located every federal Constitutional provision about copyright, the constitutional debates related to copyright, and other relevant materials from the Continental Congress. We read the full text of each state and federal copyright statute enacted up to 1860 (Library of Congress 1905, 1906; Crawford 1975). To identify case law, we searched Lexis-Nexis and Westlaw. Coverage began with the inception of 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 six other states. Coverage extended to lower courts for Connecticut, Delaware, Maryland, New York, South Carolina, and Virginia, and into the colonial period for Massachusetts, Maryland,

Pennsylvania, and Virginia. Coverage extended to all federal courts from their inception.[2] We also consulted the Copyright Office's digest of copyright decisions from 1789 to 1909 (Library of Congress 1980) and American books on copyright law published during our study period (Nicklin 1838; Curtis 1847).

Analysis: the book and magazine trades. We conducted multi-faceted searches for data on attitudes toward copyright and cultural conceptions of the author, authors publishing the same work in book and magazine form, and two commercial practices relating to copyright law and the conception of authorship as a commercial occupation: (1) authors signing their names to their work (rather than remaining anonymous or hiding behind initials or pseudonyms), and (2) printers or publishers paying authors for that work. We began with close readings of research by historians and literary scholars (e.g., Dauber 1990; Remer 1996; McGill 2003; Gross and Kelley 2010). 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; Dennie 1795 in Pedder 1936; Irving 1819 in Hellman 1918). 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., McGill 2003; Okker 2003; Gardner 2012). We examined magazines published 1741 to 1825, when archival coverage of magazines was good, and read all available prospectuses and early editorial statements, as well as the second issue of every available magazine (533 out of 902). We also searched the American Periodical Series Online, which contains digitized images of American magazines for articles containing the terms anonymity, anonymous, author*, copyright*, professional author, property

[2] Searching state court and federal court decisions was necessary because the 1819 revision to the Copyright Act granted U.S. circuit courts original (but not exclusive) jurisdiction to decide copyright disputes (U.S. Congress 1819, ch. 19). Prior to this, state courts heard copyright cases involving less than $500 and between citizens of the same state.

right[s], and reprint[ing].[3] And we searched for magazines in physical archives (the Cornell, Columbia, and University of California libraries; the New York Public Library) and other Internet archives (Hathitrust and the Google Books Library Project).

To convert prices paid to authors during this period into modern price equivalents, we used a commodity price index developed by McCusker (2001) and a gross domestic product deflator from the U.S. Bureau of Economic Analysis (2017). To provide more context, we also compared historical prices to historical wage rates.

3. The Development of American Copyright Law

The evolution of copyright in American law. There are two dominant philosophies of copyright: as recognition of a perpetual ownership right for authors in the literary property over which they labored and as a statutorily granted motivation for authors to produce creative work that benefits the public (Abrams 1983; Bracha 2008a). In colonial America, the few copy privileges granted by colonial courts reflected a conception of copyright geared more toward monopolies for the proprietors who produced and distributed books (at that time, printers and booksellers) than toward rights imbued in the authors who wrote them (Abrams 1983; Bracha 2008b, 2010b). In this era, proprietors, not authors, usually sought copyright privileges, in part because most colonial authors were gentlemen-scholars who did not seek to profit from their writing (Bugbee 1967; Bracha 2010a). Around the time of the Revolution, however, American law began to frame copyright as rooted in authors more than proprietors. For example, 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 and a discourse about authors' rights emerged (Bracha 2008c, 2010a, 2010b). American writers, such as poets Joel Barlow, John Trumbull, and spelling-book author Noah Webster, lobbied state legislators for copyright protection

[3] We focused on the years 1741 (the year the first American magazines were published) to 1825 because editorial statements and prospectuses were available for 59% of magazines founded in the eighteenth century and 51% of those founded in the first quarter of the nineteenth century. After that point, the fraction of magazines with this kind of documentary evidence plummeted as the industry expanded rapidly, to 13% of magazines founded 1826 to 1840 and 3.3% of those founded 1841 to 1860.

(Barlow 1783; Webster 1843; Grasso 1995). They maintained that such protection would unite the new nation by promoting a national cultural identity, pointed to authors' rights as justification for state copyright regimes, and claimed that copyright law was necessary for the U.S. to reach cultural parity with European powers. For example, Barlow (1783: no page) 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 enduce 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.

Similarly, poet John Trumbull, in an appeal to the Connecticut legislators published in the *Connecticut Courant* in 1783, motivated by a "natural right" derived from labor, reasoned that copyright law was essential to foster creativity in the young state and the nation as a whole:

> 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 meerly [*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 adopted a resolution recommending that states craft legislation protecting the copyright privileges of authors and/or the proprietors who published their work (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 by 1786. The idea that copyright served to protect authors' rights was the dominant theme in these statutes (Patterson 1968; Abrams 1983). For example, all twelve state laws 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 as it is in the foundational document of U.S. government, reveals a national interest in promoting learning, while at the same time 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 a copyright, authors or proprietors had to comply with statutory requirements: before publication, they had to record the title of their work in their local U.S. District Court and pay a fee of 60 cents (about $15 in 2016 dollars); within two months of registration, they had to publish a copy of the record of deposit in a newspaper for four weeks; and within six months of publication, they had to deliver a copy of the copyrighted document to the Secretary of State (U.S. Congress 1790). The onerous procedural requirements for securing copyright, combined with the explicit mention of proprietors in the statutory text, indicate that the Act emphasized copyright as a statutory grant as much as authors' property right (Abrams 1983; Patterson 1968; Bracha 2010a).

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 the productive process) for unpublished works, but regarding published works, the decision was clear: 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, copyright protection was conceived as encouraging authors to benefit the public by granting them the incentive of copyright protection (Patterson 1968; Abrams 1983).

These developments in copyright law were driven largely by the economic interest of those who wrote "practical" books, including school books, histories, geographies, and works of professional interest, and who earned at least part of their income from their writing. As explained above, Noah Webster lobbied state and federal authorities for copyright laws because he wanted to

safeguard income from his spelling and grammar books, although some cloaked their interests in the more respectable cloth of civic pride, as Joel Barlow (1783) did in the quotation above.[4] As the population grew and the economy expanded, there were more likely readers, with more money in their pockets (more wage-earners, fewer self-sufficient farmers). Thus, there was more at stake, more reason to support and use copyright law. Technological change accentuated this shift. Advances in printing, paper-making, and 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 "the arts of designing, engraving, and etching historical and other prints" (U.S. Congress 1802, ch. 36 § 2), in 1831 to musical compositions (U.S. Congress 1831), and in 1856 to dramatic performances (U.S. Congress 1856). Even for covered works, the considerable effort and high cost involved in fulfilling the statutory requirements for securing copyright 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 1790 to 1800, only 6% were copyrighted. Half of these were non-fiction works on biography, law, religion, philosophy, science, medicine, society, or politics, which were the genres most likely to find wide audiences and generate profits; less than one-seventh were fiction, plays, or poetry (Khan 2005: 236-237). Despite these practical limitations, the number of copyright filings grew exponentially, increasing from 1,793 between 1801 and 1830, to 10,073 between 1831 and 1840, and 40,000 between 1841 and 1860 (Khan 2005: 237).

[4] The pattern was the same in England: in the late seventeenth and early eighteenth century, stationers lobbied for statutory protection of the books they printed and sold, which eventually led to passage of the Statute of Anne (Feather 1980).

Federal copyright law also created two negative space. 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). Publishers paid foreign writers for advance sheets of their work and, by informal agreement, received exclusive rights to reprint that work. But such payment was still far below the real economic value of foreign work. Not until 1891, with passage of the International Copyright Act (U.S. Congress 1891) were foreign authors protected by American copyright law. 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 referred to books, and 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: 227-229). To resolve these tensions, Rep. Charles J. Ingersoll proposed a copyright 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 in this period recognized the lack of clear copyright protection for magazines. Moreover, that this bill failed to pass indicates that American lawmakers were 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, which

declared, "The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act" (U.S. Congress 1909, ch. 320 § 5(b)).

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.[5] The judge in this case held that a daily newspaper's commodity price reports were not entitled to copyright protection because their value was "so ephemeral." But he 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). This suggested that magazines were protected by copyright, provided their contents were of lasting value. Magazines published much creative, literary material; they were also touted as having long-lasting value, as magazine 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* 1896; see also *Holmes v. Hurst* 1899). Although this decision suggests that articles published in magazines before the Civil War

[5] The other copyright case was *Ritchie & Dunnavant 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 second magazine's title was not exactly same as the first.

could have been copyrighted individually, the case was heard a half-century after the War ended, during a time when the book and magazine industries were fully commercially oriented, so 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 serious obstacles for magazines, far more 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 seeking copyright (Netanel 1996; Slauter 2015). That may explain why very few magazines claimed copyright. Between 1790 and 1825, when archival coverage of magazines was good, only 7.2% 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. For example, Noah Webster, founder of the *American Magazine*, claimed copyright over his periodical, forbade the reprinting of its contents, and threatened lawsuits against reprinters:

> 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 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 in the 1850s, when a few magazines publishers – those who put out magazines with large, nation-wide circulations, such as *Putnam's Monthly* – began to claim copyright. They did so because their success made it economically feasible to claim copyright

protection for the original work they published. But magazines were still not positive spaces at this time. Copyright of magazines (entire issues or individual articles) was rare (Mott 1930: 504; McGill 2003: 197-198; Homestead 2008; McGill in Gross and Kelley 2010; Slauter 2015). 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 Hometead 2008: 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 litigate to protect copyright. Therefore, at this time, magazines might be characterized as "dark gray" – not purely "white" (positive) but also not purely "black" (negative). Thus, magazines moved a small step toward becoming a positive space.

4. Cultural Conceptions of Authors

Cultural conceptions of authors – who authors were, why they wrote, and how they and their writing were evaluated – evolved slowly from the eighteenth to the mid nineteenth century. There were three successive conceptions (Warner 1990), which overlapped in time (Grasso 1995). Up to the mid eighteenth century, the dominant conception was that of the author as a *gentleman-scholar*. The few Americans who produced literature in this era were learned 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 (Wroth and Silver 1952; Charvat 1968; Davidson 1986; Dauber 1990; Warner 1990; Rice 1997). These authors 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, publishing anonymously or

pseudonymously (Charvat 1968; Warner 1990; Rice 1997; Jackson 1999). 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 the author as a *republican citizen*, a participant in civic and political debates, arose around the time of the Revolution (Elliott 1982; Warner 1990; Grasso 1995; Rice 1997; Jackson 1999; Kaplan 2008). In this conception, personal values and honor were deemed the most appropriate motivations for writing (see Elliott 1982: 19-54; Grasso 1995). This second conception was similar to the first in that 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.[6] This second conception of the author was also similar to the first in that anonymity was applauded, but for a very different reason: the quality of principles and arguments were of paramount importance, rather than the personal stature of the author. As 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 not, is a question resting entirely with his discretion or taste. (Quoted in Jackson 1999: 7.)

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 authorship in the eighteenth and early nineteenth centuries. Printing presses required skilled manual labor and paper-making was laborious and dependent on scarce, expensive rags, so printing costs were high. There were few wealthy aristocrats to flatter with prose or poetry, so there was little patronage support for authors. The reading public was small (fewer than four million by 1800) and many people lived far from urban centers where books and magazines were produced, making it difficult

[6] Yet even in the eighteenth century, there were a few who wrote and expected to be paid for it, including historian Hannah Adams, spelling and grammar book author Noah Webster, and geography author Jedidiah Morse. These authors wrote mostly in prosaic, practical genres, not in belles lettres genres.

to find readers. Adding to the problem were the expensive and rudimentary transportation systems needed to deliver printed matter to these 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 (Gilmore 1985; Buell 1986; Warner 1990; Grasso 1995; Rice 1997; Bell 2001; Kaplan 2008; Tomc 2012). 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)

> Few can do well "for love" which can be better done for money…. If it be true in the common concerns of life, that the laborer is worthy of his hire, it is much more to be so considered when we ascend in the scale of labor, and come finally to that which most tasks the intellect and requires the greatest number of choice thoughts…. An amateur in almost every walk is regarded as much inferior to a working member of the craft. A man rarely puts his heart or invests the whole stock of his faculties in a pursuit which he takes up casually to while away an hour or two of an idle day. (Mimin 1845: 62-63)

> 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 of the author is evident in Horace Greeley's advice in 1843 to Henry David Thoreau, urging him to publish his work in mass-market magazines rather than in small-circulation periodicals, such as the Transcendentalist organ *Dial* (1840-1844), which were read only in elite circles:

> 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 Lady's & Gentleman's Magazine*, *Putnam's Monthly Magazine*, and the *Union Magazine of Literature & Art*.

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: 375-397). Outside New England, Washington Irving and James Fenimore Cooper also earned handsome livings from writing. But most authors were far less commercially successful. For example, Edgar Allan Poe seldom earned anything above the poverty line; he depended on friends and family for financial relief (Ostrom 1982). Similarly, Nathaniel 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.

Authors exchanged literary products for money in many ways: poets sold verses to individual patrons,[7] poets and fiction writers alike entered contests for literary prizes sponsored by magazines, and authors working in all genres sold their work to publishers of books and magazines. Each type of exchange was embedded in a different kind of social relationship (Jackson 2008), but each type was also 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 (Tomc 2012; Haveman 2015).

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 first half of the nineteenth century. Conceiving of literature as goods to be exchanged through markets, and authors as imbued with economic rights in literary

[7] Patronage supported only a tiny fraction of American authors. A few others, including essayist Robert Walsh and novelist Nathaniel Hawthorne, received remunerative political appointments that freed them to write – a distinctly American form of political-literary patronage that persisted throughout the nineteenth century, but such political patronage appointments supported only 45 authors (Brubaker 1975).

property and worthy of payment for that property fit neatly into this new economic system. Moreover, American society divided into specialized occupations, and elite lawyers and physicians, as well as less-prestigious groups such as mechanics and dentists, began 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, physician, scientist, and architect]? 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; emphasis in the original)

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

Yet the commercial conception of the author 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 Nathaniel 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 situations remained precarious. Only Americans with independent means or easy and remunerative sinecures could indulge in writing. In the 1840s, novelist Nathaniel Parker Willis compared authors to skilled artisans and complained that authors were not compensated fairly for their work:

> 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.)

5. Copyright Law and Conceptions of Authors

Understandings of copyright law and cultural conceptions of authors were mutually constitutive (Saunders 1992). In the middle of the eighteenth century, 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, whether political, artistic, religious, or scholarly. If they considered copyright, it was to maintain their reputations. For example, Thomas Paine stated that he 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 of this work had changed its meaning (Remer 1996: 30).

The emergence of the commercial conception of authors began to change American authors' perspective on and relationship with copyright law. Indeed, this new conception of authors was partly responsible for the development of copyright law; most notably, early lobbying by authors Noah Webster, Joel Barlow, and John Trumbull, who sought to safeguard their earnings from their writing, helped persuade state legislators in the young Republic to draft copyright statutes (Grasso 1995; Amory and Hall 2000: 477-478; Bracha 2008c, 2010a, 2010b). And the development of copyright law changed authors' conceptions of themselves, especially for those who wrote polite essays, plays, poetry, and fiction and who in the past had viewed themselves as gentlemen (Wroth and Silver 1952; Grasso 1995; Rice 1997; Kaplan 2008).

Property-rights law and the commercial conception of authors were frequently linked in public discourse, with many writers explicitly describing the economics of authorship and the value of copyright. For example, one declared:

> 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 described the fate of a friend who sought to earn his living as an author because he thought he could earn enough from selling the copyright to his work (G. 1823). Many observers celebrated the few economically successful authors; for example, after Washington Irving moved to England in 1815, over two dozen American magazines printed items describing the large royalties paid by his English publisher.

American audiences also took note of concerns about the intertwined understandings of copyright and authors reprinted from foreign media. For example, an American musical magazine demanded that music 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.

As copyright law and the commercial conception of authors coevolved, people became more aware of having to comply with copyright requirements to secure their property. For example, one magazine 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).

Finally, understandings of copyright law and the commercial conception of authors that developed in the positive space of book publishing spilled over to the negative space of magazine publishing. This was facilitated by two facts: (1) many of the individuals who were active in the book industry were also active in the magazine industry, and (2) many literary works were published in both books and magazines. Table 1 lists a selection of authors from the Revolution to the Civil War whose works – the same texts – were published in both forms. For example, an early version of Jeremy Belknap's novel *The Forresters*, appeared in the *Columbian Magazine* from June 1787 to April 1788, before it appeared in book form in 1792. The essays of Judith Sargent Murray materialized as

a series of columns titled "The Gleaner" in the *Massachusetts Magazine* from 1792 to 1794, before being collected in book form in 1798. The novel *Sarah; Or the Exemplary Wife* by Susannah Rowson was published serially in the *Boston Weekly Magazine* from 1803 to 1804, a decade before it appeared in book form. The anti-slavery essays of Maria Stewart were published in *The Liberator* from 1831 to 1832, before being made into a gift book in 1834 for Boston's First Africa Baptist Church and Society. Most famously, the novel *Uncle Tom's Cabin* by Harriet Beecher Stowe was published serially in *The National Era* from June 1851 to March 1852, and then in book form later that same year. Indeed, almost everything she published in book form first appeared in magazines (Cyganowski 1988).

[Table 1 about here]

6. 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 older gentleman-scholar conception) declined and signed authorship (associated with the newer commercially focused conception) rose, and (2) authors became more likely to be paid (sometimes well) for their contributions.[8] These material practices were made possible – but not inevitable – by the rising value of literary property, which in turn was due to the growth of the reading public and reductions in the 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 prone to hiding their identities because this form of literature was contested up to the 1820s (Baym 1987; Gardner 2012). As one historian remarked, to condemn novels, "Timothy Dwight took time out from presiding over Yale, Jonathan Edwards from fomenting a religious revival, Benjamin Rush from attending to his medical and philosophical

[8] 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 book publishers sometimes issued the same book, such as a novel or poetry collection by a popular British author (Remer 1996; Tomc 2012) .

investigations, Noah Webster from writing dictionaries, and Thomas Jefferson and John Adams from presiding over a nation" (Davidson 1986: 40-41). We coded data on naming practices for fiction from an authoritative bibliography (Wright 1969). The prevalence of named authorship increased starting in the 1820s, by which time novels were popular, and the commercial conception of the author was common (Baym 1987).[9] Figure 1 shows the breakdown of the three authorship categories from 1820 to 1850. From 1841 to 1850, named authorship averaged 59% of new titles. But even then, some prominent novelists, such as James Fenimore Cooper, kept their names off their novels' title pages (Wright 1969: 82-100), while others, such as Ned Buntline (Edward Judson) used pseudonyms (Wright 1969: 201-205).

[Figure 1 about here]

Non-fiction authors may have been more likely to sign their names to their work because those genres were more serious. Some prominent eighteenth-century examples support this conjecture: Jonathan Edwards signed his sermon *Sinners in the Hands of God* (1741), Philip Freneau his poem *The American Village* (1772), Hannah Adams her history *An Alphabetical Compendium of Various Sects* (1784), and Jeremy Belknap his *American Biography* (1794-98).

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). Another correspondent declared that logic and evidence mattered more than the personal status of the author:

> We have never understood that a man is, by any tie of morality or honour, 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 not, is a question resting entirely with his discretion or taste. (Wells 1805: 211)

[9] 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, magazine 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 anonymous authors, it is not surprising that magazine editors who revealed 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).[10] Even many of those running magazines preferred to cloak their identities: a "literary society" edited the *Lady's Magazine* (1792-1793) and "Robert Rusticoat" founded the *Wasp* (1802-1803).

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, and signed ones 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, as the following examples illustrate:

> As to experiments, anonymous, or signed by fictitious characters, they certainly cannot be brought into account. Where there is no responsibility, there is no authority. (Davidge 1806: 145)
>
> 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)

[10] Yet the "modesty" attached to anonymity did not mean authors felt no pride in their writing. For example, one chided his editor for misattributing another anonymous piece to him (*Portico* 1816: 79-80).

One reason authors became increasingly willing to reveal their identities is 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:

> 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 that 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. Hence the editor chooses to appear before the bar of the public in his proper person. (Dennie 1811: 87)

Authors also became more likely to put their names on their books or contributions to magazines as the Romantic notion of authorship, which held authors to be uniquely gifted and creative personalities, spread to America from Europe (Gilmore 1985; Tomc 2012). Such personalities deserved to be named.

Paying authors. Publishers became increasingly likely to pay authors well for their work. As Washington Irving wrote to his publisher in 1819 about the high prices charged for the serially published *Sketchbook*: "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). The *Sketchbook* sold 5,000 copies in the U.S., earning Irving $9,000 (Gross and Kelley 2010: 105). In 2016 dollars, this

amounts to $164,600. From the mid to the late 1820s, physician William P. Dewees earned $21,000 for his three books on midwifery (Jackson 2008: 16), over $500,000 in 2016 dollars. James Fenimore Cooper sold the copyright to his novels in the 1820s for an average price of $5,000, $118,000 in 2016 dollars (Green in Gross and Kelley 2010: 106-107). Sarah Payson Willis, writing under the pseudonym Fanny Fern, earned $7,000 for her *Fern Leaves* in 1853 ($0.10 per copy, 70,000 copies sold), $210,000 in 2016 dollars, while that same year Susan Warner earned $9,000, $260,000 in 2016 dollars, for her novel *The Wide, Wide World*. And for *Uncle Tom's Cabin*, by far the best-selling novel of the antebellum era, Harriet Beecher Stowe earned $20,300 in 1852, $610,000 in 2016 dollars (Williams in Casper et al. 2007: 94).

Payments to authors became more common in the magazine industry as well. As book authors came to be viewed as economic actors deserving of payment for their work, magazine authors came to be perceived in the same way, in part because the same people were active in both industries, publishing the same literary work, as Table 1 showed. *Columbian Magazine* started the trend toward by paying Jeremy Belknap for his contributions as early as 1787 (Wood 1949 [1971]: 17-19).[11] The *Port-Folio* and the *Examiner* began to pay contributors as early as 1812, with the *Examiner* offering $2 a page for well-written communications. In addition, the *Analectic Magazine* commissioned respected authors such as Gulian Verplanck and James K. Paulding during the War of 1812 (Lanzendörfer 2013: 290-293) and in 1816 extended the practice widely, offering $3 a page for original articles (Allen 1917). One editor explained why this shift occurred:

> 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 authors was a cultural breakthrough, recognizing as it did an informal property right, the sums involved were not enough to earn a living. The average monthly income of white-

[11] Most previous research (*e.g.*, Mott 1930) dated this practice to 1819.

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 set a relatively generous rate, would have had to be paid for 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 magazines with large, nation-wide circulation like the *Atlantic Magazine* also began to pay contributors in 1824; over the next decade, many others followed suit, notably *Godey's Lady's Book* and *Knickerbocker*. Even literary reviews, whose writers were most likely to 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 1929. 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" (*Atheneum* 1823: 125). 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 (Robbins 1949; Sedgwick 2000; Jackson 2008), $28 to $171 in 2016 dollars. By the 1830s, mass-market magazines began to compete intensely for essays, poems, and fiction. As a result, prices, especially for work by popular authors, escalated (Robbins 1949; Jackson 2008). 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 standard 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). To put these prices in perspective, average monthly wages for white-collar workers were about $35 in the late 1820s and about $43 in the early 1840s (Margo 2000). Thus, 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 (*Literary World* 1847), $1,413 in 2016 dollars. Authors who had earlier opposed this turn toward the market came to understand the importance of being paid (Williams in Casper et al. 2007: 97) and benefitted from the rising prices paid by magazines: in 1857 Ralph Waldo Emerson was paid $50 for a poem ($1,332 in 2016 dollars) by the *Atlantic Monthly* (Bradsher 1920). Some female authors also benefitted from this practice; for example, in 1843, *Graham's Magazine* paid Emma Embery up to $40 per story ($1,257 in 2016 dollars) (Robbins 1949). Even beginners were well paid for their contributions; for example, an 1850 essay paid Susan Warner $50, enough to clothe her entire family through the winter (Williams in Casper et al. 2007: 92-93).

Notwithstanding the impressive prices paid for work by the most popular authors, the vast majority of authors earned little, if anything, from their submissions to magazines (Sedgwick 2000; Tomc 2012). Not for nothing did prominent critic Edwin Percy Whipple complain, "the least lucrative profession in the United States is that of authorship" (Whipple 1850: 38). A well-known example is Edgar Allan Poe: 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, Nathaniel Hawthorne earned only $108 for eight stories published in *The Token*, $2,627 in 2016 dollars (Williams in Casper et al. 2007: 96).

7. 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 and their actions. But it has focused on negative spaces per se. We provide evidence of such spillovers between two related spaces: the positive space of domestic work published in book form and the negative space of such work published in magazine form. Based on this evidence and sociological and socio-legal theories that recognize the law-like, regulative force of culture and suggest that culture can stand in the place of law, we extend negative-spaces theory to include cultural spillovers between positive and negative spaces.

We showed that the positive space for domestic work published in books both promoted and reflected a shift in understandings of the role of the book authors, from gentleman-scholar to commercial occupation. The mutual constitution of this positive space in copyright law and this cultural conception of authors and their work led to two changes in both the book trade and the related magazine industry: a movement away from anonymous to named authorship and diffusion of the practice of paying authors. These cultural spillovers between positive and negative spaces occurred because many producers (writers) were active in both spaces, and because many products (non-fiction, poetry, fiction) were published in both spaces.

The theoretical underpinnings of this pattern of events are clear from sociological theory: law and culture are mutually constitutive and jointly drive economic activity. Economic actors' preferences develop through social interaction (Berger and Luckmann 1967), 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 (Fligstein 2001). Among the cultural institutions that evolve together with law, systems of classification are critical because they shape economic action by defining actors and objects (tangible and intangible) as economic (i.e., perceived as engaging in buying or selling activity) or not economic (i.e., perceived as not engaging in buying or selling activity, but rather some other form of exchange, such as gift-giving or status-seeking); such definitions determine the basis for evaluating both actors and objects (DiMaggio 1990; Lamont 2012). As cultural tools, classification systems and associated norms are highly salient and cognitively available to guide strategies of action (Swidler 1986). In this way, law engenders cultural institutions that both create opportunities for economic action and constrain it.

The theoretical underpinnings of this pattern of events are also clear from socio-legal theory. Because formal law is ambiguous, how law is applied in practice (i.e., the content and enforcement of regulations) emerges through interactions between regulators and the regulated (Clune 1983; Edelman 1992; Edelman, Uggen, and Erlanger 1999). For example, employing organizations have

leeway to signal compliance with ambiguous employee-rights law, and they do so by creating highly visible formal structures (e.g., affirmative-action offices) that symbolically conform to legal norms, even though those structures may not actually safeguard employees' rights. As such structures become widespread, they become legitimated – accepted as evidence of legal compliance by regulators, judges, employing organizations, and employees alike. Thus, how buyers, sellers, and intermediaries conceive of law and engage in legal disputes is constituted in part by the shared understandings that emerge from social interaction. 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. Law shapes the interests and goals of both buyers and sellers: it can "persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live" (Gordon 1984: 109).

In positive spaces in intellectual-property law, interactions between buyers, sellers, and intermediaries produce shared understandings of the actors themselves and the products they exchange. These understandings solidify into classification systems that define creative producers as economic actors (i.e., those who sell what they create) and creative products as economic objects (i.e., things that are bought and sold). At the same time, these understandings engender classification systems that define creative producers as legal actors (i.e., those who have legal rights over what they create) and creative products as legal objects (i.e., things whose exchange and use is protected by law). In turn, both sets of definitions, economic and legal, create constraints 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.

Both lines of argument yield a novel empirical implication: classification systems, which have normative power over economic actors, can spill over between related spaces in intellectual-property law. Positive negative spaces can be related in two ways. First, the same individuals and organizations may be active in both spaces, as fashion houses like Burberry and Adidas are active in the positive space of trademarked logos and fabric patterns, and in the negative space of fashion

designs (i.e., items of clothing) (Raustiala and Sprigman 2006, 2009; Sprigman and Raustiala 2012). Second, 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 from a positive space of intellectual-property law also populate 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 economic actors' behavior and their understandings of their roles and activities that develop in markets where the law applies may be used to guide behavior and perceptions in markets where the law does not apply. In this way, cultural conceptions of what is appropriate and acceptable, which develop in positive spaces in intellectual-property law, can spill over to related negative spaces, and thus help the development of markets in those spaces. For example, norms about recognition for work (reputational or monetary) and control over work (in terms of copying) that develop in positive spaces can spill over to negative spaces, taking the place of formal law. When this happens, behavior in negative spaces will come to resemble behavior in positive spaces, as creative producers claim credit and exercise control over reproduction. Indeed, we predict that *the closer the relationship between positive and negative spaces, the more likely such spillovers.*

Future researchers could test the arguments developed here 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 to industrial designs under existing U.S. law (see Raustiala and Sprigman 2017).

In addition to suggesting that spaces in intellectual-property law come in many shades of gray, not just black (negative) and white (positive), our research showed the importance of historical sensitivity, as the shading of such spaces changes over time, in response to shifts in economic and cultural factors. One arena where such historically sensitive, dynamic analysis would be useful is in the case of twenty-first century publishing. The development of computing power that gave rise to the internet has 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.

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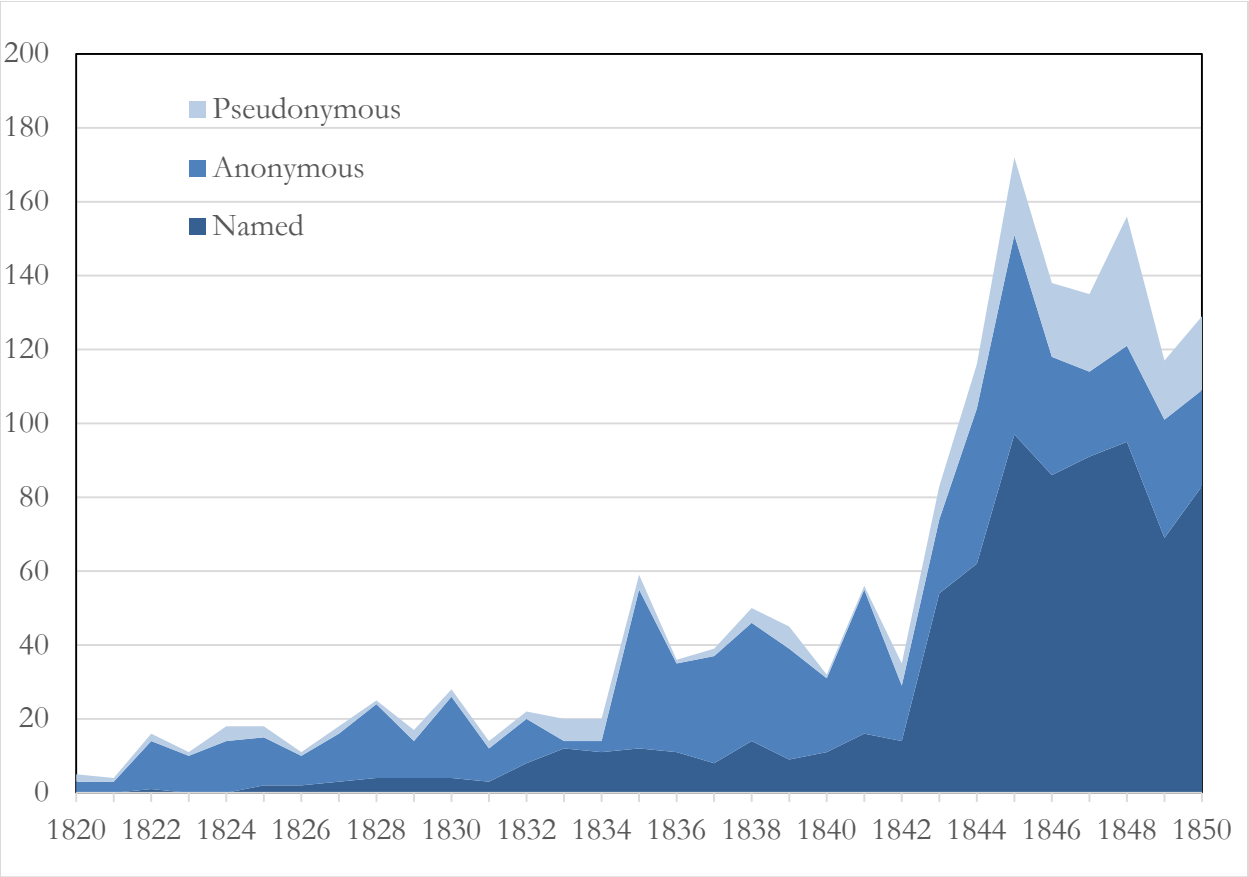
Table 1: American Authors Whose Work Was Published in Both Book and Magazine Form

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

Figure 1: The Number of New Fiction Titles with Named, Anonymous, and Pseudonymous Authors, 1820-1850



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