

The pre-history of fair use: English copyright from 1710 to 1828

Matthew Sag

Associate Professor, DePaul
University College of Law

© 2010

A
TREATISE
ON THE
LAWS OF LITERARY PROPERTY,
COMPRISING
THE STATUTES AND CASES
RELATING TO
BOOKS, MANUSCRIPTS, LECTURES; DRAMATIC AND MUSICAL
COMPOSITIONS; ENGRAVINGS, SCULPTURE, MAPS, &c.
INCLUDING THE
PIRACY AND TRANSFER OF COPYRIGHT;
WITH A
HISTORICAL VIEW,
AND
DISQUISITIONS ON THE PRINCIPLES AND EFFECTS OF THE LAWS.

By ROBERT MAUGHAM,
SECRETARY TO THE LAW INSTITUTION,
Author of the "Law of Attornies," &c.

A Tentative Thesis

There is more continuity between modern fair use doctrine and the so-called “pre-modern era” of copyright law than had previously been thought

Samuel Johnson



To abridge a book,
therefore, is no violation of
the right of the proprietor,
because to be subject to the
hazard of an abridgement
was an original condition of
the property.

Samuel Johnson



Abridgment

“an act, in itself legal, and justifiable by an uninterrupted series of precedents, from the first establishment of printing among us, down to the present time.”

Gyles v. Wilcox 1741



A real and fair abridgment,
... may with great propriety
be called a new book,
because the invention,
learning, and judgment of
the author are shewn in it,
and in many cases
abridgments are extremely
useful.

Robert Maugham

[a]n abridgment of a voluminous work, executed with skill and labor, in a bona fide manner, is not only lawful in itself, and exempt from the charge of piracy; but is protected from invasion by subsequent writers.

Austen v. Cave

The Gentleman's Magazine :
St JOHN'S GATE.



London Gazette
 Applebee's ::
 Fleet's :: ::
 Craftsman ::
 D. Spectator
 D. Doctor
 Daily Post
 D. Advertiser
 St James's Ch.
 Whitehall Ch.
 Lond. Ch. & G.
 Weekly Misc.
 General Ch.
 D. Gazetteer
 Lon. D. Post
 Com. Sense
 Old C. Sense

2d. Betop
 Dublin ::
 Edinburgh a
 D. stol :: ::
 D. wich
 D. rter
 Worcester
 Northampton
 Gloucester ::
 Stamford ::
 Nottingham
 Burgh Town
 Chester City
 Derby City
 Ipswich do.
 Reading do.
 Leeds Merc.
 Newcastle
 Canterbury
 Durham
 Wundal
 Boston ::
 Barbados ::
 Jamaica &c

For JANUARY, 1739.

By STILVANUS URBAN, Gent.

LONDON: Printed by R. CAVE, jun. at St JOHN'S GATE, and Sold by the
 Bookellers of Town and Country; of whom may be had any former Month,
 also complete Sets on Royal or common Paper, beginning with the Year 1731.

Gyles v Wilcox

PLEAS OF THE CROWN:

In Two Parts.

*OF THE
CROWN*
A Methodical Summary of the Principal Matters relating to that Subject.

With Several Hundred References, never before printed, to the Ancient and Modern Books of the Law.

And likewise three other Treatises by Sir *Matthew Hale*; Viz. Of Sheriffs Accompts, Trial of Witches, and Provisions for the Poor.

By Sir MATTHEW HALE, Knight,
late Chief Justice of the King's Bench.

Second Part being a Continuation of the PLEAS of the CROWN, down to this Time, in Sir MATTHEW HALE's Method.

By GILES JACOB, Gent.

LONDON:

Printed by J. P. Assignee of Edw. Sayer, Esq; for D. Brown, at Exeter Change, M. Watton, at the 3 Daggers in Fleetstreet, W. Meays, at the Lamb; J. Brown, at the Black Swan without Temple-Bar, and T. Woodward, at the Inner-Temple-Gate. 1716.

Continuity with modern fair use doctrine in the United States

- (1) case by case analysis
- (2) amount
- (3) market effect, especially substitution**
- (4) a type of transformative use

Robert Maugham on market effect

If an article in a general compilation of literature and science copies so much of a book, the copyright of which is vested in another person, as to serve as a *substitute* for it, though there may have been no intention to pirate it, or injure its sale,—this is a violation of literary property for which an action will lie to recover damages.

Dodsley v. Kinnersley

THE HISTORY
OF
RASSELAS,
PRINCE OF ABYSSINIA.
A TALE.

By SAMUEL JOHNSON, LL. D.



Paris,

BAUDRY, RUE DU COQ-ST. HONORE, N° 9;
BOBÉE ET HINGRAY, RUE DE MICHELIEU, N° 11.

1834.

The
Grand Magazine of Magazines;
OR, A
Public Register
OF
LITERATURE and AMUSEMENT,
*Comprehending whatever is worthy of being preserved in all
the MAGAZINES and Periodical PAMPHLETS,
Published either at Home or Abroad.*
*Together with such ORIGINAL PIECES as either for their Usefulness
or Elegance, shall be thought conducive towards rendering*
This One Magazine
Worthy of the Countenance & Encouragement of the Public.
The Whole regularly CLASSED and divided into the following Parts.

1. Essays Moral and Entertaining.
2. Trade Commerce and Politics.
3. Arts, Sciences, Natural & Civil History.
4. Poetry, Novels, Tales, Letters & Lives.
5. Account of Books foreign & domestic.
6. Foreign & Domestic Occurrences.

Collected and Digested

By **ROGER WOODVILLE, Esq;**

Floriferis ut apes in saltibus Osmia libant,

Omnia nos ————— LUCRET.



Published Monthly Pursuant to Act of Parliament.
By **M. COOPER, at the Globe in Fater-Noster-Rom, London.**
[Price One Shilling]
1760.

Rowath v Wilkes



***Folsom v Marsh* Reconsidered**