
WHAT HISTORY TEACHES US ABOUT COPYRIGHT INJUNCTIONS AND THE INADEQUATE-REMEDY-AT-LAW REQUIREMENT

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ABSTRACT

The Supreme Court has held that, as a general matter, an injunction cannot issue if there is an adequate remedy at law. This follows, according to the Court, because the standard for when injunctions may issue derives directly from the practice of the English Court of Chancery around 1789, which followed the same principle. This Article argues that the Supreme Court's reading of general Chancery custom is inapposite in copyright cases. The historical record shows that legal remedies were deemed categorically inadequate in copyright cases, and that by 1789, the Chancery's jurisdiction to issue copyright injunctions had become

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Numerous sources for this Article predate the standardization of English spelling. I have silently expanded any contractions but otherwise left the spelling unchanged. Dates occurring before September 2, 1752 are not converted to the Gregorian Calendar. Moreover, as is customary, when a date falls between January 1 and March 24, inclusive, prior to 1753, the year is given with a slash mark, e.g., Mar. 24, 1711/2, cf. Mar. 25, 1712. For an explanation of these conventions, see A HANDBOOK OF DATES FOR STUDENTS OF BRITISH HISTORY 1–20 (C.R. Cheney & Michael Jones eds., rev. ed. 2000). For statutes that expire at the end of a Parliamentary session, I reckon the sessions according to the tables in the HANDBOOK OF BRITISH CHRONOLOGY 525–81 (E.B. Fryde et al. eds., 3d ed. 1996).

concurrent and incontestable. The Supreme Court could thus hold today, without running afoul of traditional equitable principles, that a copyright injunction can issue without regard to the adequacy of legal remedies. This Article reaches its conclusion only after undertaking the most comprehensive treatment of the subject to date. It relies primarily on the original manuscript records of 220 infringement suits brought in the Court of Chancery from 1660 to 1800, which are stored at the National Archives in London, England, and a further review of earlier copyright-infringement suits from 1557 to 1680 in antecedent tribunals, many of which are also only available in manuscript form. The topic of this Article is particularly timely given the Supreme Court's recent decision in eBay Inc. v. MercExchange, L.L.C., where it discussed the standard for issuing injunctions in patent cases, and where Chief Justice Roberts stated in a concurring opinion that lower courts should consider the inadequacy requirement in light of historical practices.

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I. INTRODUCTION

In August 2005, Warner Bros. released the motion picture *The Dukes of Hazzard*. It was not a hit critically, and anyone who has seen the movie would understand why. What few people know, however, is that a licensing oversight nearly scuttled the film six weeks before its scheduled release. Most fans assume that *The Dukes of Hazzard* film was based on the popular television series of the same name which was broadcast from 1979 to 1985. It was in large part. Less known to the consuming public, however, is that the television series had been based on *Moonrunners*, a little-seen movie from 1974. Though Warner Bros. had obtained permission to create the television series, it apparently had never acquired rights to create derivative works for theatrical release.¹

So when Warner Bros. began filming *The Dukes of Hazzard* in November 2004, the *Moonrunners* producers sued for copyright infringement. The district court granted a motion for a preliminary injunction and enjoined the release of the movie subject to the posting of a

1. *Moonrunners Ltd. P'ship v. Time Warner Inc.*, No. CV 05-1362 GAF (VBKx), 2005 U.S. Dist. LEXIS 41244, at *3, *27 (C.D. Cal. June 17, 2005).

\$5 million bond.² As is usual in these cases, however, proceedings did not get very far before the parties quickly settled. Warner Bros. reportedly paid \$17.5 million to use the copyrighted work,³ and *The Dukes of Hazzard* was released in theatres without changes, and presumably for the betterment of all humankind, on August 5, 2005.

The outcome of this case would seem to demonstrate, at least under “traditional” principles of equity, that a preliminary injunction was unnecessary. Money damages would have been, and actually were, adequate to compensate the copyright holder. Warner Bros. made this very argument *ex ante*, but the district court refused to entertain it, citing circuit precedent.⁴ In the Ninth Circuit, where the *Dukes of Hazzard* case was filed, a plaintiff in a copyright case who demonstrates a likelihood of success on the merits, or actual success in the case of a permanent injunction, is entitled to a presumption that money damages would be an inadequate remedy.⁵ More importantly, the Circuit has gone further and held in *Cadence Design Systems, Inc. v. Avant! Corp.* that a defendant cannot rebut the presumption by demonstrating that money damages would fully compensate the plaintiff.⁶ In essence, if the injury complained of is copyright infringement, then the inadequacy of the legal remedies or “irreparable injury” conclusively exists as a matter of law.

The *Cadence* principle marks a major departure from the Supreme Court’s prior pronouncements on the boundaries of equitable jurisdiction generally. The Court has said two important things in that regard. First, the standard for when injunctions may issue derives directly from the practice of the English Court of Chancery circa 1789.⁷ The Supreme Court’s second statement results from its application of the first. A plaintiff must demonstrate that it will suffer an injury that cannot be remedied by monetary damages or other legal remedies in order to trigger a court’s equitable jurisdiction to issue an injunction.⁸

This Article argues that the Supreme Court’s reading of general

2. *Id.* at *43–44.

3. *Warner Bros. to Pay 17.5 Million Dollars in Dukes of Hazzard Settlement*, MYWIRE, June 30, 2005, <http://www.mywire.com/pubs/AFP/2005/06/30/915858>.

4. *Moonrunners*, 2005 U.S. Dist. LEXIS 41244, at *28–29.

5. *Apple Computer, Inc. v. Formula Int’l Inc.*, 725 F.2d 521, 525 (9th Cir. 1984).

6. *Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 827 (9th Cir. 1997).

7. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (“[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.”).

8. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

Chancery custom is inapposite in copyright cases, and that as a matter of historical practice the holding in *Cadence* is more correct. In the year 1789, and in all the years preceding it in which the Chancery heard infringement cases, the inadequate-remedy-at-law requirement played no active role in deciding whether to issue a copyright injunction. No court opinion or order in a copyright case ever required an affirmative showing of inadequacy, nor did other contemporary materials suggest one was required. It was not argued by plaintiffs, as far as can be discerned from the records, nor did it ever form the basis for denying a motion. On the contrary, the historical record suggests that in copyright cases, legal remedies were deemed categorically inadequate. By 1789, the Court of Chancery exercised a concurrent jurisdiction with the common-law courts over copyright cases, such that the Chancery was immune to the argument that equity could not issue a copyright injunction where there was an adequate remedy at law.

The absence of any significant inadequacy analysis in the cases may be explained by two factors which, in combination, were unique to copyright suits. To begin with, during the first one-hundred-plus years of copyright enforcement, from 1557 to circa 1680, litigants regularly received their remedies, including injunctions, from antecedent non-common-law tribunals (most importantly the Court of Assistants) that had an incontestable jurisdiction to remedy infringement without regard to the remedies available at law. Those practices, of which the Court of Chancery would have been aware, would likely have influenced the Chancery when it began to hear infringement suits after 1660.

Second, from the time the Chancery began hearing infringement cases until the founding of the U.S. judiciary in 1789, no effective remedies for infringement existed in the English common-law courts. Though penalties and forfeitures were made available in those courts by statute and sometimes by letters patent, the information necessary to pursue those remedies could not be compelled in either court system due to an odd interplay between the rules of evidence at law and the rules of discovery in equity. Moreover, an ordinary damages remedy for copyright infringement, which we today take for granted, was not expressly recognized with any enduring quality in England for most copyright holders until 1801, and only then by statute.

Correcting the historical misperception is important for two reasons. Most obvious is a desire to recount accurately the history, especially at a time when the standard for issuing intellectual-property injunctions is

receiving renewed attention by the Supreme Court and commentators.⁹ At present, no comprehensive history of English copyright-enforcement procedures in the years before 1800 exists, with legal historians instead having concentrated primarily on substantive copyright law and the theories underlying it.¹⁰ Second, this study also has the potential to directly affect injunction doctrine today. The Supreme Court has never squarely addressed whether the inadequate-remedy-at-law requirement should be treated differently, or even discarded, in copyright cases. If the Court takes seriously its own proclamation that courts must consider the practices of the Court of Chancery in England circa 1789, and the Supreme Court is presented with a thorough historical record, it would have to reconsider the inadequacy rule as a threshold requirement for copyright injunctions.¹¹

9. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). See also Darryl J. Adams & Victoria Wicken, *Permanent Injunctions After eBay v. MercExchange: The Year in Review*, 15 TEX. INTELL. PROP. L.J. 417 (2007); Shyamkrishna Balganes, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593 (2008); Andrew Beckerman-Rodau, *The Supreme Court Engages in Judicial Activism in Interpreting the Patent Law in eBay, Inc. v. MercExchange, L.L.C.*, 10 TUL. J. TECH. & INTELL. PROP. 165 (2007); Michael W. Carroll, *Patent Injunctions and the Problem of Uniformity Cost*, 13 MICH. TELECOMM. & TECH. L. REV. 421 (2007); James M. Fischer, *The "Right" to Injunctive Relief for Patent Infringement*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (2007); Edward D. Manzo, *Injunctions in Patent Cases After eBay*, 7 J. MARSHALL REV. INTELL. PROP. L. 44 (2007); Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63 (2007).

10. There have been many excellent treatments. For example, see RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY* (2004); LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983); Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* (June 2005) (unpublished S.J.D. dissertation, Harvard Law School), <http://www.obracha.net/oi/oi.htm>. Deazley's work stands out in particular, as it relies extensively on Chancery records to discredit the "myth" that copyright ever existed at common law. DEAZLEY, *supra*, at xxvi. Nonlawyers with an interest in book history, such as John Feather, Mark Rose, and others, have also contributed much to this field as will become evident by citations to their works below.

11. The Court might seek a normative basis for such a decision as well, but that topic is beyond the scope of this Article. Scholars have already discussed the value *vel non* of the inadequate-remedy-at-law requirement both generally and with respect to its use in copyright-infringement suits. For arguments that the inadequate-remedy-at-law rule should be eliminated in all classes of cases at the permanent or preliminary injunction stages, see OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 91–92 (1978); DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 117–23, 266–67 (1991); David A. Crerar, *"The Death of the Irreparable Injury Rule" in Canada*, 36 ALBERTA L. REV. 957, 978–89 (1998); R. Grant Hammond, *Interlocutory Injunctions: Time for a New Model?*, 30 U. TORONTO L.J. 240, 275–77 (1980); Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 318–30 (1992); Charles Alan Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 381–82, 391–92 (1955). Others have argued that the rule continues to serve a useful purpose as a threshold requirement. *E.g.*, Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 346 (1981); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 419 (1983). *But see* Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642,

This Article proceeds in several parts. Part II first discusses the inadequate-remedy-at-law requirement as it exists today in injunction cases in federal courts, both generally and in copyright cases. I then argue that, doctrinally, there is room in the Supreme Court's jurisprudence to reconsider the requirement in copyright cases. I recount how the Court has reacted (or, more accurately, not reacted) to the erosion of the requirement in intellectual-property cases to date, and focus on the Supreme Court's recent decision in *eBay Inc. v. MercExchange, L.L.C.*, and particularly Chief Justice Roberts's concurrence, where the Court urges lower courts to return to traditional equitable principles.¹² Part III then buttresses this suggestion by discussing the Court's general mandate that courts today must define their equitable jurisdiction by referring to the Court of Chancery's practice as it existed in England circa 1789.

The remaining parts turn to copyright law in England. Part IV begins with a basic primer on the early English book trade and the regulatory framework that governed it until 1789. I then closely examine in Part V the Chancery's actual practices in copyright cases from 1660 to 1800. After first describing the typical forms of complaint and the general procedures for awarding injunctions, I highlight how analysis of the inadequacy requirement is remarkably absent from copyright-injunction decisions during that period, thereby leading to the impression that the remedies available in the common-law courts were deemed categorically inadequate. I contrast this with other areas of equity jurisprudence where the records demonstrate that the requirement was more visibly enforced and bills were dismissed because of an available legal remedy.

The final two parts of this Article explain why the inadequacy

1653, 1666 (1992) (revising his position).

In the copyright context, scholars who believe that copyright injunctions impinge free speech have called for retaining the requirement—along with more rigorous application of the remaining factors for awarding an injunction—as a means of reducing their number. *E.g.*, Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 192–93 (1998); Lisa Rycus Mikalonis, Comment, *Preliminary Injunctions, Copyright, and the First Amendment: Does the Presumption of Irreparable Harm Infringe the Speech Interests of Copyright Defendants?*, 65 OR. L. REV. 765, 788 (1986). *See also* 6 WILLIAM PATRY, PATRY ON COPYRIGHT §§ 22:44–:59 (2008) (criticizing the presumption of irreparable harm in copyright cases); K.J. Greene, *Motion Picture Copyright Infringement and the Presumption of Irreparable Harm: Toward a Reevaluation of the Standard for Preliminary Injunctive Relief*, 31 RUTGERS L.J. 173, 207–08 (1999) (arguing for retaining the irreparable-harm requirement where the allegedly infringing work is a motion picture). *But see* Ralph S. Brown, *Civil Remedies for Intellectual Property Invasions: Themes and Variations*, LAW & CONTEMP. PROBS., Spring 1992, at 45, 55 (arguing the “equitable slogans about irreparable harm and inadequate legal remedies can and should be brushed aside” in favor of using other factually based inquiries for denial).

12. *eBay*, 547 U.S. at 391–94. *See also id.* at 395 (Roberts, C.J., concurring).

requirement played no active role in deciding whether to award or deny a copyright injunction. Part VI describes how for over a century from 1557 to 1680, copyright holders received their remedies, including injunctions, in non-common-law antecedent courts without having to demonstrate the inadequacy of a remedy at law. I suggest that the practice of one tribunal in particular—the Court of Assistants—could have influenced the practice of the Chancery when it began to hear infringement cases circa 1660. Part VII then turns to the remedies available in common-law courts for infringement from 1649 through 1800, demonstrating that there effectively were none. I conclude by reflecting on the fact that non-common-law courts, including most importantly the Chancery, acted as the principal copyright tribunals for the entire 230 years of copyright enforcement before 1789. By drawing from cases decided by Lord Eldon after 1789, I argue that the Chancery had already by that time obtained a concurrent jurisdiction with the law courts over copyright cases, such that the remedies available at law were irrelevant.

II. CURRENT INJUNCTION PRACTICE IN THE FEDERAL COURTS

A. THE INADEQUATE-REMEDY-AT-LAW REQUIREMENT

The standards that control when an injunction should issue in federal court are governed little by the rule of civil procedure that bears the same name. Rule 65 discusses procedural matters, such as notice, the posting of a bond, and the form of the injunction.¹³ Its only substantive provision pertains to a form of injunction that is rarely sought: *ex parte* temporary restraining orders (“TROs”)—that is, those that are sought without notice and an opportunity for the opposing party to be heard—require a showing that immediate and irreparable injury will occur to the applicant before the adverse party can be heard.¹⁴ No similar or other requirement is listed, however, for the much more commonly sought TRO *with* notice or for preliminary or permanent injunctions. Thus, in the vast majority of cases, judges base their decisions on whether to grant an injunction entirely on principles created by other judges.

The various circuits differ in their expressions of the standard.¹⁵

13. FED. R. CIV. P. 65(a)(1), (c), (d).

14. FED. R. CIV. P. 65(b).

15. See Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 514–15 (2003). Two of the formulations follow:

In order to obtain a *preliminary injunction*, the moving party must show that: (1) they are reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) they will

Regardless of their differences, there is a requirement the Supreme Court has stated must appear in every formulation. In order to obtain an injunction, a plaintiff must demonstrate that the remedies available at law, namely actual damages, would be inadequate to compensate for the injury the plaintiff will likely suffer if the injunction does not issue.¹⁶ Historically, “the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.”¹⁷ Only after the requirement has been satisfied may a court exercise its discretion in considering the remaining factors for issuing an injunction. It is because the inadequate-remedy-at-law rule sets up a “remedial hierarchy”¹⁸ in which damages are favored over equitable remedies that injunctive relief is often called an “extraordinary remedy.”¹⁹

B. COPYRIGHT CASES IN THE LOWER COURTS

Lower courts have for many years treated the inadequacy requirement less strictly in copyright cases, and an award of an injunction, be it interlocutory or final, can hardly be called extraordinary.²⁰ The relative

suffer irreparable harm which, absent injunctive relief, outweighs the irreparable harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest.

Jolner v. Village of Washington Park, 378 F.3d 613, 619 (7th Cir. 2004) (emphasis added).

According to well-established principles of equity, a plaintiff seeking a *permanent injunction* must . . . demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay, 547 U.S. at 391 (emphasis added).

16. *E.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959).

17. *Weinberger*, 456 U.S. at 312. *See also id.* at 313 (“[C]onsiderations applicable to cases in which injunctions are sought in the federal courts reflect a ‘practice with a background of several hundred years of history,’ a practice of which Congress is assuredly well aware.” (internal citation omitted)). Courts and commentators sometimes say that the irreparable-injury and inadequate-remedy-at-law requirements are synonymous, and they therefore express the concept solely as an irreparable-harm or irreparable-injury requirement. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584–85 (1952); *Fleet Wholesale Supply Co. v. Remington Arms Co.*, 846 F.2d 1095, 1098 (7th Cir. 1988); JAMES M. FISCHER, *UNDERSTANDING REMEDIES* 201–02 (2d ed. 2006); LAYCOCK, *supra* note 11, at 8–9. Other commentators have posited, however, that the irreparable-injury requirement differs from the inadequacy rule in the sense that an injury that is irreparable is one that other equitable relief cannot adequately remedy. *See* FISS, *supra* note 11, at 48; John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 551 (1978). Insofar as these two requirements may be said to differ, this Article focuses on the inadequate-remedy-at-law requirement.

18. FISS, *supra* note 11, at 38–39.

19. *Weinberger*, 456 U.S. at 312.

20. Courts were first empowered to award injunctions in copyright cases in 1819, according “to the course and principles of equity.” Act of Feb. 15, 1819, 3 Stat. 481. Subsequent amendments retained

ease in obtaining a copyright injunction is due to a number of factors, only one of which is relevant here. All circuits, with the exception of the Fifth Circuit, hold that when a plaintiff in a copyright case demonstrates a likelihood of success on the merits—or actual success in the case of a permanent injunction—the district court must presume that the remedies available at law would be inadequate.²¹

In 1997, the Ninth Circuit went further and held in *Cadence Design Systems, Inc. v. Avant! Corp.* that a defendant could not rebut the presumption by demonstrating that money damages would fully compensate the plaintiff.²² The court cited a handful of its own decisions in which a similar rule had been implicitly crafted and applied. The court also acknowledged the normative rationale that permitting a defendant to pay damages would make the plaintiff an involuntary licensor.²³ Though the *Cadence* principle has been slow to spread to other circuits, it has been treated as good law in a recent report from the U.S. Copyright Office,²⁴ and other courts have begun to follow it.²⁵

The Eighth Circuit, for example, recently embraced the same principle in a copyright case involving a permanent injunction. In *Taylor Corp. v. Four Seasons Greetings, LLC*,²⁶ the defendant had “stipulated” to the amount of profits it had earned, but at trial the plaintiff elected to seek only a permanent injunction. The Court of Appeals stated that because the plaintiff “had a legal remedy available to it, i.e., uncontested damages,” the issue was whether it could “seek purely equitable relief in the form of a

the same or similar language. See William S. Strauss, *Remedies Other than Damages for Copyright Infringement*, in 2 STUDIES ON COPYRIGHT 1031, 1031 & n.12 (Copyright Soc’y of the U.S.A. ed., 1963). Current law states that “any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a) (2000). The legislative history of the current statute indicates that Congress did not intend to alter the law or previous practices of the courts. An index of the legislative history relevant to the provision on injunctions may be found in 3 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976, at 117–39 (Alan Latman & James F. Lightstone eds., 1983).

21. See 6 PATRY, *supra* note 11, § 22:44.

22. *Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 827 (9th Cir. 1997).

23. *Id.* at 828 n.8.

24. U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT § 110 REPORT 31 (2006) (citing *Cadence* favorably).

25. *E.g.*, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 253 F. Supp. 2d 943, 972 (E.D. Ky. 2003), *rev’d on other grounds*, 387 F.3d 522 (6th Cir. 2004); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 273 n.31 (D.D.C. 2003), *rev’d on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003); *Paramount Pictures Corp. v. Carol Publ’g Group*, 11 F. Supp. 2d 329, 338 (S.D.N.Y. 1998).

26. *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958 (8th Cir. 2005).

permanent injunction.”²⁷ Noting that it was “well-established that a party is entitled to equitable relief only if there is no adequate remedy at law,” the court nevertheless went on to state that because “irreparable harm inescapably flows” from infringement, the plaintiff was entitled to injunctive relief “despite the availability of uncontested damages.”²⁸ The court did not cite *Cadence*, but rested its ruling on the same concern over involuntary licenses.²⁹

C. REACTION OF THE U.S. SUPREME COURT

The Supreme Court has on three occasions declined to arrest or undo the erosion of the inadequacy requirement in intellectual-property cases. In the first two cases, the Court acted by denying a petition for a writ of certiorari, and it is thus impossible to know whether the Court approved of the lower-court decisions. Not surprisingly, the first such case was *Cadence* itself. In the petition for review, the defendant argued that *Cadence* marked “an important departure from the fundamental equitable principle that a plaintiff is not entitled to preliminary injunctive relief if an adequate legal remedy is available.”³⁰ More recently, in 2005, the same issue was raised in a trademark case involving the Third Circuit’s rule that “trademark infringement amounts to irreparable injury as a matter of law.”³¹ The petitioner had argued that the rule would permit a plaintiff to obtain injunctive relief “even if the facts and circumstances clearly show that the plaintiff will *not* suffer irreparable injury.”³²

It was thus with eager anticipation that intellectual-property lawyers

27. *Id.* at 967. The court was wrong to equate the equitable remedy of profits with the legal remedy of damages. Nevertheless, this error leaves the court’s conclusion unchanged.

28. *Id.* at 967–68.

29. *Id.* Also raising this concern, the Sixth Circuit recently held that a copyright owner is entitled to a permanent injunction in a copyright case so long as there is a likelihood of infringement in the future. *See* *Bridgeport Music, Inc. v. Justin Combs Publ’g*, 507 F.3d 470, 492 (6th Cir. 2007). Notably, the court did not discuss the inadequate-remedy-at-law requirement specifically, as the decision in *Taylor* had. Instead, the Sixth Circuit created a more sweeping rule that *requires* the injunction to issue, and it thus forecloses any analysis of the balance-of-hardships and public-interest factors. In this sense, it clearly contravenes the Supreme Court’s decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), discussed *infra* Part II.C, which neither the parties nor the court cited.

30. Petition for Writ of Certiorari at 7, *Avant! Corp. v. Cadence Design Sys., Inc.*, No. 97-1368 (U.S. Feb. 19, 1997), *cert. denied*, 523 U.S. 1118 (1998).

31. *Citizens Fin. Group, Inc. v. Citizens Nat’l Bank of Evans City*, 383 F.3d 110, 125 (3d Cir. 2004) (permanent injunction); *S & R Corp. v. Jiffy Lube Int’l, Inc.*, 968 F.2d 371, 378 (3d Cir. 1992) (preliminary injunction).

32. Petition for a Writ of Certiorari at 4, *Citizens Fin. Group, Inc. v. Citizens Nat’l Bank of Evans City*, No. 04-1156 (U.S. Feb. 28, 2005), *cert. denied*, 544 U.S. 1018 (2005).

awaited the 2006 decision in *eBay Inc. v. MercExchange, L.L.C.*³³ At issue was the Federal Circuit's rule that a permanent injunction *must* issue once infringement and validity of the patent have been adjudged, absent exceptional circumstances to protect the public interest.³⁴ The parties also asked the Court to address the Federal Circuit's narrower rule that irreparable harm is irrebuttably presumed in such cases.³⁵ The Court rejected the first rule, stating in a brief opinion that a plaintiff seeking a permanent injunction, even in a patent case, must satisfy the "traditional" four-factor test for an injunction.³⁶ District courts also, the Court added, were to exercise their discretion "consistent with traditional principles of equity."³⁷ Remarkably, however, the Court again passed on the invitation to opine separately on the inadequacy element. The Court never once states that a presumption of inadequacy (rebuttable or not) in intellectual-property cases runs counter to traditional equitable principles. Nor could the Court have done so, given that it did not undertake any detailed analysis of the role the rule had played in early patent or copyright cases.³⁸

Particularly telling is that the Supreme Court could have easily extended the holding of one of its previous decisions in which it had rejected a presumption of inadequacy in another context. In *Amoco Production Co. v. Village of Gambell*,³⁹ the Court rejected the Ninth Circuit's rule that courts must presume irreparable injury for purposes of an injunction "when an agency fails to evaluate thoroughly the environmental impact of a proposed action."⁴⁰ The Supreme Court held in that context that "[t]his presumption is contrary to traditional equitable principles and has no basis in" the statute which authorized the injunctive relief.⁴¹ Though the

33. *eBay*, 547 U.S. 388.

34. *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005), *vacated*, *eBay*, 547 U.S. 388. *See also* Transcript of Oral Argument at 3, *eBay*, 547 U.S. 388 (No. 05-130).

35. *See* Brief of Petitioners at 29–31, *eBay*, 547 U.S. 388 (No. 05-130). *See also* Transcript of Oral Argument at 13, *eBay*, 547 U.S. 388 (No. 05-130) ("What I need is elimination of the irrebuttable presumption that doesn't allow any consideration of whether money damages are adequate in a particular case.").

36. *eBay*, 547 U.S. at 391. For the Court's four-factor test, *see supra* note 15.

37. *Id.* at 394.

38. None of the three copyright cases the Court cited in support of its decision dealt with the inadequate-remedy-at-law requirement. In two of the cases, the Court had stated that copyright injunctions should not automatically follow upon a finding of infringement because in some cases the public interest may counsel against it. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 504–05 (2001). In the third case, the Court had affirmed the denial of an injunction largely on the ground that the balance of hardships tipped in the defendant's favor. *See Dun v. Lumbermen's Credit Ass'n*, 209 U.S. 20, 22–23 (1908).

39. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987).

40. *Id.* at 545 (quoting *People of Gambell v. Hodel*, 774 F.2d 1414, 1423 (9th Cir. 1985)).

41. *Amoco*, 480 U.S. at 545 (emphasis added).

Amoco case is cited in *eBay*, it is not cited expressly for this proposition nor even implicitly by reference to the page in *Amoco* on which the proposition appears.⁴² The omission is especially striking given that eBay pressed this very argument.⁴³ Lower courts citing the *eBay* decision have since split on whether to continue applying a presumption of irreparable harm.⁴⁴

An explanation for why the Court dodged the issue in *eBay* (and perhaps in the previous two cases) can be found in *eBay*'s concurring opinions. The members of the Court seem to disagree on the role the inadequate-remedy-at-law requirement should play in intellectual-property cases, and they certainly disagree on the extent to which history matters. Chief Justice Roberts's concurrence, joined by Justices Scalia and Ginsburg, supports a reading that the inadequate-remedy-at-law rule may deserve special treatment in the intellectual-property context.⁴⁵ In a statement that forecasts the approach taken in this Article, the Chief Justice noted that

[f]rom at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases. This "long tradition of equity practice" is not surprising, given the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee's wishes—a difficulty that often implicates the [irreparable-harm and inadequacy factors]. This historical practice . . . does not *entitle* a patentee to a permanent injunction or justify a *general rule* that such injunctions should issue. . . . At the same time, there is a difference between exercising equitable discretion pursuant to the established four-factor test

42. See *eBay*, 547 U.S. at 391.

43. See Brief of Petitioners at 29–32, *eBay*, 547 U.S. 388 (No. 05-130); Reply Brief at 7, *eBay*, 547 U.S. 388 (No. 05-130).

44. Many courts continue to apply a presumption, particularly in copyright cases. *E.g.*, *UMG Recordings, Inc. v. Blake*, No. 5:06-CV-00120-BR, 2007 WL 1853956, at *3 (E.D.N.C. June 26, 2007); *Warner Bros. Entm't Inc. v. Carsagno*, No. 06 CV 2676(NG)(RLM), 2007 WL 1655666, at *6 (E.D.N.Y. June 4, 2007). See also *Canfield v. Health Commc'ns, Inc.*, No. CV 08-890 SVW (JTLx), 2008 WL 961318, at *2 (C.D. Cal. Apr. 1, 2008) (trademark); *Eisai Co., Ltd. v. Teva Pharms. USA, Inc.*, Civ. Nos. 05-5727(HAA)(ES), 07-5489(HAA)(ES), 2008 WL 1722098, at *10 (D.N.J. Mar. 28, 2008) (patent). But they have not addressed whether the presumption is rebuttable. Other courts, especially in patent cases, have interpreted *eBay* broadly to eliminate any presumption of inadequacy, and, in the process, any *Cadence*-type irrebuttable presumption as well. *E.g.*, *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 568–69 (E.D. Va. 2007); *Torspo Hockey Int'l, Inc. v. Kor Hockey Ltd.*, 491 F. Supp. 2d 871, 881 (D. Minn. 2007). See also *In-N-Out Burgers v. Chadders Rest.*, No. 2:07-CV-394 TS, 2007 WL 1983813, at *3 (D. Utah June 29, 2007) (trademark); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1210–14 (C.D. Cal. 2007) (copyright). My colleague Joe Miller kept track of *eBay*'s effect on intellectual-property injunction practice through 2007. *The Fire of Genius*, <http://www.thefireofgenius.com/injunctions> (last visited Sept. 15, 2008).

45. See *eBay*, 547 U.S. at 394–95 (Roberts, C.J., concurring).

and writing on an entirely clean slate. . . . When it comes to discerning and applying those standards, in this area as others, “a page of history is worth a volume of logic.”⁴⁶

In his concurring opinion, Justice Kennedy, joined by Justices Stevens, Souter, and Breyer, downplayed the importance of historical patterns:

The Chief Justice is . . . correct that history may be instructive in applying this test. . . . [But t]o the extent earlier cases establish a pattern of granting an injunction against patent infringers almost as a matter of course, this pattern simply illustrates the result of the four-factor test in the contexts then prevalent.⁴⁷

Given that neither Justices Thomas nor Alito joined a concurring opinion, it is difficult to know, based on *eBay* alone, whether the Court would welcome an historical reexamination of the inadequacy requirement in intellectual-property cases. Moreover, Chief Justice Roberts’s concurrence neither indicates what history we should examine (American and/or English) nor how far back to look. Fortunately, *eBay* is not the only case to consider. The Court has recently reaffirmed in another context that history does matter when determining the equitable jurisdiction of the federal courts, regardless of the subject matter. Federal courts are to look to the principles and practices of the Court of Chancery in England at the end of the eighteenth century.

III. RELEVANCE OF THE ENGLISH COURT OF CHANCERY

The federal judiciary was founded on the notion of a dual system of law and equity. Article III of the Constitution empowered the legislature to create federal courts to hear “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority.”⁴⁸ Though the Constitution did not require Congress to create *separate* systems of law and equity, that is precisely what occurred following contentious debates as to the proper reach of equity jurisdiction.⁴⁹

Section 11 of the Judiciary Act of 1789 provided that federal courts

46. *Id.* at 395 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)) (internal citations omitted).

47. *eBay*, 547 U.S. at 395–96 (Kennedy, J., concurring).

48. U.S. CONST. art. III, § 2, cl. 1.

49. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 96–100 (1923).

would have original jurisdiction “of all suits of a civil nature at common law or in equity” in cases properly brought in those courts.⁵⁰ But the jurisdiction was limited by section 16, which stated that federal courts could only hear cases in equity when there was no “plain, adequate and complete remedy [to] be had at law.”⁵¹ Not long after, the Supreme Court interpreted section 16 as merely declaring already long-established principles of equity jurisdiction.⁵² It therefore mattered little to the Court that section 16 was repealed in 1948⁵³ as a belated statutory clean-up after the merger in 1938 of law and equity procedure in the federal courts. Thus, the Court stated in 1949 that “[n]otwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.”⁵⁴

The Supreme Court has injected meaning into its “principles of equity jurisdiction” by referring to the practices of the courts in England. 1792 marks the Court’s first statement that it would consider “the practice of the courts of *King’s Bench* and *Chancery in England*, as affording outlines for the practice of this court.”⁵⁵ Soon after, in *Robinson v. Campbell*, the Court stated that “the remedies in the courts of the United States, are to be, at common law or in equity . . . according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.”⁵⁶ And as the United States moved further away from its founding, the Court fixed the time in which to assess the English courts’ practices. The equitable jurisdiction conferred by the Judiciary Act was an “authority to administer . . . the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”⁵⁷

50. Judiciary Act of 1789, § 11, 1 Stat. 73, 78.

51. *Id.* § 16, 1 Stat. at 82. Section 16 was later codified in section 723 of the Revised Statutes. *See* U.S. Rev. Stat. § 723 (1875). That provision was then simultaneously repealed and reenacted in 1911. *See* Judicial Code of 1911, ch. 14, § 297, 36 Stat. 1087, 1168 (repealing § 723); *id.* at ch. 11, § 267, 36 Stat. at 1163 (replacing § 723). Lastly, when the U.S. Code was first published in 1925, the rule became codified at 28 U.S.C. § 384.

52. *Boyce’s Ex’rs v. Grundy*, 28 U.S. (3 Pet.) 210, 215 (1830). *See also* *Mathews v. Rodgers*, 284 U.S. 521, 525 (1932); *Whitehead v. Shattuck*, 138 U.S. 146, 150–51 (1891).

53. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 996, *repealing* 28 U.S.C. § 384.

54. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949).

55. Rule, 2 U.S. (2 Dall.) 411, 413–14 (1792). *See also* Rules of Practice for the Courts of Equity of the United States, Rule 33, 20 U.S. (7 Wheat.) at v, xiii (1822) (“In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England.”).

56. *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222–23 (1818).

57. *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939).

The Court recently reaffirmed this approach in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*⁵⁸ The issue presented was whether, in an action for money damages, a federal court could issue a preliminary injunction preventing the defendant from transferring assets in which the plaintiff had no recognized interest, such as a lien.⁵⁹ The Court stated that “[s]ubstantially . . . the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.”⁶⁰ Following an investigation of various authorities, the Court concluded that the relief requested was not one traditionally accorded in equity. The Court noted that the “English Court of Chancery, from which the First Congress borrowed in conferring equitable powers on the federal courts, did not provide an injunctive remedy such as this until 1975.”⁶¹

Though *Grupo* was more concerned with a specific type of injunction rather than the principles under which injunctions may issue generally or in a particular class of cases, it does not alter the Court’s previous case law. Indeed, the Court reiterated in *Grupo* that the “substantive prerequisites for obtaining an equitable remedy *as well as the general availability of injunctive relief* . . . depend on traditional principles of equity jurisdiction,”⁶² by which the Court meant the principles of the Court of Chancery. The Court’s approach here is not surprising. It has already stressed in other contexts that English legal history can (and sometimes must) affect U.S. doctrine today.⁶³

58. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

59. *Id.* at 310.

60. *Id.* at 318 (internal quotations omitted).

61. *Id.* at 327. Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented. *Id.* at 333. The dissenters agreed that consulting the practices of the English Chancery was relevant, but they argued that the majority had adopted too static an approach:

[T]he Court relies on an unjustifiably static conception of equity jurisdiction. From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England; we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.

Id. at 336 (internal citations omitted).

62. *Id.* at 318–19 (emphasis added).

63. For example, the scope of habeas corpus protection depends, at its minimum, on the scope of the writ as it existed in 1789, *see Boumediene v. Bush*, 128 S. Ct. 2229, 2248 (2008), leading some scholars to scour the National Archives in England for a better understanding of the scope of the writ as it existed then, *see* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008). The right to a jury trial, moreover, largely depends on whether the claim at issue resembles an action tried in the common-law courts of England circa 1791. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376–77 (1996). And recently, the Court has gone so far as to overrule its own Confrontation Clause jurisprudence as being inconsistent with English common law as it existed in 1791. *See Crawford v. Washington*, 541

Before engaging in a similar inquiry in the copyright context, the next part of this Article offers a basic primer on the regulatory framework that governed the English book trade from 1512 to 1789. An understanding of the substantive component of copyright law helps inform the subsequent discussion of enforcement practices. Beginning so early—at the inception of copyright protection in the sixteenth century—provides context and is also relevant given that early enforcement practices would have influenced practices in later years. Part IV also supplements previous histories of copyright law that may not have had the benefit of the primary sources relied upon here.

IV. COPYRIGHT'S REGULATORY FRAMEWORK: 1512–1789

Copyright, broadly speaking, came to be protected in England in one of four principal ways. Presented roughly in the order in which they were expressly recognized, they are: (1) by royal privilege, which the Crown typically granted by letters patent; (2) by registration of the work with the Company of Stationers; (3) by the Statute of Queen Anne; and (4) as a matter of common law. In England today, an act of Parliament serves as the primary source of copyright protection; remnants of the first copyright remain; and the second and fourth copyrights are obsolete. During the time frame studied in this Article, however, the sources of copyright mentioned above often coexisted and sometimes conflicted. The Court of Chancery treated these four forms of protection similarly when it came to deciding whether to award an injunction. Thus, use of the term “copyright” throughout this Article is intended to encompass all four forms of protection, unless otherwise indicated.

A. PRINTING PRIVILEGES

The power to issue printing privileges stemmed from the Crown's belief that it had the absolute right to control and dispose of certain classes of books, much as it could other property.⁶⁴ The earliest exclusive printing privilege of which there is any record in England is from circa 1512. It was then that King Henry VIII granted to John Rastell the printer or Thomas Linacre the author (the grantee is ambiguous) the sole right for two years to print and sell *Progymnasmata*.⁶⁵ Exclusive printing privileges became the

U.S. 36, 54 (2004).

64. JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS 11, 14 (1994).

65. THOMAS LINACRE, LINACRI PROGYMNASMATA GRAMMATICES VULGARIA *colophon* (London, Johan Rastell c. 1512) (“Emprynted in London on ye sowth syde of paulys by Johan Rastell

norm soon after and began to appear in grants by letters patent, which were so named because they were recorded on the Patent Rolls and were open to public inspection. Like other privileges, printing patents could be assigned, shared, inherited, and renewed, and typically lasted for a term of years or life. Most were granted to printers and publishers, rather than authors, but there were some exceptions.⁶⁶

These privileges could be work specific or class wide. The privilege granted for *Progymnasmata* is an example of the former, but there were many others.⁶⁷ Class patents, on the other hand, gave the holder the sole right to print and sell a whole class of works, such as all Latin dictionaries or all grammar books. This type of grant was especially oppressive because *all* authors of works falling within a patented class were prohibited from publishing their own works through anyone other than the patentee. Authors were thus faced with either accepting the terms offered by the patentee, not publishing their works, or breaching the patent and risking a lawsuit. Though class patents were initially spread among numerous holders,⁶⁸ by the beginning of the seventeenth century they were largely consolidated into the hands of a few.

Three major class patents emerged which, taken together, formed the basis for the vast majority of infringement suits brought in the Chancery from 1660 to 1800. The first of these was the patent for the office of the King's Printers, which granted the holder for a certain term of years the sole right to print all statutes, proclamations, and acts of Parliament, and furthermore the sole right to print the most important religious works, namely the Bible in English and the Book of Common Prayer. A second class patent covered books relating to the common law, and included reports of cases decided by the benches, abridgements of the same, and

with ye priuylege of our most suerayn lord kyng Henry the. viiii. grauntyd to the compyler therof. that noo man in thys hys realme sell none but such as the same compyler makyth pryntyd for ye space of ii. yeere.”). The word “compyler” in the text is ambiguous and may refer either to Rastell or Linacre. See JOSEPH LOEWENSTEIN, *THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT* 69 (2002).

66. See, e.g., A COMPANION TO ARBER 212–13, 218–19, 318–19, 321–22 (W.W. Greg ed., 1967). For more on this subject, see Arnold Hunt, *Book Trade Patents, 1603–1640*, in *THE BOOK TRADE & ITS CUSTOMERS 1450–1900*, at 27, 31–33 (Arnold Hunt et al. eds., 1997). Contrast this with Scotland, where nearly half of the work-specific patents were granted to authors. See ALASTAIR J. MANN, *THE SCOTTISH BOOK TRADE 1500–1720*, at 112 tbl.1 (2000).

67. See, e.g., A COMPANION TO ARBER, *supra* note 66, at 151–52, 153, 154, 155, 157–58, 162–64, 178, 236–37, 350–51 (1967); 2 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554–1640 A.D. 61–62, 746–47 (Edward Arber ed., photo. reprint 2006) (1875) [hereinafter TRANSCRIPT OF THE REGISTERS].

68. Christopher Barker's Report in December 1582, on the Printing Patents of 1558–1582, reprinted in 1 TRANSCRIPT OF THE REGISTERS, *supra* note 67, at 114, 114–16, 144.

treatises. Over the years, these two class patents were held by numerous individuals and syndicates which regularly enforced the patents in the Court of Chancery.

The third major consolidated patent covered all primers, psalters, psalms, almanacs, and prognostications in English. James I granted this patent to the Company of Stationers (of which I will say more shortly) in 1603 and regranted it in 1615/6.⁶⁹ Unlike most other printing patents, its term was perpetual. The Company enforced this patent regularly and its lawsuits account for over a quarter of all Chancery copyright-infringement suits brought between 1660 and 1800. The Company held its patent in a corporate capacity, and Company members therefore partook in its benefits by owning shares in a holding entity called the English Stock.⁷⁰ As will be seen in the section that follows, however, individual members also enjoyed a separate form of copyright for works that fell outside the scope of the Company's patent.⁷¹

B. THE STATIONERS' COPYRIGHT

Formed originally as an association of textwriters and illuminators in 1403,⁷² the Company of Stationers eventually morphed into a guild of printers, publishers, and others in the book-printing trade. In its early years, the guild's principal purpose was to provide the necessary credentials for members of the profession. But on May 4, 1557,⁷³ Philip and Mary I

69. See Hunt, *supra* note 66, at 41, 45. Both grants are reprinted in THE CHARTER AND GRANTS OF THE COMPANY OF STATIONERS OF THE CITY OF LONDON 43–50, 53–65 (London, R. Nutt 1741).

70. Cyprian Blagden, *The English Stock of the Stationers' Company*, 10 THE LIBRARY 163, 163 & n.2 (5th Ser. 1955).

71. In what was truly an extraordinary arrangement, the Universities of Cambridge and Oxford were also empowered, by virtue of their royal charters, with concurrent printing rights permitting them to print several classes of books—including those already held by other patentees—so long as the books were not officially prohibited. See P.M. HANDOVER, PRINTING IN LONDON FROM 1476 TO MODERN TIMES 58–59 (1960). Though the universities agreed for many years to abstain from printing in exchange for a yearly rent, that arrangement eventually ceased, leading to disputes with the other patentees, including in the Court of Chancery. *E.g.*, Hills v. Univ. of Oxford, C8/273/49, C7/172/53 (Ch. 1683/4), 1 Vern. 275, 23 Eng. Rep. 467 (Ch. 1684); Stationers v. Parker, Skinner 233, 90 Eng. Rep. 107 (K.B. 1685); Mount v. Fenner, C11/1870/22 (Ch. 1732); Baskett v. Bentham, C11/1584/9 (Ch. 1742), *sub nom.* Baskett v. Univ. of Cambridge, 2 Burr. 661, 97 Eng. Rep. 499, 1 Black. W. 105, 96 Eng. Rep. 59, 2 Keny. 397, 96 Eng. Rep. 1222 (K.B. 1758).

72. PETER W.M. BLAYNEY, THE STATIONERS' COMPANY BEFORE THE CHARTER, 1403–1557, at 13 (2003).

73. In early literature on the Company, its year of incorporation was often incorrectly given as 1556. This error was discovered in the early 1900s, and 1557 has long been established as the correct date. E. GORDON DUFF, A CENTURY OF THE ENGLISH BOOK TRADE xxvii (photo. reprint 1948) (1905). Nevertheless, the incorrect year occasionally reappears in modern scholarship.

granted the Company a royal charter that forbade any person to print “any book or any thing for sale or traffic within this our realm of England or the dominions of the same,” unless they either held letters patent granting such a privilege or were members of the Company.⁷⁴ In exchange, the Crown expected the Stationers to exercise their printing rights in a manner consistent with the Crown’s desire to prohibit seditious and heretical books through a system of prepublication screening and licensing.⁷⁵

The Company devised a registration system to manage its monopoly and to comply with the licensing requirements. Only licensed books were to be registered,⁷⁶ and the person or persons (if done jointly) who first registered them were presumed to own the “copies” in those books.⁷⁷ The process of how registration led to a copyright was described in a report prepared in 1583 by a special commission to the Privy Council of Queen Elizabeth. The report stated that for works not covered by letters patent, the Stationers

haue a kinde of preuileges among them selues by ordinances of the companie, whereby euerie first printer of any lawefull booke presenting [i.e., registering] it in the hall, hath the same as seuerall to him self as any man hath any boke by her majesty’s preuilege, and we think her majesty’s grauntes most meete to be mainteined aboue all other.⁷⁸

There was no set term for copyrights administered in this fashion. Thus, like the Company’s 1615/6 class patent, the Stationers’ copyright was also understood to be perpetual. Members of the Company could assign, sell, and bequeath their copyrights to other members.⁷⁹ But because most authors were not members, they could not themselves obtain a Stationers’ copyright.⁸⁰

The dual system of copyright by registration and prepublication licensing was affirmed and strengthened over the years through several

74. 1 TRANSCRIPT OF THE REGISTERS, *supra* note 67, at xxx–xxxi.

75. LEO KIRSCHBAUM, SHAKESPEARE AND THE STATIONERS 31–32 (1955).

76. *See id.* at 31–36. Provisional entries demonstrate that the rule later became more flexible. *Id.* at 42–43, 47–48; RONALD B. MCKERROW, AN INTRODUCTION TO BIBLIOGRAPHY FOR LITERARY STUDENTS 136 n.2 (photo. reprint 1994) (1927).

77. JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING 39 (2d ed. 2006).

78. Final Report of the Commissioners (July 18, 1583), *reprinted in* A COMPANION TO ARBER, *supra* note 66, at 126. *See also* Liber A, ff. 8v–9r (1565) (earlier indication of copyright by registration). The citation to Liber A refers to a record of the Company of Stationers. For a detailed description of the Company’s records, see *infra* note 326.

79. PATTERSON, *supra* note 10, at 5.

80. AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 73–75 (photo. reprint 1971) (1899). *But see* ADRIAN JOHNS, THE NATURE OF THE BOOK 229 & n.124 (1998) (describing “very rare” instances where authors registered works).

decrees of the Court of Star Chamber, sitting in a quasi-legislative capacity, in 1566,⁸¹ 1586,⁸² and 1637.⁸³ Printing or importing books contrary to letters patent or the ordinances of the Company of Stationers could lead to forfeiture of the infringing books, a penalty of twenty shillings for every offending copy (with half to the Crown and half to the person who reported the offense),⁸⁴ loss of the infringer's presses, and imprisonment.⁸⁵ Similar penalties attended those who printed works without first obtaining a license from the censorship authorities. In either case, offenders of the decrees could be brought before the Court of High Commission or the Court of Star Chamber,⁸⁶ and they sometimes were, at least until Parliament abolished those prerogative courts in 1641.

Copyright statutes enacted during the Interregnum, when England was governed as a Commonwealth and Protectorate, differed little from the Star Chamber decrees that preceded them, despite the absence of royal prerogative rule in England.⁸⁷ The penalty for offending was changed in 1649 to six shillings and eight pence per infringing book,⁸⁸ and the principal court empowered to punish offenses became the Upper Bench (being the name of the King's Bench during the Interregnum), along with certain inferior courts.⁸⁹ Further minor changes followed in 1653, including the statement that "any Court of Record whatsoever" could hear and

81. Ordinances Decreed for Reformation of Divers Disorders in Printing and Uttering of Bookes, *reprinted in* 1 TRANSCRIPT OF THE REGISTERS, *supra* note 67, at 322 [hereinafter 1566 Decree].

82. The Newe Decrees of the Starre Chamber for Orders in Printinge, *reprinted in* 2 TRANSCRIPT OF THE REGISTERS, *supra* note 67, at 807 [hereinafter 1586 Decree].

83. Decree of Starre Chamber, Concerning Printing, *reprinted in* 4 TRANSCRIPT OF THE REGISTERS, *supra* note 67, at 528 [hereinafter 1637 Decree].

84. 1566 Decree, *supra* note 81, ¶¶ 3, 4.

85. 1586 Decree, *supra* note 82, ¶ 4; 1637 Decree, *supra* note 83, ¶ 8.

86. 1566 Decree, *supra* note 81, ¶ 5 (naming the High Commission); 1586 Decree, *supra* note 82, ¶ 6 (same); 1637 Decree, *supra* note 83, ¶¶ 2, 7 (naming the High Commission and Star Chamber). *See also* A Proclamation Against Disorderly Printing, Vttering, and Dispensing of Bookes, Pamphlets, &c., (Sept. 25, 1623), *reprinted in* A COMPANION TO ARBER, *supra* note 66, at 219, 219–21 (naming the High Commission and Star Chamber).

87. Two ordinances that issued during the Civil War, prior to the Interregnum, were largely concerned with licensing issues, and the latter of the two said nothing about copyrights. *See* An Ordinance for the Regulating of Printing (June 14, 1643), *in* 1 ACTS & ORDINANCES OF THE INTERREGNUM, 1642–1660, at 184 (C.H. Firth & R.S. Rait eds. 1911) [hereinafter ACTS & ORDS. INTERREGNUM]; An Ordinance Against Unlicensed or Scandalous Pamphlets, and for the Better Regulating of Printing (Sept. 30, 1647), *in* 1 ACTS & ORDS. INTERREGNUM, *supra*, at 1021.

88. An Act Against Unlicensed and Scandalous Books and Pamphlets, and for Better Regulating of Printing (Sept. 20, 1649), *in* 2 ACTS & ORDS. INTERREGNUM, *supra* note 87, at 245, 251. If the Company of Stationers prosecuted the case, the penalty recovered was to first cover those expenses, and the remainder would then be split between the Commonwealth and the Company for the use of its poorer members. *Id.* at 252.

89. *Id.* at 252–53.

determine causes,⁹⁰ by which was meant common-law courts such as the Upper Bench and Common Pleas.

Provisions relating to copyright and its enforcement were also largely left unchanged from prior law when Charles II regained the throne in 1660 and Parliament passed the Printing Act of 1662.⁹¹ The licensing provisions were strengthened, however, which led Parliament to insert sunset provisions into the Act and each of its subsequent extensions. Parliament duly renewed the Act in 1664 and 1665,⁹² but then refused several requests to extend it again,⁹³ leading to its eventual lapse in March 1679. For the next six years, the laws regulating printing, including those supporting the Stationers' copyright, remained in limbo until Parliament jumpstarted the 1662 Act once again in 1685 and renewed it once more in 1692.⁹⁴ The Act then expired permanently in May 1695 at the close of that year's Parliamentary session.

C. STATUTORY COPYRIGHT—STATUTE OF QUEEN ANNE TO 1789

Two principal consequences flowed from the death of the Printing Act: first, the system of prepublication licensing died with it, never to be seen again;⁹⁵ and second, the expiration of the Act thrust the Stationers' copyright back into limbo. A panic of sorts ensued among the Stationers, and their persistent lobbying,⁹⁶ spurred also in part by their fear that the union of Scotland and England in 1707 would lead to a flood of Scottish reprints into England,⁹⁷ eventually led to the first modern-like copyright statute: An Act for the Encouragement of Learning etc., also known as the Statute of Queen Anne, which became effective on April 10, 1710.⁹⁸ The Statute had eleven sections, but only a few are relevant for an

90. An Act for Reviving of a Former Act, Entituled, *An Act Against Unlicensed and Scandalous Books and Pamphlets, and for Regulating of Printing*, with Some Additions and Explanations (Jan. 7, 1652/3), in 2 ACTS & ORDS. INTERREGNUM, *supra* note 87, at 696, 698–99. The beneficiary of the penalty was also broadened to include any person who prosecuted a case. *Id.* at 699.

91. Statute, 1662, 13 & 14 Car. II, c. 33 (effective June 10, 1662 to June 10, 1664).

92. Statute, 1664, 16 Car. II, c. 8 (effective until Mar. 2, 1664/5); Statute, 1664–65, 16 & 17 Car. II, c. 7 (effective until Oct. 31, 1665); Statute, 1665, 17 Car. II, c. 4 (effective until Mar. 13, 1678/9).

93. See FAILED LEGISLATION, 1660–1800, at 92, 132, 134, 144 (Julian Hoppit ed., 1997).

94. Statute, 1685, 1 Jac. II, c. 17, § 15 (effective June 24, 1685 to Mar. 14, 1692/3); Statute, 1692, 4 W. & M., c. 24, § 15 (effective Feb. 13, 1692/3 to May 3, 1695).

95. FEATHER, *supra* note 77, at 47–48.

96. See DEAZLEY, *supra* note 10, at 1–37 (recounting the lobbying efforts of the Stationers); HARRY RANSOM, THE FIRST COPYRIGHT STATUTE 76–92 (1956) (same).

97. MANN, *supra* note 66, at 122–23.

98. Statute, 1710, 8 Anne, c. 19. Please note that 9 THE STATUTES OF THE REALM 256 (1822) differs from all other sources by reproducing this Statute in Chapter 21, rather than Chapter 19.

understanding of the case law.

Perhaps most important to the Stationers, the Statute protected works previously published under the Stationers' copyright for a term of twenty-one years from the effective date of the Statute, and "no longer." This savings clause thus ensured that all such works, many of which were extremely lucrative, would retain statutory protection until April 10, 1731.⁹⁹ For works published after the Statute, authors and their assignees would enjoy the sole right to print their works for a term of fourteen years from publication, with a possible fourteen-year renewal if the author was still living at the expiration of the first term.¹⁰⁰ Privileges by letters patent were left unaffected by the Statute,¹⁰¹ and a right against importation of certain books printed abroad was added in 1739.¹⁰²

Plaintiffs could recover in any court of record at Westminster—meaning the King's Bench, Common Pleas, and Exchequer, but not the Chancery¹⁰³—a penalty of a penny per sheet from the infringer, to be split between the plaintiff and the Crown, and a forfeiture of the infringing works so that they could be damasked and made into waste paper.¹⁰⁴ Recovery of these remedies required the plaintiff to have registered its work with the Company of Stationers before publication, and to have brought its claims within three months of the offense.¹⁰⁵ These rights and remedies, with a few immaterial changes, were later extended to engravers of prints and portraits,¹⁰⁶ and to certain works held in perpetuity by the major universities of Great Britain.¹⁰⁷

D. COMMON-LAW COPYRIGHT

The last form of protection that arose during this period of study was the common-law copyright for published works.¹⁰⁸ The legislative gaps of

99. 8 Anne, c. 19, § 1. Though, as we will see shortly, the booksellers later argued that their rights were protected at common law in perpetuity.

100. *Id.* §§ 1, 11.

101. *Id.* § 9. See also PATTERSON, *supra* note 10, at 143, 148.

102. Statute, 1739, 12 Geo. II, c. 36, § 1. The original statute had allowed certain books printed abroad in foreign languages to be imported into Great Britain. 8 Anne, c. 19, § 7.

103. For more on the meaning of "court of record," see *infra* notes 392–96 and accompanying text.

104. 8 Anne, c. 19, § 1.

105. *Id.* §§ 2, 10.

106. Engraving Copyright Act, 1735, 8 Geo. II, c. 13, § 1; Engraving Copyright Act, 1766, 7 Geo. III, c. 38, § 1.

107. Copyright Act, 1775, 15 Geo. III, c. 53, § 2.

108. A right of first publication was separately recognized on the ground that the author of a work (or his assigns) held a property right to his manuscript prior to publication. See THOMAS EDWARD

the Printing Act of 1662, and the fact that protection under the Statute of Queen Anne was for a limited term, left open the need for such a right for works that were not separately protected by letters patent. Members of the Company of Stationers argued that a common-law right, though not expressly recognized as such, protected their copies in perpetuity. Others argued that no such right ever existed at common law or, if it did, the Statute preempted it.

Remarkably, the question of whether copyright existed at common law was not decided during the legislative lapses of 1679–1685 or 1695–1710. By all accounts, only a single attempt was made during those times to enforce a Stationers' copyright in a common-law court, but it was a nonstarter, as it appears the case did not proceed beyond the pleadings.¹⁰⁹ The question of common-law copyright thus came to be decided only after the terms under the Statute of Queen Anne had begun to expire, and even then not for over thirty years. Following an abortive attempt in 1761,¹¹⁰ the issue was finally decided by an English common-law court in 1769. The King's Bench in *Millar v. Taylor*, by a decision of three to one, formally recognized the existence of a common-law right and further held that it was

SCRUTTON, *THE LAW OF COPYRIGHT* 53 (photo. reprint 2007) (4th ed. 1903). Thus, from the earliest days of printing "[i]t was necessary for a stationer to obtain the author's permission to publish his work" before the Stationer could obtain a Stationers' copyright for himself by registering the work. PATTERSON, *supra* note 10, at 69. *See also id.* at 67–77; An Ordinance for the Regulating of Printing, *supra* note 87, at 185. Nevertheless, it was not uncommon before 1643 for printers to publish the works of authors without their permission. *See* H.S. BENNETT, *ENGLISH BOOKS & READERS, 1558 TO 1603*, at 20–26 (1965).

109. *See* *Ponder v. Braddill*, 1 Lilly's Mod. Entries 67 (C.P. 1679/80); Frank Mott Harrison, *Nathaniel Ponder: The Publisher of The Pilgrim's Progress*, 15 *THE LIBRARY* 257, 270 (4th Ser. 1934). It also is generally accepted that no cases based on the Stationers' copyright were brought in the Court of Chancery during the lapses. As was stated in *Millar v. Taylor*, proprietors of copies "had no idea a bill in equity could be entertained, but upon letters patent adjudged to be legal. A bill in equity, in any other case [i.e., involving the Stationers' copyright], had never been attempted or thought of . . ." *Millar v. Taylor*, 4 Burr. 2303, 2317, 98 Eng. Rep. 201, 209 (K.B. 1769) (Willes, J.). Though the judges were correct that most cases had been based on letters patent, the latter statement is incorrect. I know of ten cases filed during the lapses where a Stationer sued in Chancery for infringement of a work protected solely by registration with the Company. *See* *Chiswell v. Lee*, C10/209/24 (Ch. 1681); *Pawlett v. Lee*, C10/202/96, C10/209/62 (Ch. 1681–83); *Herringman v. Clerke*, C8/301/33, C8/309/116 (Ch. 1681/2–83); *Pawlett v. Lee*, C10/211/60, C10/212/68 (Ch. 1683/4); *Pawlett v. Minshall*, C33/298, f. 121r (Ch. 1701); *Tonson v. Hills*, C8/623/33 (Ch. 1706–1706/7); *Rogers v. Hills*, C5/342/64 (Ch. 1708); *Wellington v. Mortier*, C5/276/36 (Ch. 1708); *Wellington v. Levi*, C5/343/46, C5/276/37r–v (Ch. 1708/9–1709). The case of *Pawlett v. Harris*, C10/218/34 (Ch. 1685), was filed just before the renewing of the Printing Act and thus straddled it.

110. In *Tonson v. Collins*, 1 Black. W. 301, 321, 96 Eng. Rep. 169, 180 (K.B. 1761), the King's Bench seemed inclined to recognize a common-law copyright in published works, but then dismissed the case for lack of a genuine case or controversy. *See id.* at 345 n.(d), 96 Eng. Rep. at 191. *See also infra* text accompanying notes 432–33.

not preempted by the Statute.¹¹¹

The decision was short-lived, however, for when the issue then arose in the case of *Donaldson v. Becket*, the House of Lords hearing the cause in 1774 reached a different outcome.¹¹² There is some ambiguity as to the voting of the judges due to inconsistencies in the way the case was reported, but most scholars today agree that a majority of the voting judges held that a perpetual copyright *did* exist at common law for published works, and that the right had *not* been taken away by the Statute of Queen Anne.¹¹³ Nevertheless, not being bound by the opinions of the judges or perhaps being confused as to the nature of their opinions,¹¹⁴ the peers in the House of Lords voted against the existence of any common-law right in previously published works.¹¹⁵

V. ENFORCEMENT IN THE COURT OF CHANCERY: 1660–1800

Even though copyright existed via printing privileges since 1512 and as a right of the members of the Company of Stationers since 1557, it appears that neither the common-law courts nor the Court of Chancery adjudicated copyright-infringement cases before 1660.¹¹⁶ The earliest cases

111. *Millar*, 4 Burr. 2303, 98 Eng. Rep. 201.

112. *Donaldson v. Becket*, *cit.* 4 Burr. 2408, 98 Eng. Rep. 257, 2 Bro. PC 129, 1 Eng. Rep. 837, 17 Cobb. Parl. Hist. 954 (H.L. 1774).

113. Abrams, *supra* note 10, at 1164–71; DEAZLEY, *supra* note 10, at 205; MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 98–99 (1993).

114. DEAZLEY, *supra* note 10, at 209–10.

115. *Donaldson*, 17 Cobb. Parl. Hist. at 1003. The common-law right of first publication was later preempted by statute in 1911. *See* British Copyright Act, 1911, 2 Geo. V, c. 46, § 31.

116. One known exception being *Wolfe v. Payne*, C33/29, f. 143v, C33/30, f. 143v (Ch. 1563/4), which involved a copyright by letters patent. At an early stage of the case, the Chancery entered an injunction. Because it might be the first copyright injunction ever granted by the Court of Chancery, it bears reproducing in full:

The said Richard Payne and [blank] Marshe have this daye made their apparannce before the Lord keeper of the great seale of Englande and are ordered to make answere to the bill of the plaintiff by saturdaye next, and the said Richard Payne hath undertaken that the said Home who hath not appeared shall also make his answere by the same daye / And yt is ordered by the said Lord keeper that neither the said Richard Payne nor [blank] Marshe nor any of them shall hereafter printe or cause to be prynted any accydencc [a form of grammar book] to the preiudice of the priuledge graunted to the plaintiff nor shall in any wyse utter or sell anye of the accidence allreadie printed by them or by their meanes or consent nor shall any wayes be aydinge assisting or consentinge to any person for the printinge of the same untill suche tyme as the cause in questyon shall be hearde and therupon other order taken therin by the said Lord keeper / And it is further ordered that all other accidence not sould or uttred shall be by them retayned and be forthcomynge to be ordered as upon the hearing of the matter shall be thought mete [/] And besydes that the said Richard and [blank] shall be answerable for the said accidence alrebye solde and uttred as this court shall adiudge / for the better performance of this order aforesaid the said Richard Payne and [blank] Marshe are enioyned by the said Lord keeper in the somme of CC [pounds] to observe and kepe the same.

Id. at C33/30, f. 143v. (I am grateful to David Seipp and Hamilton Bryson for helping me track down

were instead brought in other tribunals, such as the Court of High Commission, the Court of Star Chamber, and the Court of Assistants. Part VI below demonstrates the relevance of those antecedent tribunals to later Chancery practice, and further describes why copyright holders eventually moved their claims to the Court of Chancery. This part, however, turns directly to the jurisprudence most relevant to contemporary U.S. injunction practice: the jurisprudence of the Court of Chancery from 1660 to 1800.

The next several sections are largely descriptive and begin with some caveats on the rigors of searching for pre-1800 copyright-suit records. I then describe the typical infringement complaint and the procedures for awarding the various types of injunctions in copyright cases—namely, temporary restraining orders, preliminary injunctions, and perpetual injunctions. An analysis of injunction decisions follows, with a view to demonstrating that the Chancery only denied or dissolved injunctions due to defects in the merits of the plaintiff's case, hardship to the defendant, or unclean hands, but never on the ground that the plaintiff had an adequate remedy in the common-law courts. This is then contrasted with the Chancery's approach in other subject areas.

A. THE STATE OF THE RECORDS

Investigating the practices of the English Court of Chancery circa 1789 in copyright cases is a daunting task, if one is to do it properly. To begin, one cannot limit the inquiry to cases decided at or around that magical moment in 1789. There are too few copyright cases in the 1780s to obtain a representative sample of Chancery practice. But even more fundamentally, obtaining a "representative" sample alone can be misleading, given the nature of the inquiry. One cannot say, or even suggest, that the Chancery *never* or *always* did something unless an attempt has been made to survey all cases from the relevant subject area. This has made it necessary to search for copyright-infringement suits as far back as 1660.

Nor can one limit the search to published cases. Printed reports of copyright cases are few and far between from 1660 to 1800—I count thirty-six—and often the reports consist of less than a page.¹¹⁷ Much of the blame

this source). By consent of the parties, the Chancellor later referred the matter for "fynall determynacon" to the Bishop of London and at least two of the following individuals: the Dean of Powles, William Seres, and James Gonwell (the latter two were wardens of the Stationers' Company). *Id.* at C33/32, f. 256v (Ch. 1565). They were to rule "according as to their wysdomes and discessions shall be thought most agreable to Justice & equitytie." *Id.* For a possible explanation why this early case was initially brought in the Court of Chancery rather than in other tribunals, see *infra* note 387.

117. This figure includes captioned cases in equity and common-law courts, but does not include

for these frustratingly short reports lays with the costs associated with contemporary law printing,¹¹⁸ but the reporters themselves also typically transcribed only those parts of a case they happened to find interesting or unusual, meaning that common routines were often not remarked upon.¹¹⁹ Making matters worse, the vast majority of copyright-infringement suits were not reported at all. According to my review of the pertinent court records, at least 220 cases for copyright infringement were brought in the Court of Chancery from 1660 to 1800.¹²⁰ Thus, only a small fraction, about 16 percent, of all copyright-infringement suits were ever reported.

To obtain a fuller understanding of copyright-enforcement practices, one must consult the original records preserved in the National Archives in London, England. The National Archives is a treasure trove of English legal history and it houses, *inter alia*, the original pleadings, orders, decrees, and proofs of cases filed in the Court of Chancery.¹²¹ With the exception of a few digitized images already available online,¹²² Chancery records must be viewed in person at the Archives. I unearthed and reviewed approximately 550 pieces of parchment (about 450 of which turned out to involve copyright-infringement cases) and over 700 entries of Chancery orders and decrees in copyright cases. Superior in many ways to the reported cases, these records are not without their shortcomings. Just as the reported cases must be read and considered with the appropriate level of caution, so too must the original court archives. Two principal limitations plague the Chancery records.

First, there is an inherent difficulty in identifying and reconstructing copyright-infringement suits. Unlike today, where a case has its records stored together—for example, pleadings, motions, etc.—records in the Chancery were instead sorted by document type. Pleadings, court orders,

cases that might have been briefly mentioned in another reported case.

118. J.H. Baker, *Why the History of English Law Has Not Been Finished*, 59 *CAMBRIDGE L.J.* 62, 76 (2000).

119. *Id.* at 73–74, 78.

120. See Appendix of Infringement Suits 1560–1800, <http://www.lclark.edu/faculty/tomas>.

121. The standard guide to the system of records of the Court of Chancery is HENRY HORWITZ, *A GUIDE TO CHANCERY EQUITY RECORDS AND PROCEEDINGS 1600–1800* (2d ed. 1998). The guide is slightly out of date as it does not incorporate many of the online resources now available. The National Archives has since produced two online research guides. See The National Archives, *Early Chancery Proceedings: Equity Suits Before 1558*, <http://tinyurl.com/2ldfe2> (last visited Sept. 19, 2008); The National Archives, *Chancery Proceedings: Equity Suits From 1558*, <http://tinyurl.com/3boygc> (last visited Sept. 19, 2008). References to C4, C5, C6, C7, C8, C9, C10, C11, or C12 represent pleadings in the Chancery, whereas orders and decrees from the Chancery's register books are to C33.

122. See *Primary Sources on Copyright 1450–1900* (Lionel Bently, Martin Kretschmer & Ronan Deazley eds.), <http://www.copyrighthistory.org>.

and proofs from a single suit must therefore always be searched for and obtained separately. More problematically, the vast majority of Chancery records are irregularly indexed. Though most pleadings are indexed and their reference numbers made available online, the indices typically include only the surnames of the principal plaintiff and defendant and almost never the suit's subject matter.¹²³ Orders and decrees of the court are all indexed, but once again the indices refer solely to first-party surnames and, even more taxing, are found only in contemporary, handwritten indices which must be perused at the Archives. Though use of these sources would have been routine for litigants in the eighteenth century,¹²⁴ it certainly is not today.¹²⁵

The orders from uncovered cases also often suffer from a lack of detail. The Chancery's own rules had declared since at least 1635 that all entries in the register books be brief, presumably to conserve paper:

The registers, in drawing up Orders, shall use all convenient brevity, according to the manner of ancient times; they shall mention the material reports, affidavits, and former Orders, upon which any new Order is grounded to have been read, but shall not repeat them; they shall not, unless it be by special direction of the Court, fill any Order with the disputes of counsel, nor with reasons or allegations *pro et contra*, nor mention any reasons but such on which the Court relied in making the Order, and those with brevity and clearness.¹²⁶

The records bear this out. Though the arguments of counsel are sometimes summarized, they more often are not, with the court simply stating that it

123. The principal parties on either side could also change during litigation due to death or dismissal, making a case seem sometimes to drop off the radar when in fact it has merely been revived under a different name. *E.g.*, *Sheridan v. Falkener*, C12/1355/14, m. 1 (Ch. 1776), *revived as* *Thompson v. Falkener*, C12/1355/14, m. 2 (Ch. 1778); *Gay v. Walker*, C12/1817/67 (Ch. 1729), *revived as* *Baller v. Walker*, C12/1817/15 (Ch. 1732/3).

124. Litigants and the court often consulted the register books. *E.g.*, *Fox v. Mackreth*, 2 Cox 158, 158, 30 Eng. Rep. 72, 73 (Ch. 1789); *Countess of Strathmore v. Bowes*, 1 Cox 263, 263–64, 29 Eng. Rep. 1158, 1158–59 (Ch. 1786); *Fawel v. Healis*, Dick. 485, 485, 21 Eng. Rep. 358, 358 (Ch. 1773); *Millar v. Taylor*, 4 Burr. 2303, 2407, 98 Eng. Rep. 201, 257 (K.B. 1769).

125. Some of this research has already been undertaken by others and has served as an excellent starting point in my effort to recover as many copyright cases as possible. *See* DEAZLEY, *supra* note 10, at vii–ix; R.J. GOULDEN, *SOME CHANCERY LAWSUITS 1714–1758: AN ANALYTICAL LIST* (rev. ed. 1983); Joyce Helene Brodowski, *Literary Piracy in England from the Restoration to the Early Eighteenth Century* 339–46 (1973) (unpublished D.L.S. dissertation, Columbia University), *microformed on* Film No. 76-29,052 (Xerox Univ. Microfilms). I discovered the remaining cases through painstaking review of the indices of pleadings and register books over the period of five weeks spent in the National Archives and numerous months of research outside the Archives.

126. Ordinances of Nov. 17, 1635, No. 12, *in* THE GENERAL ORDERS OF THE HIGH COURT OF CHANCERY 69, 75 (John Beames ed., 1815) [hereinafter GENERAL ORDERS]. *See also* Orders of Nov. 28, 1743, *in* GENERAL ORDERS, *supra*, at 369, 381–82 (reciting similar limitations).

had relied upon the “debate of counsel” or arguments made in written petitions, the latter of which were not preserved until 1756.

I have supplemented these records with other contemporary accounts of cases and practices, including other manuscript sources. Decisions from the Court of Session in Scotland often shed light on the practices of the Chancery. In particular, during the battle over the existence of common-law copyright in the mid-to-late eighteenth century, the briefs on both sides of the disputes were often published, undoubtedly because the parties were printers themselves. Moreover, Chancery practice can be discerned from the treatises of lawyers who litigated there.

B. BILLS OF COMPLAINT AND THE RELIEF REQUESTED

Copyright-infringement suits in the Court of Chancery were initiated by an unsworn bill of complaint. Throughout the period of study, the format of the bill changed little. Bills were always written on parchment, with the size varying depending on the complexity of the grievance. They began with “Humbly Complaining shew unto your Lordship your dayly orator,”¹²⁷ or something similar, and with the plaintiff identifying himself, his profession, and place of residence. The plaintiff then set out his title in the copyrighted work at issue. In cases involving letters patent, for example, the bill would recite the date and basic terms of the patent. This recitation was often quite lengthy in cases involving the patent for the office of the King’s Printers,¹²⁸ as it had often changed hands and been litigated. The Stationers’ 1615/6 patent was also often the subject of a lengthy recitation.¹²⁹ If previous lawsuits at law had upheld the validity of the patent, those might be mentioned as well.¹³⁰

Cases involving the Stationers’ copyright also alleged their title in the work by either stating that they had purchased the copyright from the original author or from another Stationer. Take, for example, the lawsuit Henry Herringman brought against Edmund Clerke in 1682 for infringing *The Works of Abraham Cowley*.¹³¹ The allegation of title in this case bears reproducing at length because Herringman uses the single word “copyright” much in the same way we use and understand that term today, and he did so nearly fifty years before the term was previously thought to

127. Stationers v. Bradford, C6/477/69, m. 1 (Ch. 1704).

128. Baskett v. Nicholson, C11/178/5, m. 1 (Ch. 1747).

129. An exemplar of a bill filed by the Stationers was published in 1695. See WILLIAM BROWN, PRAXIS ALMÆ CURIÆ CANCELLARIÆ: A COLLECTION OF PRECEDENTS 125–39 (London, 1695).

130. Stationers v. Lee, C9/117/38, m. 2 (Ch. 1681).

131. Herringman v. Clerke, C8/301/33 (Ch. 1681/2).

have been in use:¹³²

[Y]our Orator did for a valuable consideraton of money paid by your Orator Buy and purchase of and from the Author and Compiler and Proprietor of the Booke herein after mencioned the originall Copy and Copyright or Propriety of the Copy of the same Booke[,] That is to say of the Booke entitled or called the workes of Abraham Cowly the Copy=right of which Booke your Orator soe bought about Fifteene yeares since[,] And thereupon was entred as Proprietor of the said Booke in the Register of the Company of Stationers London according to Custome kept for that purpose[.] And the Author . . . did . . . grant to your Orator the said Originall Copy and the Copyright and Propriety thereof¹³³

Cases involving claims brought after the Statute of Queen Anne contained similar allegations of title, both in cases involving works falling into the savings clause of the Statute¹³⁴ and those first published after its enactment.¹³⁵ In some cases, of course, the allegation was simply a claim of authorship.¹³⁶

Having set forth the basis of their title, plaintiffs would then recite how the defendant and his confederates had infringed or were about to infringe the copyright or privilege held by the plaintiff. The bills then typically asked for four things. First, they requested a discovery of the names of any associates of the defendants, the number of books or sheets they had printed or imported, the number of the same that were sold, the titles used on the books, the prices at which they were sold, and the profits

132. The Oxford English Dictionary attributes the first use of “copyright” in a nonhyphenated form to Blackstone’s Commentaries in 1767, and the first use of “copy-right” in the year 1735. OXFORD ENGLISH DICTIONARY ONLINE (2d ed. 1989), <http://dictionary.oed.com>. Donald Nichol has pointed out, however, that “copyright” was used in correspondence as early as 1728. See Donald W. Nichol, *On the Use of “Copy” and “Copyright”: A Scriblerian Coinage?*, 12 THE LIBRARY 110, 114 (6th Ser. 1990). The earliest known use of the phrase “copy right” was thought at first to have been in the year 1701, as having appeared in the registers of the Stationers’ Company. See PATTERSON, *supra* note 10, at 4. John Feather has noticed, however, that “copy right” also appeared in a 1678 bylaw of the Stationers’ Company. FEATHER, *supra* note 64, at 46. See also *infra* note 334 and accompanying text. And Adrian Johns has similarly noted that the phrase appeared in a decision of the Court of Assistants in the same year. JOHNS, *supra* note 80, at 365 n.126 (citing Court Book E, f. 60v (1678)).

133. *Herringman v. Clerke*, C8/301/33, m. 1 (Ch. 1681/2). The word appeared as “copyright” in a demurrer in the same case, *see id.* at C8/301/33, m. 2 (Ch. 1681/2), and as “Copyright” in one of the answers, *see id.* at C8/301/33, m. 3 (Ch. 1682). The conjoined word also appeared in the answer to another suit. See *Rogers v. Hills*, C5/342/64, m. 2 (Ch. 1708).

134. *Knaplock v. Curl*, C11/690/5, m. 1 (Ch. 1721/2); *Burnet v. Chetwood*, C11/242/45, m. 1 (Ch. 1721).

135. *Dilly v. Walker*, C12/1730/41, m. 1 (Ch. 1794); *Millar v. Lynch*, C12/307/52, m. 1 (Ch. 1742).

136. *Trusler v. Evans*, C12/1331/25, m. 1 (Ch. 1773); *Gay v. Walker*, C12/1817/67 (Ch. 1729).

made. Second, bills almost universally asked for an injunction to restrain the defendant and his servants, workmen, and agents from printing, publishing, importing, or selling the infringing works.¹³⁷ Third, bills would usually waive the right to recover any penalties or forfeitures available at law. And lastly, they would always request a writ of subpoena summoning the defendant or defendants to appear and fully answer the charges made in the bill.

It was usually said by the plaintiff, though not always,¹³⁸ that he had exhibited his bill in equity because there was no remedy at law. A plaintiff might ask the Chancellor to act “according to equity and good conscience they being utterly remediless at Lawe.”¹³⁹ Or, as happened in another suit, the bill might state that “the Nature and Quality of this Matter is such as your Orators have not . . . ane proper Remedy att the Comon Law.”¹⁴⁰ Another common refrain was more simply that the plaintiff was “remediless in the premisses by the Strict rules of the Common Law.”¹⁴¹ These statements were pro forma, however, and were neither necessary nor sufficient alone to create jurisdiction.¹⁴²

Subpoenas would issue as a matter of course after the complaint had been filed, summoning the defendant to appear and submit an answer or otherwise respond to the complaint.¹⁴³ In some cases, where by affidavit a plaintiff demonstrated that the defendant lived in the City of London, the

137. I have found only three instances where the bill of complaint omitted a request for an injunction. In two of the cases, the plaintiffs amended the complaints to include one. *See* *Stationers v. Wellington*, C6/476/4, m. 1, C7/320/40, m. 1 (Ch. 1701); *Stationers v. Lee*, C5/560/41, m. 4, C5/560/41, m. 1 (Ch. 1681). The third case was not strictly pursued as an infringement case. *See* *Bill v. London*, C6/155/19, m. 1 (Ch. 1661/2). There, the plaintiff had seized Bibles imported by the defendant contrary to the plaintiff's privilege as King's Printer. In response, the defendant had sued him in the King's Bench in an action for trover. The plaintiff's Chancery suit sought discovery that could be used in defense of the common-law action. *See id.*

138. *See* *Nicol v. Stockdale*, C12/132/23, m. 1 (Ch. 1784) (omitting inadequacy allegation).

139. *Atkyns v. Moore*, C10/67/3, m. 1 (Ch. 1662).

140. *Atkyns v. Stationers*, C10/161/2, m. 1 (Ch. 1667).

141. *Knaplock v. Curl*, C11/690/5, m. 1 (Ch. 1721/2).

142. 1 EDMUND ROBERT DANIELL, *A TREATISE ON THE PRACTICE OF THE HIGH COURT OF CHANCERY* 486 (London, J. & W.T. Clarke 1837) (“The omission of this clause . . . will not render the bill defective.”). It was the facts alleged in the bill that mattered more than any jurisdictional averment per se. JOHN MITFORD, *A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL* 43 (2d ed., London 1787).

143. In the early practice of the court, the Chancellor would first review a bill to determine whether it presented a grievance cognizable in equity, and only then would a subpoena issue. *See* 1 GEORGE SPENCE, *THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 337–38 (Philadelphia, Lee & Blanchard 1846). But by the time copyright cases began to be heard, subpoenas issued as a matter of course, leaving the question of jurisdiction to be decided by demurrer. *See* F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 7 (John Brunyate ed., 2d ed. 1969).

plaintiff could request and obtain a subpoena before the complaint had been filed.¹⁴⁴

C. THE PROCEDURE FOR GRANTING INJUNCTIONS

The Court of Chancery awarded three forms of injunctions. The first was designed to last until the defendant had put in a “full and perfect” answer. This injunction is thus somewhat similar to our modern-day temporary restraining order, and I will, for the sake of simplicity, label it as such even though the Court of Chancery did not use that term. The second type of injunction, more akin to our preliminary injunction, enjoined a defendant until a full hearing could be had on the merits of the case. That hearing might be one at law, where the case could be sent to determine the validity of a patent or copyright title, a hearing in the Chancery itself, or some combination thereof. Lastly, the Chancellor could award a “perpetual” or final injunction.

1. Temporary Restraining Orders

The standards for when a TRO could issue depended on whether the plaintiff requested one before or after the defendant’s time to respond had expired. If the request occurred *after* it had become clear the defendant had not responded or could not respond on time, the Chancellor would grant a TRO until answer as a matter of course upon motion made by the plaintiff. On these motions of course, “the court [would not] hear any thing against it.”¹⁴⁵ For instance, if the defendant failed to appear on time and was therefore in contempt, the plaintiff would automatically obtain an *ex parte* TRO upon motion and affidavit averring proof of service of the subpoena.¹⁴⁶ Or if the defendant appeared within time but then departed without filing a response to the bill, a TRO would also issue as of course upon motion alone.¹⁴⁷ This might occur, for example, where the defendant appeared but then asked to make his answer in the country by *dedimus*

144. In such cases, the complaints were usually filed a few days after the subpoena. *E.g.*, *Dilly v. Doig*, C33/484, f. 203v (Ch. Mar. 6, 1794), C12/1730/37, m. 1 (Ch. Mar. 10, 1794); *Stationers v. Partridge*, C33/312, f. 546r (Ch. July 30, 1709), C7/299/3, m. 1 (Ch. Aug. 2, 1709). An extreme case seems to have been *Hills v. University of Oxford*, where the court issued subpoenas to three individuals living in London on March 1, 1683/4, *see Hills v. Univ. of Oxford*, C33/261, f. 304v (Ch. 1683/4), but the plaintiffs delayed filing the bill of complaint until three weeks later, *see id.* at C8/273/49, m. 1 (Ch. Mar. 22, 1683/4).

145. RICHARD BOOTE, *THE SOLICITOR’S PRACTICE IN THE HIGH COURT OF CHANCERY EPITOMIZED* 21 (5th ed., London, His Majesty’s Law-Printers 1782).

146. *Id.* at 25.

147. *Id.*

potestatem or chose not to answer so as to delay the proceedings. On TROs sought after the defendant's appearance but before the answer, the plaintiff was supposed to advise the defendant of the motion so that he could oppose it.¹⁴⁸

In cases where the plaintiff requested a TRO *before* the expiration of the response time, the plaintiff was required to dip into the merits of the case and demonstrate title and infringement by affidavit.¹⁴⁹ These “merits-TROs” were relatively uncommon and unnecessary in the seventeenth century because of the time-consuming nature of printing and the quick time required for responding to a complaint.¹⁵⁰ Subpoena responses were usually due in four days from the return date if the defendant lived within ten miles of London or eight days if living at a greater distance.¹⁵¹ When coupled with the fact that many early pirates were irresponsible, a plaintiff could wait for the defendant to miss the response date and simply request a TRO as of course. Beginning in the mid-eighteenth century, however, plaintiffs more regularly sought merits-TROs.¹⁵²

Regardless of how obtained, a TRO once granted lasted until the defendant had put in a “full and perfect” sworn answer, which could take multiple filings to achieve. After submitting an answer, the defendant would move to dissolve the TRO, which the court would dissolve as a matter of course unless the plaintiff showed cause to the contrary. Cause was shown at this stage by filing exceptions to the answer claiming it was not full and perfect, which would ensure the TRO would continue at least until such time as the exceptions could be ruled upon by reference to one of

148. See *Marasco v. Boiton*, 2 Ves. Sr. 112, 112, 28 Eng. Rep. 74, 74 (Ch. 1750). *E.g.*, *Mason v. Murray*, C33/448, f. 152r–v (Ch. 1777); *Sheridan v. Falkener*, C33/446, f. 302r–v (Ch. 1776); *Baskett v. Akenhead*, C33/343, f. 273r (Ch. 1725). *But see* *Harrison v. Cockerell*, 3 Mer. 1, 1, 36 Eng. Rep. 1, 1 (Ch. 1817) (noting that *ex parte* injunctions after appearance were still possible).

149. See 2 JOSEPH HARRISON, *THE ACCOMPLISH'D PRACTISER IN THE HIGH COURT OF CHANCERY* 237 (7th ed., London, A. Strahan & W. Woodfall 1790) (“[I]njunction[s] will be granted on motion, certificate of bill being filed, and affidavit of facts being produced.” (internal citation omitted)); *INFORMATION FOR JOHN MACKENZIE AGAINST JOHN ROBERTSON* 26 (1771) (“[A]n injunction . . . may be moved on the usual affidavits (of property, and the piratical publishing and vending) immediately after the bill filed.”), reprinted in *THE LITERARY PROPERTY DEBATE: SEVEN TRACTS 1747–1773* (Stephen Parks ed., 1974) [hereinafter *LITERARY PROPERTY DEBATE*].

150. *But see* *Norton v. Lee*, C33/258, f. 117r (Ch. 1681) (obtaining a merits-TRO).

151. *BOOTE*, *supra* note 145, at 5–6. Counterintuitively, the distance was formerly twenty miles. *THE CLERK'S ASSOCIATE* 44 (London, E. Nutt et al. 1738).

152. *E.g.*, *Thompson v. Harrison*, C33/462, f. 9r–v (Ch. 1783); *Jefferys v. Bowles*, C33/433, f. 161v (Ch. 1770); *Manby v. Owen*, C33/404, f. 164v (Ch. 1755); *Austen v. Cave*, C33/371, f. 493r (Ch. 1739); *Walthoe v. Walker*, C33/368, f. 127r (Ch. 1736/7); *Eyre v. Walker*, C33/363, f. 419v (Ch. 1735); *Gibbs v. Cole*, C33/361, f. 194v (Ch. 1733/4); *Mount v. Fenner*, C33/358, f. 348r (Ch. 1732).

the masters working in the Chancery.¹⁵³ But even if the master reported that the answer was full and perfect, the report could itself be excepted to, thus necessitating a hearing before the Lord Chancellor or Master of the Rolls to ultimately determine whether the answer was indeed sufficient.¹⁵⁴ This entire process could be repeated for amended answers as well,¹⁵⁵ subject to checks for abuse, such that the plaintiff could continue the TRO for a significant amount of time.

2. Preliminary Injunctions

Once a full and perfect answer had come in, the court would determine whether to continue the injunction to the hearing—that is, whether to convert the TRO into a preliminary injunction.¹⁵⁶ Usually this was accomplished by again ordering that the TRO would be dissolved unless the plaintiff showed cause to continue the injunction, but with cause now only to be shown on the merits of the case.¹⁵⁷ If the prior TRO had been granted as of course, then the plaintiff would have to demonstrate by sworn affidavit (having not previously done so on the TRO) a right of title in the work along with a suggestion of infringement. If the TRO had been on the merits, however, the plaintiff could rely on the previous showing by affidavit or submit additional affidavits to support transforming the TRO into a preliminary injunction.¹⁵⁸ The court would then consider the defendant's sworn answer, which functioned as an opposition, along with affidavits of fact filed by nonparty witnesses in support of the defendant's position.¹⁵⁹

153. See BOOTE, *supra* note 145, at 26; WILLIAM BOHUN, *CURSUS CANCELLARIÆ* 449 (2d ed., London, E. Nutt et al. 1723). *Accord* Strahan v. Newberry, C33/442, f. 129r (Ch. 1774); Norton v. Lee, C33/258, f. 68v (Ch. 1681). In later years, if the plaintiff sought an extension of time in which to except to the answer, he would lose that argument as a basis for showing cause to continue the TRO. Instead, the plaintiff would have to “shew Cause on the Merits,” Stationers v. Carman, C33/442, f. 136v (Ch. 1774), thereby jumping directly to the issue of whether the TRO should be converted into a preliminary injunction. *Accord* Strahan v. Newberry, C33/442, f. 179v (Ch. 1774).

154. Stationers v. Parker, C33/288, f. 65r (Ch. 1696).

155. Norton v. Lee, C33/258, ff. 64v, 79r (Ch. 1681).

156. Though rare, there are instances where a plaintiff skipped a TRO request and instead asked solely for a preliminary injunction following the defendant's answer. *E.g.*, Tonson v. Walker, C33/398, f. 322r (Ch. 1752).

157. Gibbs v. Cole, C33/361, f. 503r (Ch. 1734). For example, in *Read v. Hodges*, C11/538/36 (Ch. 1740), the court ordered a merits-TRO dissolved *nisi causa* after the master had determined the answer to be full and perfect. *Read v. Hodges*, C33/374, ff. 153v, 275v–276r (Ch. 1740). The plaintiff then showed cause to convert the merits-TRO into a preliminary injunction by again demonstrating by affidavit that the defendant's work was a copy. *Id.* at f. 299r–v (Ch. 1740).

158. See Gibbs v. Cole, Dick. 64, 64, 21 Eng. Rep. 192, 192, 3 P. Wms. 255, 255, 24 Eng. Rep. 1051, 1051–52 (Ch. 1734).

159. *E.g.*, Gilliver v. Watson, C41/44, nos. 566 & 567 (Ch. Pasch. 1729) (opposing affidavits).

If the answer confessed or did not dispute the plaintiff's title and copying, the court would automatically transform the TRO into a preliminary injunction.¹⁶⁰ An answer might, however, call the plaintiff's title or copying into question. A defendant might swear, for instance, that he had heard the plaintiff's patent had been declared invalid in a previous action at law.¹⁶¹ He might aver that the plaintiff's chain of title was deficient for failing to trace itself back to the original author of the work.¹⁶² Or more simply, the defendant might deny having ever printed or imported the work.¹⁶³ Others also swore to the hardship they would suffer if the injunction were to be continued.¹⁶⁴ And in some instances, the answer might declare the matter to be determinable at law.¹⁶⁵ This latter statement was pro forma, however, and inconsequential.¹⁶⁶

It is difficult to discern from the records how strong a disputed case had to be on the merits in order to obtain a preliminary injunction (or a merits-TRO for that matter). On issues of right and title, earlier cases seemed to have required that the right be "plain."¹⁶⁷ But by the mid-eighteenth century, it appeared that perhaps a colorable right would suffice.¹⁶⁸ Even less is known about the strength required for demonstrating infringement. In any event, the weighing of the merits was typically undertaken by the Chancellor or the Master of the Rolls.¹⁶⁹ Though the court sometimes referred the issue of whether an infringement had likely occurred to a master for report,¹⁷⁰ the ultimate decision of whether to grant an injunction rested with the court itself.

160. See *Allen v. Crobcraft*, Barn. C. 373, 374, 27 Eng. Rep. 684 (Ch. 1740) ("[W]here a plain Equity set forth by the Bill is admitted by the Answer, but endeavoured to be avoided by another Fact, the Injunction shall always be continued till the Hearing.").

161. *Stationers v. Rogers*, C5/335/68, m. 1 (Ch. 1708).

162. *Gilliver v. Watson*, C11/2581/36, m. 2 (Ch. 1729).

163. *Wellington v. Levi*, C5/276/37 (Ch. 1709).

164. *Thompson v. Stanhope*, C12/80/4, m. 2 (Ch. 1774).

165. *Wellington v. Mortier*, C5/276/36, m. 2 (Ch. 1708).

166. Serious challenges to the court's jurisdiction were made by the filing of a demurrer or plea. W.J. JONES, *THE ELIZABETHAN COURT OF CHANCERY* 206 (1967). See also *infra* Part V.D.3.

167. See *infra* Part V.D.2.a.

168. *Tonson v. Walker*, 3 Swans. 672, 679, 36 Eng. Rep. 1017, 1020 (Ch. 1752) ("[N]ot a clear right, but probability of right, may be, and is, a ground for an injunction.").

169. See, e.g., *Butterworth v. Robinson*, 5 Ves. Jr. 709, 709, 31 Eng. Rep. 817, 818 (Ch. 1801); *Bell v. Walker*, 1 Bro. C.C. 451, 451-52, 28 Eng. Rep. 1235, 1235 (Ch. 1785).

170. *In re Leadbetter*, 4 Ves. Jr. 681, 31 Eng. Rep. 351 (Ch. 1799); *Carnan v. Paterson*, C33/465, ff. 449v-450r (Ch. 1786); *Bell*, 1 Bro. C.C. at 452 n.(1), 28 Eng. Rep. at 1235. *Accord* *Nicol v. Stockdale*, 3 Swans. 687, 689, 36 Eng. Rep. 1023, 1023 (Ch. 1785).

3. Perpetual Injunctions

The Chancery also had the power to grant perpetual injunctions, or what are now called permanent, or more properly, final injunctions, after an adjudication of the merits. Questions of *infringement*, such as whether the works were substantially similar or a fair abridgement, were adjudicated in the Chancery. The Lord Chancellor typically referred these issues to a master for report,¹⁷¹ but the Chancellor or his deputy, the Master of the Rolls, sometimes decided it themselves.¹⁷² A finding of no infringement would lead to the dissolving of any prior injunction and dismissal of the case.¹⁷³ When a plaintiff's *right or title* was doubtful, however, the Chancery referred the issue to the common-law courts for decision. This occurred, for example, with the King's Printers' patent,¹⁷⁴ the common-law books patent,¹⁷⁵ the patents held by the universities,¹⁷⁶ and the Stationers' 1615/6 patent.¹⁷⁷ Similar referrals occurred on questions relating to the Stationers' copyright,¹⁷⁸ copyright at common law,¹⁷⁹ and copyright under the Statute of Queen Anne.¹⁸⁰

Final injunctions were relatively uncommon before 1789.¹⁸¹ Most

171. *E.g.*, *Strahan v. Newberry*, C33/442, f. 179v (Ch. 1774); *Trusler v. Evans*, C33/440, f. 284r (Ch. 1773); *Jefferys v. Bowles*, C33/433, f. 267v (Ch. 1770); *Wellington v. Levi*, C33/314, ff. 54v–55r (Ch. 1709). In an interesting early case, the Chancellor ordered the author of the allegedly infringed book to compare his work with the book of the defendant to determine whether it was indeed a copy. *Chiswell v. Lee*, C33/257, ff. 100r (Ch. 1681), 112r–v (Ch. 1681/2). In another case, the Chancellor ordered the issue of copying to be arbitrated. *Gyles v. Wilcox*, Barn Ch. 368, 369–70, 27 Eng. Rep. 682, 682–83 (Ch. 1740/1).

172. *E.g.*, *Whittingham v. Wooler*, 2 Swans. 428, 430, 36 Eng. Rep. 679, 680 (Ch. 1817).

173. *E.g.*, *id.* at 431, 36 Eng. Rep. at 681; *Strahan v. Newberry*, Lofft 775, 775–76, 98 Eng. Rep. 913, 913–14 (Ch. 1774).

174. *Baskett v. Univ. of Cambridge*, 2 Burr. 661, 97 Eng. Rep. 499, 1 Black. W. 105, 96 Eng. Rep. 59, 2 Keny. 397, 96 Eng. Rep. 1222 (K.B. 1758); *Hills v. Lee*, C33/261, ff. 282v–283r (Ch. 1683/4).

175. *Atkins v. Stationers*, C33/229, f. 700v (Ch. 1668) (seeking the advice of Justice Twisden of the King's Bench and "such other Judges as hee [Twisden] shall thinke fitt"). The divided opinion of the common-law judges in this case is briefly reported at 2 Chan. Cas. 66, 22 Eng. Rep. 849.

176. *Hills v. Univ. of Oxford*, C33/263, ff. 766v–767r, 1 Vern. 275, 275, 23 Eng. Rep. 467, 467 (Ch. 1684).

177. *Stationers v. Carnan*, 2 Black. W. 1004, 1009, 96 Eng. Rep. 590, 593 (C.P. 1775); *Stationers v. Partridge*, C33/316, f. 525r–v (Ch. 1710/1), 10 Mod. Rep. 105, 105, 88 Eng. Rep. 647, 647 (K.B. 1712); *Stationers v. Parker*, C33/288, f. 202r (Ch. 1696/7).

178. *Pawlett v. Lee*, C33/262, ff. 323v–324r (Ch. 1683/4).

179. *Millar v. Taylor*, C33/426, ff. 68v–69r (Ch. 1765).

180. *King v. Reed*, 8 Ves. Jr. 228, 228, 32 Eng. Rep. 341, 341 (Ch. 1804); *Bach v. Longman*, 2 Cowp. 623, 623, 98 Eng. Rep. 1274 (K.B. 1777).

181. For examples of final injunctions, see *Mason v. Murray*, C33/452, ff. 486r–487r (Ch. 1779); *Becket v. Donaldson*, C33/439, ff. 26r–27r (Ch. 1772); *Macklin v. Richardson*, C33/436, ff. 35v–36r, Amb. 694, 27 Eng. Rep. 451 (Ch. 1770); *Millar v. Taylor*, C33/426, f. 60r–v (Ch. 1765); *Gay v.*

copyright cases terminated after the entry of an interlocutory injunction, typically because the defendant acquiesced, not unlike today. But in the few cases where litigants fought on, and the plaintiff succeeded on the merits, the Chancery would grant a final injunction as a matter of course. A clerk thus recorded in *Hills v. Lee* that the

Court declared that where it appeared to the Court that there was a right as it doth in this Case[,] the Law having determined the same for the [plaintiff,] Itt was Naturall for the Court to give releife for the same in specie[,] And doth therefore thinck fitt & soe orders and decrees that the Injunction \formerly granted in this Cause by order of the [date] be made perpetuall/¹⁸²

Beginning in 1737, final injunctions were sometimes accompanied by an order that the defendant disgorge the profits he had earned.¹⁸³ The Chancery founded this power on a desire to prevent the multiplicity of suits that might arise if a plaintiff were required to bring an action at law to recover them.¹⁸⁴ An award of profits seems to have been at the plaintiff's election, however, as it was sometimes waived.¹⁸⁵ This might occur, for example, where an interlocutory injunction had rendered the defendant's gains trivial or nonexistent. Nevertheless, it made the Chancery a one-stop shop for preventing *and* repairing infringements, a fact that further solidified the Chancery's burgeoning role as the primary copyright tribunal after 1660.

D. INJUNCTION ARGUMENTS AND OUTCOMES

I have uncovered 220 copyright-infringement suits brought in the

Walker, *sub nom.* Baller v. Watson, C33/369, ff. 315v–316v (Ch. 1737); Gibbs v. Cole, C33/365, f. 222r–v (Ch. 1735/6); Knaplock v. Cull, C33/339, f. 12r–v (Ch. 1722); Baskett v. Parsons, C33/329, ff. 418v–419r (Ch. 1718).

182. *Hills v. Lee*, C33/261, ff. 282v–283r (Ch. 1683/4). *Accord* Stationers v. Lee, C33/262, f. 260r–v (Ch. 1683/4).

183. As Deazley has discovered, *see* DEAZLEY, *supra* note 10, at 65–69, the first copyright case to award profits was *Gay v. Walker, sub nom. Baller v. Watson*, C33/369, ff. 315v–316v (Ch. 1737). For other such cases, see *Mason v. Murray*, C33/452, ff. 486r–487r (Ch. 1779); *Pyle v. Falkener*, C33/442, ff. 309v–311r (Ch. 1774); *Becket v. Donaldson*, C33/439, ff. 26r–27r (Ch. 1772); *Millar v. Taylor*, C33/426, f. 60r–v (Ch. 1765). This is not to say, however, that the Chancellor had refused prior to that date to award profits. A case in which the issue was squarely presented had not arisen. *E.g.*, *Baskett v. Parsons*, C33/329, ff. 418v–419r (Ch. 1718) (waiving award of profits).

184. *Jesus Coll. v. Bloom*, 3 Atk. 262, 263, 26 Eng. Rep. 953, 953, Amb. 54, 55, 27 Eng. Rep. 31, 31 (Ch. 1745) (a claim for waste).

185. *E.g.*, *Fradella v. Weller*, 2 Russ. & Myl. 247, 250, 39 Eng. Rep. 388, 389 (Ch. 1831); *Macklin v. Richardson*, C33/436, ff. 35v–36r, Amb. 694, 697, 27 Eng. Rep. 451, 452 (Ch. 1770); *Gay v. Walker, sub nom. Baller v. Watson*, C33/369, ff. 315v–316v (Ch. 1737) (waiving against one defendant only); *Baskett v. Parsons*, C33/329, ff. 418v–419r (Ch. 1718).

Court of Chancery between 1660 and 1800. In reviewing these cases, I was looking for several things. First, of the 220 cases, how many sought injunctions, and to what lengths did the plaintiffs go, if any, in stating they had no remedy in the common-law courts? Of the bills that sought injunctions, how many were granted? And of those that were denied or dissolved, why was that so? Was it ever because there was an adequate remedy at law? Lastly, insofar as there was any record of a defendant arguing the bill should be dismissed on a demurrer or plea, how did the Chancery rule on that request? I have already answered the first question—every copyright-infringement suit that I identified and reviewed asked for an injunction.¹⁸⁶ The remaining questions are answered in the sections that follow.

1. (Not?) Arguing the Inadequacy of the Remedy at Law

The first place a plaintiff could have argued the inadequacy of the remedy at law was, of course, in the bill of complaint. I have already recounted how, with but one exception, every bill contained a basic averment that the plaintiff had no remedy at law, but that those averments were merely pro forma and standing alone were inconsequential.¹⁸⁷ Nevertheless, bills often contained an additional explanation for why the Chancery had jurisdiction to hear the bill. The following example from *Pope v. Bickham* is typical:

In Tender Consideration whereof and for that your Orator is remediless in the premisses by the strict rules of the Common Law and only releivable in a Court of Equity where matters of Fraud and Discovery and of this nature are properly Cognizable and releivable and for that your Orator Cannot have a Discovery of the matters aforesaid save from the answer of the said George Bickham and the rest of the Confederates thereto when Discovered on Oath nor can your \Orator/ prevent or restrain the printing from plates Engraved or otherwise or the publishing or Sale of the Copys of the said book or poem Engraved printed and published in prejudice of your Orators right and benefit as aforesaid without an Injunction for that purpose from this honourable Court[.]¹⁸⁸

This sort of language was not unique to copyright cases, and was indeed boilerplate for any suit in equity in which a discovery and injunction was sought. But the bill only states the obvious—that common-law courts

186. See *supra* note 137 and accompanying text.

187. See *supra* notes 138–42 and accompanying text.

188. *Pope v. Bickham*, C11/626/30 (Ch. 1743/4). *Accord* *Gibbs v. Cole*, C11/261/60, m. 1 (Ch. 1733/4).

could not order discovery from a party, nor could they grant an injunction.¹⁸⁹ It does not explain, nor do any of the bills I encountered explain, why a remedy at law, such as damages or penalties, would be inadequate compensation.¹⁹⁰

We are thus left to examine records that are more directly associated with injunction requests. One class of requests can be dispensed with at the outset. In the case of TROs as a matter of course, it can be said with confidence that a plaintiff would never have had to argue that the remedy at law was inadequate. These injunctions were, as already noted, granted automatically and often *ex parte*. Once it had become clear the defendant could not respond on time, a plaintiff merely had to ask for the TRO and the court would grant it.¹⁹¹ The court would not have entertained any objection to the TRO on the ground that an adequate remedy existed at law. Indeed, any objection to the injunction would have to have been made on a motion to dissolve the injunction after the answer was put in or by demurrer to the bill, during which time the TRO would remain in force.

The remaining types of injunction requests—merits-TROs, preliminary injunctions, and final injunctions—could have in theory presented an opportunity for the parties to argue over the inadequacy of the remedies at law, but with few exceptions any such proof has long since

189. See W.H. Bryson, *Introduction to 1 CASES CONCERNING EQUITY AND THE COURTS OF EQUITY 1550–1660*, at xxiii–xxiv (W.H. Bryson ed., 2001) [hereinafter *CASES CONCERNING EQUITY*]; D.M. KERLY, *AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 76–78* (photo. reprint 1986) (1890).

190. The closest case was *Stationers v. White*. There, the plaintiffs admitted in their bill that they had not registered the work at issue—a new version of the psalms of David—and as a consequence could not have the benefit of the Statute of Queen Anne. See *Stationers v. White*, C11/749/6, m. 1 (Ch. 1716). A defendant in the case argued that the failure to register should foreclose a suit in equity for lack of notice:

[T]he plaintiffs by their Bill Confessing that by their not Registering the said New Version according to the Act of Parliament aforesaid that they are Remediless at Common Law this Defendant hopes the said plaintiffs shall not have any Aid or Assistance of this Honourable Court the said plaintiffs by their Carelesse or Wilfull Neglect to Register the same haveing through Ignorance Surprized this Defendant into a Suite & thereby Put this Defendant to great Charge & Expence which might have been prevented by the said plaintiffs Registering their Title to the said Version.

Id. at C11/751/16 (Ch. 1716/7). The case was an odd one. Because the book was a psalm it fell under the Stationers' 1615/6 patent and registration was not required to receive protection under the patent. Yet, the plaintiffs did not mention the patent in their bill. There is some evidence to suggest that though the suit had been brought in the name of the Stationers' Company, the Company actually had no interest in pursuing it and that perhaps the suit had been brought without their permission. *Id.*

191. Further reflecting the automatic nature of these TROs, some Chancellors in the seventeenth century instructed their clerks to issue TROs when answers were to be by *dedimus potestatem* even without the perfunctory motion. See LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGOMENA OF CHANCERY AND EQUITY" 72, 142–43 (D.E.C. Yale ed., Wm. W. Gaunt & Sons 1986) (c. 1674); Order of Nov. 26, 1649, in *GENERAL ORDERS*, *supra* note 126, at 117, 117–18.

vanished. Due to long-standing practice, injunction requests were made by oral motion rather than by written petition.¹⁹² Though use of petitions was not unheard of, it was typically confined to instances where the court was out of session, such as during the long vacation of the Trinity term.¹⁹³ For example, in *Nicol v. Kearsley*, the court granted an injunction to stay the defendant from printing Captain Cook's *Voyages* on petition, between the Seals, at the Lord Chancellor's house.¹⁹⁴ And in *Tonson v. Clifton*, the plaintiff petitioned for an injunction to last for three days until a proper oral motion could be made in open court, both of which the court granted.¹⁹⁵ Apart from these two cases, however, every other injunction request I encountered was made on oral motion, meaning we cannot simply consult written filings to determine whether plaintiffs argued inadequacy.¹⁹⁶

Being without petitions, nor comprehensive records of what litigants said in open court,¹⁹⁷ we are left to wonder whether the parties spent any significant time discussing the remedies available at law or whether the parties and the court concerned themselves more with the merits of the claim. Because we cannot determine what was said, we must instead focus on what was done. Court rulings indicate it was the merits that mattered most, and that the Chancery actively looked to the common-law courts to help determine the right, but not the proper remedy.

192. Francis Bacon first articulated this rule when he ordered that "[i]njunctions . . . are not to be granted upon petitions." Ordinances Made by the Lord Chancellor Bacon, No. 80 (Jan. 29, 1618/9), in *GENERAL ORDERS*, *supra* note 126, at 1, 35. Chancellor Clarendon relaxed the rule in 1661 by allowing injunction requests by petition, so long as the other side received notice and a copy of the petition. *See Orders Heretofore Used in Chancery* (May 22, 1661), Order on Petitions, in *GENERAL ORDERS*, *supra* note 126, at 165, 214–15.

193. *See* 2 HARRISON, *supra* note 149, at 237 n.(‡); ROBERT HINDE, *THE MODERN PRACTICE OF THE HIGH COURT OF CHANCERY* 583, 588 n.(t) (Dublin, E. Lynch et al. 1786).

194. *Nicol v. Kearsley*, C33/462, f. 461r (Ch. 1784). This procedure was so unusual that Dicken thought it worth reporting. *See Nichols v. Kearsly*, Dick. 645, 21 Eng. Rep. 422 (Ch. 1784). Unfortunately, I have been unable to locate a copy of the *Nicol* petition in the C28/25 petition book.

195. *Tonson v. Clifton*, C33/340, f. 30r (Ch. Dec. 8, 1722), f. 33v (Ch. Dec. 11, 1722). Petitions before 1756 are not preserved in the Chancery records.

196. The affidavits filed for merits-TROs and preliminary injunctions are also unrevealing on this point. Affidavits were limited to recounting relevant facts, such as the plaintiff's ownership of title and the defendant's actual or impending infringement. *E.g.*, *Hawkesworth v. Parkinson*, C31/187, nos. 79 & 80 (Ch. 1773); *Tonson v. Clifton*, C41/38, nos. 878 & 949 (Ch. Mich. 1722). They did not serve, nor would they, to argue whether the remedies available at law were adequate.

197. The personal notes of attorneys sometimes survive. This occurred, for example, on a request for a merits-TRO in the case of *Stationers v. Carnan*, C33/442, f. 7v (Ch. 1773). A brief used by the attorney at argument survives in the records of the Stationers' Company. *See Stationers v. Carnan*, Brief, To Move for Injunction at the Rising of the Court on 19th Nov. 1773, in *RECORDS OF THE WORSHIPFUL COMPANY OF STATIONERS 1554–1920, REEL 99* (Robin Myers ed., 1985). Notably, this document reveals that counsel focused on the merits of the case and contains no mention of the inadequacy of the remedies available at law.

2. Injunction Outcomes

Of the copyright cases for which there is a record of the decision, injunction requests were granted in all, with the exception of twenty-eight cases where an injunction was either denied *ab initio* or dissolved following a change in circumstances. The overwhelming norm was thus for the court to grant the injunction. Of those that were denied or dissolved, it was mostly on account of a grave defect in the merits of the plaintiff's case. For example, there might have been a problem with the plaintiff's right or title, or perhaps the plaintiff could not prove that the work had actually been copied. Sometimes the copying might have also been a fair abridgment. The Chancery also denied injunctions under the principles that the defendant would suffer too great a hardship or the plaintiff had unclean hands. Notably, however, the court never denied a request on the ground that the remedy was at law.¹⁹⁸

a. Title/Right Problems

In cases involving letters patent, the Chancery early on refused to grant a merits-TRO or preliminary injunction until the patent's validity had first been tested at law. This occurred in 1683, for example, when the King's Printers sought to prevent the importation of English Bibles printed abroad. The Lord Keeper refused to grant an injunction unless the right was "plain," and ordered that the patent be tried at law on stipulated facts and "when the trial [was] over, [to] come back again."¹⁹⁹ The same occurred when a dispute arose between the King's Printers and the University of Oxford.²⁰⁰ It eventually came to be, however, that the court would not require a plaintiff to first adjudge the patent at law before being eligible for an injunction.²⁰¹ Thus, in *Baskett v. Bentham*, the court continued an injunction while the parties tested the King's Printers' patent in the Court of King's Bench.²⁰² And when the patent ultimately came back

198. I would also add briefly the obvious situation where the Chancellor would dissolve an injunction upon hearing from the parties that they had settled. *E.g.*, *Baskett v. Osbourne*, C33/345, f. 246r (Ch. 1725/6) ("[P]laintiffs & Defendants have Accomodated all mattres in difference in this cause. It was therefore prayed that the said Injunction may be dissolved & that the Plaintiffs Bill may now stand Dismissed out of this Court without costs[,] which is Ordered accordingly . . .").

199. *Hills v. Lee*, *sub nom.* *Anonimus*, 1 Vern. 120, 120, 23 Eng. Rep. 357, 357, C33/259, ff. 313v–314r (Ch. 1682/3).

200. *Hills v. Univ. of Oxford*, C33/263, ff. 766v–767r, 1 Vern. 275, 275–76, 23 Eng. Rep. 467, 467 (Ch. 1684).

201. *See Dodsley v. Kinnersley*, Amb. 403, 406, 27 Eng. Rep. 270, 271–72 (Ch. 1761) (noting the prior practice).

202. *Baskett v. Bentham*, C33/379, f. 322r (Ch. 1742/3). *Accord* *Baskett v. Cunningham*, 2 Eden 137, 138, 28 Eng. Rep. 848, 849 (Ch. 1762).

unenforceable vis-à-vis the rights of the defendant, the court, not surprisingly, dissolved the preliminary injunction.²⁰³

Pawlett v. Lee in 1681 provides an example of a case where the plaintiff's Stationers' copyright was successfully questioned during a lapse of the Printing Act of 1662.²⁰⁴ There, the court granted a TRO as a matter of course until answer and further order.²⁰⁵ The defendants submitted their answers which, though later found to be insufficient by a master, contained so compelling a point as to persuade Lord Nottingham to order after "debate of the mattre & hearing what was alledged on either side," that the TRO previously granted be "from henceforth absolutely dissolved."²⁰⁶ Several points were made in the answers, and it is thus difficult to tell which convinced the court. But one can surmise that it very well could have been the first argument that the work was only protected through the right of first publication by the particular printer, but not after. All three answers stated:

And this defendant further saith that hee is advised that the Complainant cannot now Claime any propriety in the said Coppies for that hee hath had the benefitt of the first Impression Utterance and Sale[.] And the said bookes being now become bookes of Generall use and part of A generall Trade any one of the Kings Subjects that are bred up in the Trades of printing or bookselling may print utter or sell . . . any of the said bookes . . .²⁰⁷

Nottingham's dissolution of the injunction may have signaled his belief that during the legislative lapse of the Printing Act no copyright at common law existed to buttress the Stationers' copyright and prohibit others from making further impressions of the works.

Several years later, after the Chancellorship had changed hands,

203. *Baskett v. Bentham, sub nom. Baskett v. Univ. of Cambridge*, 1 Black. W. 105, 121–22, 96 Eng. Rep. 59, 65–66 (K.B. 1758). Similarly, in *Stationers v. Carnan*, C12/79/42 (Ch. 1773–74), a partial preliminary injunction was allowed while the parties tested the Stationers' class patent covering almanacs in the Court of Common Pleas. After the Common Pleas invalidated the patent, *see Stationers v. Carnan*, 2 Black. W. 1004, 1009, 96 Eng. Rep. 590, 593 (C.P. 1775), the Chancery dissolved the injunction, *see id.* at C33/444, f. 321v (Ch. 1775).

204. *Pawlett v. Lee*, C10/202/96 (Ch. 1681).

205. *Id.* at C33/258, f. 82r (Ch. 1681).

206. *Id.* at f. 85v (Ch. 1681).

207. *Id.* at C10/202/96, m. 2 (Ch. 1681). *Accord id.* at mm. 3–4. The books at issue—*The Whole Duty of Man*, *The Causes of the Decay of Christian Piety*, and *The Gentleman's Calling*—had previously been printed by Pawlett's predecessor in interest, Mary Garthwait (and before her by her husband Timothy Garthwait). Thus, the defendants' arguments seem to have been that Pawlett only had a right to print the books once, after which others could print them. This argument would have been patently absurd under the Printing Act of 1662.

Pawlett's widow and son brought an identical suit for infringement of the same books against the same defendants (and others)²⁰⁸ and encountered a similarly hostile reception. On Pawlett's request for an injunction, the defendants' counsel

insisted that the plaintiffs Father in his life tyme exhibited a Bill against the Defendant Lee and severall others for selling the same severall Bookes severally printed without his license or Consent and that this Bill was to the same Effect as the former and that the Injunction in that Cause was dissolved²⁰⁹

The Lord Keeper thought "the matter in question was whither the plaintiff is the true proprietor of the severall Coppys of the severall Bookes," and therefore ordered Pawlett to bring an action at law before the Lord Chief Justice of the King's Bench on stipulated facts to determine that very issue.²¹⁰ I found no order granting an injunction in the meantime, so we must presume that none was made. Given the decidedly poor outcomes in the *Pawlett* cases, it is not surprising that the Stationers failed (most likely intentionally) to bring these suits to the attention of the King's Bench in *Millar v. Taylor*.²¹¹

The remaining cases in which a title/right problem torpedoed an injunction all involve published works under the Statute of Queen Anne (and its successors) or unpublished manuscripts. In *Gilliver v. Watson*,²¹² for example, the court granted a merits-TRO until answer,²¹³ but then dissolved it upon reading the answer of the defendants and opposing affidavits which claimed that neither the bill nor the supporting affidavits traced the title of copyright back to a named author, and indeed that others had heard the plaintiff admit he had no right in it.²¹⁴ Title also appears to have been seriously in doubt in *Hawkesworth v. Parkinson*, a case involving an unpublished work, as the court refused to convert a merits-TRO into a preliminary injunction.²¹⁵ And in *Jefferys v. Baldwin*, the court

208. *Pawlett v. Lee*, C10/211/60 (Ch. 1683/4).

209. *Id.* at C33/262, ff. 323v–324r (Ch. 1683/4).

210. *Id.* The action does not appear to have been pursued.

211. *See supra* note 109. The Stationers' Company was certainly aware of these suits as it had given Robert Pawlett and later his wife leave to file them. *See In re Pawlett*, Court Book E, f. 160r (1682); *In re Pawlett*, Court Book F, f. 3v (1683).

212. *Gilliver v. Watson*, C11/2581/36 (Ch. 1729).

213. *Id.* at C33/351, f. 284v (Ch. 1729).

214. *Id.* at C11/2581/36, m. 2, *sub nom.* *Gilliver v. Snaggs*, 2 Eq. Ca. Abr. 522, 22 Eng. Rep. 441 (Ch. 1729). A similar title problem plagued the bill in another case, leading the Chancellor to dissolve an injunction. *See Nicol v. Stockdale*, C12/132/23, m. 1 (Ch. 1784), 3 Swans. 687, 688–89, 36 Eng. Rep. 1023, 1023 (Ch. 1785).

215. *Hawkesworth v. Parkinson*, C33/439, f. 304v (Ch. 1773). The order itself states only that the

questioned whether the plaintiff authored the work.²¹⁶

Expiration of the term under the Statute of Queen Anne affected other cases. Thus, in *Osborne v. Donaldson*, the court dissolved a TRO after the answer suggested that the copyright term had expired.²¹⁷ The Lord Chancellor was unsure whether a common-law copyright existed outside the Statute, so he ordered the parties to test the right at law.²¹⁸ Moreover, after the decision in *Donaldson v. Becket*, several other plaintiffs abandoned their suits based on the common-law right and had their bills (and injunctions) dismissed for want of prosecution.²¹⁹

b. Infringement Problems

The Court of Chancery also denied or dissolved interlocutory injunctions where the infringement was doubtful. In *Dodsley v. Kinnersley*,²²⁰ for example, the Lord Keeper refused to grant a merits-TRO where the defendant's work appeared to be a fair abridgment.²²¹ The case was so weak, in fact, that the Master of the Rolls subsequently dismissed the suit and left the plaintiff to an action at law.²²² Many years later, in *Carnan v. Paterson*, the Master of the Rolls granted a preliminary injunction despite a master's report detailing the differences between the plaintiff's and defendant's books.²²³ The Lord Chancellor, on a motion to dissolve the injunction, was not as confident as the Master of the Rolls about the merits of the case, and he dissolved the injunction and ordered the master in ordinary to compare the books once more.²²⁴

plaintiff had failed to show cause why the injunction should be continued, *id.*, but Mark Leeming believes it was due to a problem with the chain of title. Mark Leeming, *Hawkesworth's Voyages: The First "Australian" Copyright Litigation*, 9 AUSTL. J. LEGAL HIST. 159, 165–66 (2004). For another manuscript case where an injunction was dissolved in part, see *Pope v. Curl*, 2 Atk. 342, 26 Eng. Rep. 608 (Ch. 1741).

216. *Jefferys v. Baldwin*, C12/1903/7 (Ch. 1752–53), Amb. 164, 164, 27 Eng. Rep. 109, 109 (Ch. 1753) (granting a demurrer and refusing an injunction because the plaintiff had commissioned the engraving).

217. *Osborne v. Donaldson*, C12/517/52, m. 2 (Ch. 1764), 2 Eden 327, 328, 28 Eng. Rep. 924, 924 (Ch. 1765).

218. *Osborne*, 2 Eden at 328, 28 Eng. Rep. at 924. The action was not pursued.

219. *Rivington v. Donaldson*, C33/442, f. 494r (Ch. 1774); *Rivington v. Lloyd*, C33/442, f. 160v (Ch. 1774); *Strahan v. Cavell*, C33/442, f. 512r (Ch. 1774).

220. *Dodsley v. Kinnersley*, C12/496/2 (Ch. 1759), Amb. 403, 27 Eng. Rep. 270 (Ch. 1761).

221. *Id.* at 403, 27 Eng. Rep. at 270.

222. *Id.* at 406, 27 Eng. Rep. at 272. This claim also appears to have not been pursued.

223. *Carnan v. Paterson*, C33/465, ff. 449v–450r, *sub nom.* *Carnan v. Bowles*, 2 Bro. C.C. 80, 29 Eng. Rep. 45, 1 Cox 283, 29 Eng. Rep. 1168 (Ch. 1786).

224. *Carnan v. Paterson*, C33/467, f. 23v, *sub nom.* *Carnan*, 2 Bro. C.C. at 85 n.(1), 29 Eng. Rep. at 48, 1 Cox at 284–85, 29 Eng. Rep. at 1168 (Ch. 1786).

c. Hardship and Unclean Hands

Before 1800, the Court of Chancery also denied or dissolved copyright injunctions on the grounds that the defendant would suffer too great a hardship or because the plaintiff had come to the court with unclean hands. In a case involving the first scenario, the court refused to grant an injunction while the plaintiff's patent was being tested at law because "in case the right should be found with [the defendant, who also held a patent], they would by such prohibition receive a prejudice, that [the court] could not compensate nor make good to them."²²⁵

The case of *Baskett v. Brotherton* and *Parsons* serves as an interesting example of the court altering a previous injunction to accommodate a severe hardship to the defendant.²²⁶ The King's Printers had brought suit to enjoin the defendant from importing religious books from Scotland into England in violation of their patent. The Chancery permanently enjoined the defendant²²⁷ and later clarified that the books already seized by the customs house were to remain there indefinitely.²²⁸ Just over one year later, the defendant stated that it was "a great loss & prejudice to the Defendant to have the books detained from him," and he prayed that the books be released so that he could take them back to Scotland. The court agreed on condition that he post security.²²⁹

Unclean hands were present in *Cary v. Faden*.²³⁰ There, the Chancellor refused to grant a merits-TRO because even though the defendant had copied parts of the plaintiff's work, the plaintiff had himself copied large parts of the work of another.²³¹ The plaintiff was instead left with an action at law, where a jury verdict returned a nominal award of one

225. *Hills v. Univ. of Oxford*, 1 Vern. 275, 276, 23 Eng. Rep. 467, 467 (Ch. 1684). *Accord* *Millar v. Taylor*, 4 Burr. 2303, 2324, 98 Eng. Rep. 201, 213 (K.B. 1769). It must be noted, however, that in these two cases there was also a substantial question on the merits of the plaintiff's case, thus suggesting that the hardship to the defendant was relevant only when the right was doubtful. This later became the view of some chancellors. *Stevens v. Keating*, 2 Ph. 333, 334–35, 41 Eng. Rep. 970, 971 (Ch. 1847).

226. *Baskett v. Brotherton*, C11/2610/16, C11/239/49 (Ch. 1716), *sub nom.* *Baskett v. Parsons*, C11/1706/9 (Ch. 1720/1).

227. *Id.* at C33/329, ff. 418v–419r (Ch. 1718).

228. *Id.* at C33/335, ff. 41v–42r (Ch. 1720).

229. *Id.* at C33/337, ff. 124v–125r (Ch. 1721/2). A similar modification occurred in another case where, due to the plaintiff's lengthy delay in pursuing an action at law to test their patent and the defendant's hardship, the court permitted the defendant to sell some of his infringing books in the meantime. *Stationers v. Parker*, C33/290, ff. 140v–141r (Ch. 1697).

230. *Cary v. Faden*, C12/256/9, 5 Ves. Jr. 24, 31 Eng. Rep. 453 (Ch. 1799).

231. *Id.* at 25–26, 31 Eng. Rep. at 454.

shilling.²³²

3. Demurrers and Pleas

If a defendant sought to seriously challenge the Chancery's jurisdiction to relieve in a matter, the defendant would file a demurrer or plea. A demurrer admitted the facts alleged in the bill but claimed they were somehow insufficient to warrant an answer. A plea presented facts outside the bill to suggest the same. Either process could be directed to the entire bill—that is to say, to the request for discovery and the remedy sought—or solely to the remedy sought.²³³ I have unearthed thirty-four copyright-infringement cases in which a defendant filed a demurrer or plea, which is a relatively low number when considered in context. Relative to all copyright suits filed, that amounts to only 15 percent. The proportion increases to 26 percent if we count only those cases where a defendant had actually filed a response to the suit, rather than defaulting altogether or appearing only. But that proportion is then reduced to 20 percent if only demurrers and pleas that were actually pursued to a hearing are included.²³⁴ In any event, in cases where there is a record of a decision on a demurrer or plea, most were denied, and for those that were granted, it was never because there was an adequate remedy at law.

232. *Cary v. Longman*, 3 Esp. 273, 275, 170 Eng. Rep. 613, 614 (K.B. 1801), *new trial denied* 1 East 358, 359, 362, 102 Eng. Rep. 138, 139–40 (K.B. 1801).

233. See *Hodgkin v. Longden*, 8 Ves. Jr. 2, 3, 32 Eng. Rep. 249, 249–50 (Ch. 1802). During most of our period of study, the defendant had to choose his target carefully. If the defendant demurred to the entire bill, and the court agreed that the bill did not state a valid claim for relief in equity, but *did* state a valid request in equity for discovery, then the court would deny the entire demurrer. The defendant would have to refile the demurrer as to the remedy only, answer the discovery request, and pay costs for the failure of the first demurrer. But starting in 1788, Lord Thurlow changed this practice and held that a valid ground for rejecting a request for relief automatically called for rejecting what otherwise would be a valid request for discovery (which might be used in an action at law, for example). See *Price v. James*, 2 Bro. C.C. 319, 29 Eng. Rep. 175, Dick. 697, 21 Eng. Rep. 442 (Ch. 1788). See also *Collis v. Swayne*, 4 Bro. C.C. 480, 29 Eng. Rep. 999 (Ch. 1793). This meant defendants were no longer forced to demur solely to the form of relief when that was the only true defect of the bill. The new rule applied to pleas as well. See *Sutton v. Earl of Scarborough*, 9 Ves. Jr. 71, 75, 32 Eng. Rep. 528, 529 (Ch. 1803). Lord Eldon lamented this change from prior practice and held that a defendant could still voluntarily choose to demur to the remedy only and answer the discovery, thereby essentially tracking the prior practice. See *Todd v. Gee*, 17 Ves. Jr. 273, 277, 34 Eng. Rep. 106, 107 (Ch. 1810); *Hodgkin*, 8 Ves. Jr. at 3, 32 Eng. Rep. at 250. See also *Barker v. Dacie*, 6 Ves. Jr. 681, 686, 31 Eng. Rep. 1256, 1258 (Ch. 1802); *French v. Dear*, 5 Ves. Jr. 547, 548, 31 Eng. Rep. 731, 731 (Ch. 1800).

234. A filed demurrer or plea would sit idle until a party, typically the defendant, petitioned the court to calendar it for a hearing. HINDE, *supra* note 193, at 213. Failing to set a demurrer or plea down for a hearing abandoned it. See Ordinances of Nov. 17, 1635, No. 14, in GENERAL ORDERS, *supra* note 126, at 69, 77 (“And if the defendant who demurred make no such instance [i.e., request] to the register within eight days after the plea or demurrer is put in Court, the same, without any motion, shall be disallowed of course, as put in for delay . . .”).

In *Jefferys v. Baldwin*, for example, the Chancellor dismissed a case on demurrer because the plaintiff had not authored the engraving at issue but had merely commissioned it from another.²³⁵ Other dismissals occurred due to technical defects of the bill. Thus, in *Harrison v. Hogg*, the court granted a demurrer due to the misjoinder of the plaintiffs.²³⁶ In another case, *Hills v. University of Oxford*, the defendant demurred because the plaintiffs had failed to name a party whose participation was necessary to conclude the case.²³⁷ Before the court could rule on the demurrer, the plaintiff amended the suit to add the party,²³⁸ but it seems clear the demurrer would have otherwise been granted.

The form of demurrer most commonly denied was one in which the defendant argued that he should not be compelled to make any discovery whatsoever as it would be against his penal interest. As I will explain further in Part VII.A, by long tradition, the Court of Chancery would not order a defendant to disclose any fact that might lead to a penalty or forfeiture. Thus, in *Burnet v. Chetwood*, after a TRO had been granted, the defendants demurred, stating they were advised that

they cannot make the said discovery or deliver up the said Sheets if any such there were without making themselves lyable to the penalties and forfeitures mentioned in the said Statute [of Queen Anne] and that by the constant rules of this Court no Defendant is obliged to Answer to any matter the confession whereof may Subject him to any forfeiture or penalty at Law.²³⁹

Though defendants were correct, these demurrers were overruled because plaintiffs, knowing of the rule, typically waived their right to the penalties in the bill.²⁴⁰ Moreover, the Court of Chancery also rejected demurrers that had argued these waivers were invalid because a plaintiff could not waive the part of the penalty owed to the Crown.²⁴¹

Other grounds on which defendants demurred or pleaded (unsuccessfully) included arguments that: (1) the translation of a party's work was not prohibited by the Statute of Queen Anne;²⁴² (2) the work had

235. *Jefferys v. Baldwin*, C12/1903/7, m. 2, Amb. 164, 27 Eng. Rep. 109 (Ch. 1753).

236. *Harrison v. Hogg*, C12/651/40, m. 2, 2 Ves. Jr. 323, 328, 30 Eng. Rep. 654, 656 (Ch. 1794).

237. *Hills v. Univ. of Oxford*, C8/273/49, m. 2 (Ch. 1684).

238. *Id.* at C33/261, f. 314v (Ch. 1684).

239. *Burnet v. Chetwood*, C11/242/45, m. 2 (Ch. 1721). Here, the defendant did not set the demurrer for hearing. *See also* *Mason v. Murray*, C12/1643/16, m. 3, C33/448, f. 507r (Ch. 1777).

240. *See infra* text accompanying notes 419–24.

241. *Gay v. Walker*, C11/1739/34, m. 1, C33/353, f. 153v (Ch. 1729–30).

242. *Burnet v. Chetwood*, C11/242/45, m. 2 (Ch. 1721). The defendant did not set the demurrer for hearing.

only been registered after its initial publication, contrary to the Statute;²⁴³ (3) the work had not been registered at all, contrary to the Statute;²⁴⁴ (4) the Stationers' 1615/6 patent was an illegal restraint on trade;²⁴⁵ (5) a defendant who was apprenticed to a master printer could not answer unless his master was also named in the suit;²⁴⁶ and (6) a printer should not have to disclose the secrets of his trade.²⁴⁷

I have found only a handful of cases where the defendant demurred—at least in part—on the ground the plaintiff had an adequate remedy at law. The first three cases arose in the seventeenth century, and in each of these the defendants raised the argument in a deemphasized manner. Two of the three involved the Stationers' 1615/6 patent, and the third a Stationers' copyright. The court denied all three demurrers outright. In two other cases, both of which were filed after the Statute of Queen Anne, the defendants advanced more sophisticated arguments. But in both cases, the defendants never pressed their demurrers to a hearing, likely indicating that they doubted the merits of their positions.

In the first case, *Stationers v. Lee*, the Stationers sued several defendants in 1681 for printing works in violation of the Company's 1615/6 patent.²⁴⁸ One of the defendants, Samuel Lee, filed a plea and demurrer in which he raised numerous arguments. Near the end of an otherwise lengthy document, Lee arrogated that "it appeared by the Complainants Bill that they have a proper remedy at Law."²⁴⁹ The court rejected this throwaway argument and ordered Lee to "put in a full & perfect answer to the plaintiffs bill."²⁵⁰ *Stationers v. Braddyll*, filed in 1682, was identical in all pertinent respects.²⁵¹ A defendant, John Gaine, used the same argument Lee had made the year before, and Gaine did so at the very end of his plea and demurrer.²⁵² The court overruled the motion and ordered him to answer as well.²⁵³

The same argument was then made in *Herringman v. Clerke*, a case

243. *Gay v. Walker*, C11/1739/34, m. 1, C33/353, f. 153v (Ch. 1729–1729/30).

244. *Stationers v. White*, C11/749/6, m. 2, C33/328, f. 37v (Ch. 1716). *See also supra* note 190.

245. *Stationers v. Braddyll*, C7/580/112, C33/258, f. 387r (Ch. 1681/2).

246. *Baskett v. Watson*, C11/1179/29, mm. 2–3 (Ch. 1717/8–19). In this case, a hearing was set, but the defendant then filed an amended answer, indicating an abandonment of his demurrer.

247. *Herringman v. Clerke*, C8/301/33, m. 2, C33/257, f. 608v (Ch. 1681/2).

248. *Stationers v. Lee*, C5/560/41, m. 1 (Ch. 1681).

249. *Id.* at m. 2.

250. *Id.* at C33/258, f. 25r (Ch. 1681).

251. *Stationers v. Braddyll*, C7/581/162, m. 1 (Ch. 1681/2).

252. *Id.* at C7/580/112 (Ch. 1681/2).

253. *Id.* at C33/258, f. 387r (Ch. 1682).

based on the Stationers' copyright.²⁵⁴ Three of the defendants put in a demurrer and answer in which they raised several arguments. Buried within the document was the assertion that if the works had been printed in violation of the plaintiff's copyright, the plaintiff could "bring his accion at law against the person or persons that printed the same for recovery of his damages & for that damages for the same are onely recoverable at law."²⁵⁵ In denying the demurrer, the Chancellor did not acknowledge the argument.²⁵⁶ Indeed, it appears from the orders in the case that the parties and the court concerned themselves solely with the other grounds presented in the demurrer.

The most interesting demurrer I encountered occurred in the case of *Tonson v. Baker*.²⁵⁷ The case is important because it was probably the first ever filed involving the Statute of Queen Anne,²⁵⁸ but the demurrer is even more so because it directly challenged the Court of Chancery's jurisdiction to relieve in copyright-infringement suits. Under orders from the House of Lords, the Lord Chancellor had awarded Jacob Tonson the exclusive right to publish the trial of Henry Sacheverell, a churchman who had preached against the government. Tonson entered the title of the book prior to publication in the "Register book of the Company of Stationers . . . According to the late Act of Parliament Intituled an Act for Encouragement of Learning."²⁵⁹ He thereby allegedly "became intituled to the sole \righ of/ Printing the said tryall for fourteen yeares."²⁶⁰ After Tonson began selling his first impression,²⁶¹ he learned that John Baker had sold a large number of comprints. Tonson sued in the Chancery, seeking a merits-TRO enjoining Baker from further sales which the Master of the Rolls granted.²⁶²

254. *Herringman v. Clerke*, C8/301/33, C8/309/116 (Ch. 1681/2–83).

255. *Id.* at C8/301/33, m. 2 (Ch. 1681/2).

256. *Id.* at C33/257, f. 608v (Ch. 1682), C33/259, ff. 278v–279r (Ch. 1682/3).

257. *Tonson v. Baker*, C9/371/41 (Ch. 1710).

258. The bill of complaint was filed on July 8, 1710, just three months after the effective date of the Statute of Queen Anne. *Tonson* thus predates the case of *Nutt v. Gibson*, C11/1965/21 (Ch. 1713/4–14), which was previously thought to have been the first case to mention the Statute.

259. *Tonson v. Baker*, C9/371/41, m. 1 (Ch. 1710).

260. *Id.* at C33/314, f. 375v (Ch. 1710). In subsequent cases, this form of right was acknowledged to be based on privilege, rather than on the Statute. See *Gurney v. Longman*, 13 Ves. Jr. 493, 506, 33 Eng. Rep. 379, 384 (Ch. 1807) (involving a similar order from the House of Lords granting publication rights in a trial); *Manby v. Owen*, C33/404, f. 164v (Ch. 1755) (similar order from the Lord Mayor).

261. *Tonson's* book was titled THE TRYAL OF DR. HENRY SACHEVERELL, BEFORE THE HOUSE OF PEERS, FOR HIGH CRIMES AND MISDEMEANORS (London, Jacob Tonson 1710). For a copy of the House of Lords' order to the Lord Chancellor, see *id.* at 456.

262. *Tonson v. Baker*, C33/314, f. 375v (Ch. 1710). Copies of the infringing work that were sold before Baker was enjoined survive today. See A COMPLETE HISTORY OF THE WHOLE PROCEEDINGS OF

Rather than answer, Baker demurred to all discovery and relief on the ground that the Chancery had no jurisdiction to remedy copyright infringement under the Statute of Queen Anne. He pleaded that the penalties under the Statute were

by the same Act to be recovered in any of her Majestys Courts of Record at Westminster . . . And there is nothing in the said Act that gives this Honourable Court or any other Court of Equity a Cognisance of any thing done in breach thereof nor ought this Defendant in a Court of Equity to \be obliged to/ discover whether he has been guilty of an Offence against a penall Statute.²⁶³

Baker also argued that whether he had violated the Statute was only “inquireable and determinable in a Court of Law and not in a Court of Equity.”²⁶⁴ He further added that insofar as he may have violated the order from the House of Lords, that was a matter determinable only in the House of Lords itself.²⁶⁵

Unfortunately, it seems Baker and his counsel did not think much of the demurrer, as they never pursued it to a hearing.²⁶⁶ As a consequence, it was de facto overruled. Moreover, because Baker never put in an answer to the bill, he ensured that the injunction formerly granted “until answer and further order” would continue indefinitely.

Many years later, a defendant raised a similar argument, but then also appeared to abandon it. In *Eyre v. Walker*, the plaintiffs claimed to hold the copyright in *The Whole Duty of Man*,²⁶⁷ a work whose term had already expired under the savings clause of the Statute of Queen Anne. Believing the work to be in the public domain, the defendant Robert Walker began to print his own edition. Plaintiffs sued and within days of filing their bill obtained a merits-TRO.²⁶⁸ Walker demurred in part and answered in part. For his answer, he alleged that the protection of the savings clause had expired and that the work was not otherwise protected by letters patent.²⁶⁹ But in the demurrer portion, at the very top of the document, he specifically objected to the injunction on the ground that the remedy was at law:

THE PARLIAMENT OF GREAT BRITAIN AGAINST DR. HENRY SACHEVERELL WITH HIS TRYAL BEFORE THE HOUSE OF PEERS (London, J. Baker 1710).

263. *Tonson v. Baker*, C9/371/41, m. 2 (Ch. 1710).

264. *Id.*

265. *Id.*

266. I should also add that Baker’s counsel had been appointed by the court after it determined that Baker was *in forma pauperis*. *Tonson v. Baker*, C33/314, f. 421v (Ch. 1710).

267. *Eyre v. Walker*, C11/1520/29, m. 1 (Ch. 1735). *See also supra* note 207.

268. *Id.* at C33/363, f. 419v (Ch. 1735).

269. *Id.* at C11/1520/29, m. 2 (Ch. 1735).

[A]s to such part and so much of the said Bill as seeks to Restrain this Defendant by the Injunction of this Honourable Court . . . this Defendant doth Demurr in Law thereunto and for Cause of Demurrer Sheweth That . . . the said Bill as this Defendant is Advised [doth not] contain any Equity as against this Defendant neither doth the said Bill Alledge any Impediment which a Court of Equity ought to Remove Whereby the Complainants are in any wise hindred from proceeding at Law to Recover Satisfaction in Damages in Case they have been damnified²⁷⁰

The court never ruled on Walker's request that it dissolve the injunction and order the plaintiffs to seek their damages at law because Walker never set the demurrer for a hearing. Thus, as occurred in *Tonson v. Baker*, we have neither evidence of the parties debating the point, nor even a ruling from the court. No other pleadings or orders exist in the case. Given that only one edition of Walker's version of *The Whole Duty of Man* appears in the English Short Title Catalogue,²⁷¹ and that the only library to possess a copy seems to be the British Library, we must assume that Walker acquiesced to the injunction.

The outcome of this case and the others discussed in this section demonstrate how utterly insignificant the adequacy argument was.

E. CASE LAW OUTSIDE THE COPYRIGHT CONTEXT

That the Chancery never denied nor dissolved an injunction in a copyright case on the ground that the remedy at law was adequate, nor granted a demurrer or plea on that basis, must be contrasted with outcomes in other subject areas where the Chancery did do so. Lord Campbell wrote in his comprehensive study of all the Lord Chancellors and Keepers from the earliest times through 1827 that in the years before Lord Eldon (circa 1801–1827) instances of special injunctions to prevent mischief were “few and far between.”²⁷² Commenting on the time period most relevant to this Article, he wrote that “Lord Thurlow [who sat as Chancellor from 1783–1792] would hardly grant an injunction where the parties had a remedy at law.”²⁷³ And before Thurlow, “there [were] not more than half a dozen instances of each species of injunction, and in these relief was as often

270. *Id.*

271. English Short Title Catalogue Citation No. T232043, <http://estc.bl.uk>.

272. 10 JOHN LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 245 (5th ed., London 1868).

273. *Id.*

denied as granted.”²⁷⁴

Take the case of *Whitchurch v. Hide*, for example.²⁷⁵ The plaintiff held water rights by assignment and had sued to enjoin the defendant from interfering with those rights by laying pipes and breaking up the ground. The defendant demurred on the ground that the plaintiff should first have to prove his right at common law.²⁷⁶ The Chancellor agreed, but then went further and seemed to suggest that even if that right were upheld at law, the plaintiff’s remedy would remain at law and that no equity would be reserved for the Chancery:

As to the objection that the plaintiff may have no remedy at law, there is but little weight in it; for if he has a sole exclusive right, no doubt but he has a remedy; and if any person infringe that right, and he cannot bring a common action of trespass, he may have an action of the case, for the law will not permit a man who has a right to be without a remedy.²⁷⁷

In *Jackson v. Barnard*,²⁷⁸ the plaintiffs were long-time tenants of a building in which the defendant had begun to squeeze fruit in the cellar with a large press engine. The engine appeared likely to damage the building, which was old and decayed. Upon learning that the defendant had received a new parcel of fruit and “was going to squeeze,” the plaintiffs filed suit and sought a merits-TRO from the Chancery.²⁷⁹ The court refused, as it was reluctant to restrain the defendant from his trade. But the Chancellor also stated that if the defendant did “any special injury by an abuse of the cellar which he has rented, the society may have their action, and be recompensed in damages.”²⁸⁰

Similar principles can be found in other cases. Among other things, the Court of Chancery refused: (1) to enjoin the cutting of timber on land held in trust by the plaintiff where the defendant was a mere trespasser, and being such, an action for trespass would lie against him;²⁸¹ (2) to settle the boundaries of two parishes when it could be easily determined at law;²⁸² (3) to grant merits-TROs involving waste in the digging of mines;²⁸³ (4) to

274. *Id.*

275. *Whitchurch v. Hide*, 2 Atk. 391, 26 Eng. Rep. 636 (Ch. 1742).

276. *Id.* at 391, 26 Eng. Rep. at 636.

277. *Id.* at 392, 26 Eng. Rep. at 637.

278. *Jackson v. Barnard*, Ridg. Temp. H. 259, 27 Eng. Rep. 823 (Ch. 1744).

279. *Id.* at 259, 27 Eng. Rep. at 823.

280. *Id.* at 260, 27 Eng. Rep. at 823.

281. *Mogg v. Mogg*, Dick. 670, 21 Eng. Rep. 432 (Ch. 1786).

282. *Waring v. Hotham*, Dick. 550, 21 Eng. Rep. 384 (Ch. 1779).

283. *Lowther v. Stamper*, 3 Atk. 496, 496, 26 Eng. Rep. 1085, 1086 (Ch. 1747).

order specific performance of a note to pay money;²⁸⁴ (5) to order the transfer of stock by agreement even where only a limited quantity was available;²⁸⁵ and (6) to disgorge profits from tenant waste when an action of trover was available.²⁸⁶ These outcomes stand in stark contrast to what we know of copyright injunctions.

F. SUMMARY OF FINDINGS

The records of copyright suits in the Court of Chancery between 1660 and 1800 demonstrate that the inadequate-remedy-at-law requirement played no active role in deciding whether to deny a copyright injunction. What mattered most was the merits of the case, followed by the unclean hands of the plaintiff, and perhaps the hardship to the defendant. These were all matters which merited the attention of the court and the clerks that transcribed its decisions. The absence of any significant argument over whether the remedies available at law were adequate leaves the distinct impression that those remedies were deemed categorically inadequate. Though the records clearly lead us in that direction, what they do not do is tell us *why* that was so.

Of course, there must be some explanation for these outcomes, but it must have been so well understood that it would not have been recorded in any court records. As John Baker has explained:

Law can exist, in the sense that people are aware of it and conform to it, even when it is neither written down in legislation nor the subject of accessible declarations by the judiciary. . . . And, even in the context of court proceedings, there is a world of practice and discretion which is understood by experienced practitioners but is not to be found in books.²⁸⁷

To get a sense of why the Chancery acted the way it did in copyright cases we must step outside the box, so to speak, and attempt to construct an

284. *Sands v. Fleetwood*, Nelson 186, 189, 21 Eng. Rep. 822, 822 (Ch. 1691).

285. *Cud v. Rutter*, 1 P. Wms. 570, 571, 24 Eng. Rep. 521, 522, 5 Vin. Abr. 538, pl. 21 (Ch. 1719).

286. *Jesus Coll. v. Bloom*, 3 Atk. 262, 263–64, 26 Eng. Rep. 953, 953, Amb. 54, 55–56, 27 Eng. Rep. 31, 31 (Ch. 1745). For examples of other cases where equitable relief was denied because of the remedy at law, see *Johnson v. Goldswaine*, 3 Anst. 749, 750, 145 Eng. Rep. 1027, 1028 (Exch. 1796); *Watkins v. Bush*, Dick. 663, 21 Eng. Rep. 430 (Ch. 1786); *Woodward v. Gyles*, 2 Vern. 119, 23 Eng. Rep. 686 (Ch. 1689/90); *Lord North v. Lord Gray*, Dick. 14, 21 Eng. Rep. 171 (Ch. 1680); *Owen v. Aprice*, 1 Ch. Rep. 32, 21 Eng. Rep. 499 (Ch. 1628–29); *Barty v. Shaw*, Choyce Cas. 146, 21 Eng. Rep. 87 (Ch. 1581); *Anonymous* (Ch. c. 1558–1603), reprinted in 1 CASES CONCERNING EQUITY, *supra* note 189, at 170, 171; *Anonymous*, Cary 15, 21 Eng. Rep. 8 (Ch. 1478–79).

287. *Baker*, *supra* note 118, at 78.

explanation from other contemporary materials. I endeavor to do just that in the next two sections, where I offer an explanation for why copyright cases differed. Unlike other areas where the inadequacy requirement prominently featured, the common-law courts played no significant *remedial* role during the entire 230 years of copyright enforcement before 1789. Part VI will demonstrate that the earliest cases, from 1557 to 1680, were brought in non-common-law tribunals that were specially empowered to hear infringement cases, and where the remedy at law, if there was one, would have been irrelevant. Thus, during the course of the first one hundred years of copyright enforcement, copyright holders became accustomed to receiving their remedies without having to show the inadequacy of the remedies at law. Part VII will then show that even when those antecedent tribunals fell out of favor and litigants began moving cases to the Chancery after 1660, the Chancery would have, apart from being influenced by the prior practice, found that the common-law courts still offered no practical remedies at all.

VI. ANTECEDENT TRIBUNALS: 1557–1680

Before copyright suits began to be brought regularly in the Court of Chancery after 1660, they were instead brought in other tribunals, such as the Court of High Commission, the Court of Star Chamber, and the Court of Assistants.²⁸⁸ The existence of these courts helps explain the dearth of suits elsewhere prior to 1660. But they are also important for another reason. They demonstrate that during the first century of copyright enforcement, litigants had obtained their remedies for infringement in non-common-law courts.

The next three sections address the jurisprudence of these tribunals. The first begins with the Court of High Commission (1557–1641), which played the smallest role in pure infringement cases. The Star Chamber (1566–1641) is treated next, and though plagued by a lack of records, it nevertheless appears that it heard cases without regard to the remedies available at law. Last is the Court of Assistants (1557–1680), which deserves the most attention because of the number of suits it heard, the fact the High Commission and Star Chamber referred cases there, and evidence suggesting that it (more than the other tribunals) could have directly influenced the way the Chancery approached copyright suits.

288. Complaints for infringement of letters patent were also occasionally brought before the Privy Council, a body on which the Lord Chancellor also sat. *E.g.*, *Seymour v. Stationers*, Court Book D, ff. 195v–196v (P.C. 1671/2); *Stationers v. Wolfe*, SP12/15, no. 40, f. 59 (P.C. 1582/3), reprinted in 2 TRANSCRIPT OF THE REGISTERS, *supra* note 67, at 779.

A. THE COURT OF HIGH COMMISSION: 1557–1641²⁸⁹

Set up in the sixteenth century, the Courts of High Commission were ecclesiastical bodies made up of bishops and civilian lawyers who dealt with, among other things, contempt for religion and clergy.²⁹⁰ The principal Court of High Commission sat in London and was, as has already been mentioned, specifically empowered by the Star Chamber decrees to punish violations of the same.²⁹¹ The Commission had also held since 1556/7 by its own patent, and by an injunction of Queen Elizabeth in 1559, independent authorization to punish the publishing of heretical and seditious books.²⁹² Perhaps not surprisingly, given the nature of the tribunal and its charge, it appears from the available records that the High Commission concerned itself more with punishing unlicensed printing and blasphemy than infringement *per se*.²⁹³

That having been said, there were occasions when copyright holders resorted to the Commission as a court of first resort for infringement cases. For instance, in 1560, William Seres complained to the High Commission that certain persons had violated his patent for printing primers (that is, books of private prayers) and psalters.²⁹⁴ The Commission did not hear the claim itself, however, and instead referred the matter to the Court of Assistants of the Company of Stationers to discover those responsible and punish them accordingly.²⁹⁵ And in 1616, a case of patent infringement was argued in and punished by the High Commission. There, the Commission fined Thomas Dawson one hundred pounds (later reduced to forty pounds) for printing books contrary to the patent held by Robert Barker.²⁹⁶ Notably,

289. The High Commission was abolished in 1641. *See* Statute, 1640, 16 Car. I, c. 11 (effective Aug. 1, 1641).

290. 1 R.H. HELMHOLZ, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 286–87 (2004). *See also* ROLAND G. USHER, *THE RISE AND FALL OF THE HIGH COMMISSION* 11, 64–90, 104 (photo. reprint 1968) (1913) (recounting the history of the High Commission).

291. *See supra* note 86. The 1566 and 1586 Star Chamber decrees were in fact issued at the request of the commissioners. USHER, *supra* note 290, at 54.

292. *See* USHER, *supra* note 290, at 337–38; Injunctions Given by Her Maiestie, 1559, 1 Eliz. I, ¶ 51, reprinted in 1 *TRANSCRIPT OF THE REGISTERS*, *supra* note 67, at xxxviii–xxxix.

293. *See* SCRUTTON, *supra* note 108, at 12–13 n.(y). A manuscript in the collections of the Inner Temple supports the notion that the Commission would limit its reach to spiritual matters. The author argued the Commission had no jurisdiction to punish a violation of the 1586 decree because, among other things, most offenses described therein were temporal, not ecclesiastical, and that otherwise a person might be twice vexed, once in the Star Chamber and once in the Commission. *Whether the high Commissioners may legally proceede to censure men for a breach of decree of Starrchamber made 28 Eliz for the better ordering of Printers & Stationers*, Petyt MS 518, f. 68r–v (c. Jac. I, 1603–25).

294. *In re Seres* (H.C. 1560), reprinted in 2 *TRANSCRIPT OF THE REGISTERS*, *supra* note 67, at 62.

295. For the ruling of the Court of Assistants in this case, see *infra* note 341.

296. *In re Dawson* (H.C. 1615/6), reprinted in *A COMPANION TO ARBER*, *supra* note 66, at 161–

no reference was made in this case to the Company, but that may have been to avoid a conflict of interest as Thomas Dawson was at the time Master of the Company.²⁹⁷

In other cases, the issue of infringement appears to have been incidental. Thus, in 1622, the High Commission ordered the destruction of a press and the imprisonment of a printer who had printed primers and almanacs covered by the Stationers' 1615/6 class patent.²⁹⁸ But it appears the Commission cared more that the printer had kept his press a secret, that he was not a *master* printer who could run his own press in any event, and that he had not obtained a prepublication license.²⁹⁹ In yet another case, a bookseller was charged with printing the psalms as if he had done so for the University of Cambridge when he had not. But, again, the court seemed more concerned that the printer had put "blasphemy in them."³⁰⁰ Indeed, nearly every other case I encountered involving the book trade dealt solely with unlicensed printing or heresy.³⁰¹ This was not, then, the court in which copyright holders were to pursue a stand-alone infringement claim.

62; *In re Dawson*, Liber A, ff. 88v *bis*, 89r–v (1616).

297. A COMPANION TO ARBER, *supra* note 66, at 55.

298. *In re Wood*, Court Book C, f. 71r–v (1621/2), Liber A, ff. 99r–100v (1622).

299. *Id.* at Liber A, ff. 99r–100v.

300. *In re Sparkes* (H.C. 1631/2), reprinted in REPORTS OF CASES IN THE COURTS OF STAR CHAMBER AND HIGH COMMISSION 268 (photo. reprint 1965) (1886) [hereinafter REPORTS OF CASES].

301. See, e.g., *In re Hooganhuis* (H.C. 1635–37), reprinted in A COMPANION TO ARBER, *supra* note 66, at 310–18; *In re Cowper* (H.C. 1633/4–36), reprinted in A COMPANION TO ARBER, *supra* note 66, at 298–300; *In re Goskin* (H.C. 1632), reprinted in REPORTS OF CASES, *supra* note 300, at 314; *In re Slater* (H.C. 1631), reprinted in REPORTS OF CASES, *supra* note 300, at 186; *In re Sparke* (H.C. c. 1631), reprinted in A COMPANION TO ARBER, *supra* note 66, at 273–74; *In re Boler* (H.C. 1629/30), reprinted in A COMPANION TO ARBER, *supra* note 66, at 253–57; *In re Jones* (H.C. 1629), reprinted in A COMPANION TO ARBER, *supra* note 66, at 243–50; *In re Burton* (H.C. 1628), reprinted in A COMPANION TO ARBER, *supra* note 66, at 242–43; *In re Wood* (H.C. 1624), reprinted in A COMPANION TO ARBER, *supra* note 66, at 230–31; *In re Votivae Angliae* (H.C. 1624), reprinted in A COMPANION TO ARBER, *supra* note 66, at 225. Perhaps the most famous case was the one brought against Robert Barker, the holder of the Bible patent as the King's Printer. Barker printed a Bible in 1631 that was so riddled with errors that it became known as the Wicked Bible. One edition omitted "not" from the 7th Commandment, printing "Thou shalt commit adultery." THE HOLY BIBLE CONTAINING THE OLD TESTAMENT AND THE NEVV, Exodus 20:14 (London, Robert Barker 1631) (located in the British Library). Another edition contained the following typographical error: "The Lord hath shewed us his glory, and his great asse." THE HOLY BIBLE CONTAINING THE OLD TESTAMENT AND THE NEVV, Deuteronomy 5:24 (London, Robert Barker 1631) (located with the British and Foreign Bible Society). It should have read "greatnesse." The Commissioners ordered the books burnt and fined Barker two hundred pounds. They later remitted the fine on Barker's promise to set up a Greek press at Oxford. See *In re Barker* (H.C. 1632), reprinted in REPORTS OF CASES, *supra* note 300, at 296–97, 304–05; *In re Barker* (H.C. 1633/34), reprinted in A COMPANION TO ARBER, *supra* note 66, at 297–98.

B. THE COURT OF STAR CHAMBER: 1566–1641³⁰²

Undoubtedly the most notorious of the antecedent tribunals, the Court of Star Chamber's infamy fortunately comes not from its copyright rulings, but from Charles I's abusive use of the court in other matters to punish his opponents. There is some dispute as to when the court came to be used as a regularized body in which to hear judicial matters, but we know that by 1540 it began to keep its own judicial records.³⁰³ A royal proclamation in 1623 and the court's own decree in 1637 expressly empowered it to hear cases of copyright infringement and other printing offenses.³⁰⁴ The court also heard printing cases before 1623 on the principle that it exercised a contempt jurisdiction for violation of its decrees of 1566 and 1586.³⁰⁵

The makeup of the Court of Star Chamber was similar to the Court of Chancery.³⁰⁶ The Lord Chancellor presided on both courts, but he was assisted in the Star Chamber by select members of the Privy Council and upon his request by one or more common-law judges.³⁰⁷ By 1566 the Star Chamber exercised a primarily criminal jurisdiction, with the Attorney General prosecuting seditious printing by information,³⁰⁸ but the court also heard criminal cases on private petition.³⁰⁹ In such private-party cases, the procedures for bringing and answering a complaint were nearly identical to those used in the Court of Chancery, and both courts used a subpoena to compel appearance and proceeded without the aid of a jury.³¹⁰ The Star Chamber also awarded injunctions, most commonly in its early years to

302. The Court of Star Chamber was abolished in 1641. *See* Statute, 1640, 16 Car. I, c. 10 (effective Aug. 1, 1641).

303. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 118 (4th ed. 2002).

304. A Proclamation Against the Disorderly Printing, Uttering, and Dispersing of Bookes, Pamphlets, &c., *supra* note 86, at 221; 1637 Decree, *supra* note 83, ¶¶ 2, 7. *See also supra* note 86 and accompanying text.

305. For cases invoking the court's jurisdiction on the basis of a contempt of its 1566 and 1586 decrees, see *A-G v. Knightley* (Str. Ch. c. 1589), *abstracted in* JOHN SOUTHERDEN BURN, *THE STAR CHAMBER: NOTICES OF THE COURT AND ITS PROCEEDINGS* 71 (London, 1870); *Day v. Franke*, STAC5/D4/1, m. 2 (Str. Ch. 1585); *Flower v. Dunne*, STAC5/F2/17, m. 3 (Str. Ch. 1585); *Day v. Warde*, STAC5/D3/16, m. 1 (Str. Ch. 1581/2). *See also* *Stationers v. Wattes*, STAC8/276/24 (Str. Ch. 1613); *Stationers v. Venge*, STAC5/S83/39 (Str. Ch. c. 1596).

306. EDWARD JENKS, *A SHORT HISTORY OF ENGLISH LAW* 167–69 (photo. reprint 2005) (1912).

307. Edward P. Cheyney, *The Court of Star Chamber*, 18 AM. HIST. REV. 727, 729–30 (1913).

308. *E.g.*, *A-G v. Wetherell*, STAC8/34/4 (Str. Ch. 1619/20–1622/3); *A-G v. Fuller*, STAC8/19/7 (Str. Ch. 1607/8–1608/9); *A-G v. Jones*, STAC8/11/18 (Str. Ch. 1606–13).

309. J.A. GUY, *THE COURT OF STAR CHAMBER AND ITS RECORDS TO THE REIGN OF ELIZABETH I* 28, 37, 40–41, 47, 58–59 (1985); Thomas G. Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, 6 AM. J. LEGAL HIST. 221, 226 (1962).

310. *See* CORA L. SCOFIELD, *A STUDY OF THE COURT OF STAR CHAMBER* 73–76 (photo. reprint 1969) (1900).

restrain actions at common law and to settle possession until a matter could be heard.³¹¹

I had therefore hoped that the jurisprudence of this court might provide context and a perfect lead-in to understanding the procedure for granting injunctions in the copyright cases that later blossomed in the Court of Chancery, but I was disappointed. George Curtis wrote in 1847 that the “judicial proceedings of that tribunal are supposed to be chiefly lost or destroyed, and prosecutions for printing or pirating another man’s copy, or otherwise printing unlawfully, cannot now be found.”³¹² While this is not entirely accurate, it is not far off. Some of the pleadings and proofs survive, but they are often nothing more than scraps of proceedings.³¹³ The greatest losses are the register books which contained all of the orders of the court. They were misplaced in the late seventeenth century.³¹⁴ Thus, what little we know of the outcomes of Star Chamber cases comes from notes lawyers made of the then-extant register books for use as precedents and from treatises written by those who practiced there. Entries in the records of the Company of Stationers have also shed light on some outcomes in book-trade cases.

The complaints of which I am aware demonstrate that plaintiffs did not specifically ask for injunctions.³¹⁵ They instead requested, not surprisingly, that the court take a speedy order of punishment according to the terms of the Star Chamber decrees. Though it is not possible to know the remedies meted out in every case, with the records being as they are, it seems that in hearing cases of infringement, the Star Chamber worked within its own decrees by fining and imprisoning offenders and destroying their presses as provided therein. I have found limited evidence of injunctions being awarded by the Court of Star Chamber.³¹⁶ But, again, the

311. WILLIAM HUDSON, *A TREATISE OF THE COURT OF STAR CHAMBER* 196 (photo. reprint 1986) (1621); Barnes, *supra* note 309, at 239–40; Thomas G. Barnes, *Star Chamber Litigants and Their Counsel, 1596–1641*, in *LEGAL RECORDS AND THE HISTORIAN* 7, 19 (J.H. Baker ed., 1978).

312. GEORGE TICKNOR CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT* 30–31 (photo. reprint 2005) (1847). *Accord* Millar v. Taylor, 4 Burr. 2303, 2313, 98 Eng. Rep. 201, 207 (K.B. 1769) (“No case of a prosecution in the Star-Chamber, for printing without license, or against letters patent, or pirating another man’s copy . . . has been found. Most of the judicial proceedings of the Star-Chamber are lost or destroyed.”).

313. To borrow a phrase from Ronan Deazley. See DEAZLEY, *supra* note 10, at 51.

314. See Thomas G. Barnes, *The Archives and Archival Problems of the Elizabethan and Early Stuart Star Chamber*, 2 *J. SOC’Y OF ARCHIVISTS* 345, 348, 350–51, 360 (1963).

315. See Ponsonby v. Legatt, STAC5/P5/6, m. 2 (Str. Ch. 1600); Daye v. Harrison, STAC5/D28/7, m. 3 (Str. Ch. 1585/6); Flower v. Smythe, STAC5/F7/7, m. 1 (Str. Ch. 1585/6); Day v. Franke, STAC5/D4/1, m. 2 (Str. Ch. 1585); Flower v. Dunne, STAC5/F2/17, m. 3 (Str. Ch. 1585); Day v. Warde, STAC5/D3/16, m. 1 (Str. Ch. 1581/2).

316. See *In re Marsh* (Str. Ch. c. 1558), *abstracted in* BURN, *supra* note 305, at 55 (“Thos. Marsh,

records available to consider were meager.

As a prerogative court designed to supplement the criminal courts of common law,³¹⁷ the Star Chamber was nevertheless subject, in theory, to the same jurisdictional objections that could be brought in the Court of Chancery—namely that the complainant had a remedy at law. Some complaints, to be sure, alleged that the petitioner had no remedy in the common-law courts.³¹⁸ But this was simply a pro forma statement, and other infringement complaints made no mention of it.³¹⁹ Usually, suitors simply stated that they had suffered a wrong and “[i]n only a few cases did they explain why it was necessary for them to seek the help of the court.”³²⁰ Moreover, though the defendant’s answer sometimes stated that the matter was determinable at law,³²¹ that was also stated pro forma and “was not meant as a serious defence.”³²² Indeed, the filing of an answer was technically seen as accepting the jurisdiction of the court.³²³

The proper place for a jurisdictional challenge was in a demurrer. The Star Chamber discouraged them, however, by penalizing defendants forty shillings if the demurrer was denied.³²⁴ Not surprisingly, I could find no demurrers in the extant records that challenged the Star Chamber’s power to hear an infringement case on the ground an adequate remedy existed at law.³²⁵ Even if I had found one, I doubt it would have been successful. Given that the Star Chamber was specifically empowered to hear cases of this sort, we can safely assume it was no objection to the court’s jurisdiction that the plaintiff could sue in the common-law courts. It therefore would not have occurred to copyright holders that they would

stationer, for selling books without license of the patentees. Ordered that the persons detected for the printing and corrupting of the Bp. of London’s book, shall be bound to print no more.”).

317. 1 SPENCE, *supra* note 143, at 349–50. *See also* Emperor of Austria v. Day, 3 De G. F. & J. 217, 239, 45 Eng. Rep. 861, 870 (Ch. 1861) (referring to the Star Chamber as “a Court of Criminal Equity”).

318. Day v. Warde, STAC5/D3/16, m. 1 (Str. Ch. 1581/2).

319. Day v. Franke, STAC5/D4/1, m. 2 (Str. Ch. 1585); Flower v. Dunne, STAC5/F2/17, m. 3 (Str. Ch. 1585).

320. SELECT CASES IN THE COUNCIL OF HENRY VII, at lxxxi (C.G. Bayne & William Huse Dunham, Jr. eds., 1958).

321. Daye v. Harrison, STAC5/D28/7, m. 2 (Str. Ch. 1585/6).

322. SELECT CASES IN THE COUNCIL OF HENRY VII, *supra* note 320, at xci. *Accord* J.A. GUY, THE CARDINAL’S COURT 86 (1977).

323. *See* William J. Jones, *Due Process and Slow Process in the Elizabethan Chancery*, 6 AM. J. LEGAL HIST. 123, 136–37 (1962).

324. HUDSON, *supra* note 311, at 165. *See also* GUY, *supra* note 322, at 86.

325. For demurrers filed on the ground that the plaintiffs’ complaints had not been verified by a proper court official, *see* Daye v. Harrison, STAC5/D28/7, m. 1 (Str. Ch. 1585/6); Day v. Franke, STAC5/D4/1, m. 1 (Str. Ch. 1585).

have to demonstrate that the remedies available at law were inadequate before they could sue in the Star Chamber.

C. THE COURT OF ASSISTANTS: 1557–1680

The last and most important antecedent tribunal is the Court of Assistants, which heard the vast majority of copyright-infringement disputes from 1557 to 1680.³²⁶ The Court of Assistants governed the

326. The original records of the Court of Assistants are stored in the archives at Stationers' Hall in London, England. A microfilm edition containing the court's records, along with most other records of the Company of Stationers, has been available since 1985 in 115 reels. *See* Records of the Worshipful Company of Stationers 1554–1920 (Robin Myers ed., 1985). The indispensable guide to the records and microfilm reels is ROBIN MYERS, THE STATIONERS' COMPANY ARCHIVE 1554–1984 (1990). All references herein are to the original sources. Some portions of the Company's records have been separately transcribed and published, however. The following table may be of some assistance:

Years:	Contained in:	Transcription:
1554–1596	Register A	1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554–1640 A.D. (Edward Arber ed., photo. reprint 2006) (1875)
1559–1777	Liber A	Transcribed from 1602–1640 in RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1602 TO 1640 (William A. Jackson ed., 1957)
1571–1576	Court Book A; lost	None
1576–1603	Court Book B	Folios 1r–426v and 486v–487v are in 2 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554–1640 A.D. (Edward Arber ed., photo. reprint 2006) (1875) Folios 427r–486r are in RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1576 TO 1602 ~ FROM REGISTER B (W.W. Greg & E. Boswell eds., 1930)

Company of Stationers, and was made up of the Master of the Company, two Wardens from the same, and a number of senior members called Assistants.³²⁷ The court was charged with, among other things, drafting the ordinances of the Company.³²⁸ But it often also functioned in a judicial capacity to help settle disputes among members of the Company, including infringement of letters patent and the Stationers' copyright. By virtue of the royal charter of the Company in 1557³²⁹ (and, later, the other decrees, ordinances, and acts mentioned previously),³³⁰ the court was empowered with certain investigative powers—primarily the ability to search for and seize books and presses—along with certain punitive and remedial powers, which largely obviated the need to go to the principal courts.

Perhaps most fascinating about this court is that its jurisprudence—

1602–1655	Court Book C	Transcribed from 1602–1640 in RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1602 TO 1640, <i>supra</i>
1605–1640	Book on Entrance of Fines, a.k.a. Fine Book	<i>Id.</i>
1655–1679	Court Book D	None
1675–1683	Court Book E	None
1683–1697	Court Book F	None
1697–1717	Court Book G	None

This table was adapted from MYERS, *supra*, at 22–24, 42–48, 52. The records from 1717 to 1983 are described further in Robin Myers' book. *See id.* at 48–49. An extraordinarily valuable chronology of book-trade documents has recently been published which contains references to and abstracts of many of the court's decisions from 1641 to 1700. *See* D.F. MCKENZIE & MAUREEN BELL, A CHRONOLOGY AND CALENDAR OF DOCUMENTS RELATING TO THE LONDON BOOK TRADE 1641–1700 (2005). An index of Court Books E, F, and G has also recently been published. *See* ALISON SHELL & ALISON EMBLOW, INDEX TO THE COURT BOOKS OF THE STATIONERS' COMPANY 1679–1717 (Robin Myers ed., 2007).

327. RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1576 TO 1602 ~ FROM REGISTER B, at xiii–xiv (W.W. Greg & E. Boswell eds., 1930) [hereinafter RECORDS FROM REGISTER B]; PATTERSON, *supra* note 10, at 32–33.

328. Proposed ordinances were subject to the approval of the Lord Chancellor, the Treasurer, the Chief Justice of the King's Bench, and the Chief Justice of the Court of Common Pleas, or at least three of them. Statute, 1504, 19 Hen. VII, c. 7, ¶ 1. The Stationers' Company continued to submit its ordinances for approval late into the seventeenth century. *See, e.g.*, Court Book D, ff. 258v–259r (1675/6); *id.* at f. 273r (1676/7); Court Book E, ff. 117r–121v (1681); 1 TRANSCRIPT OF THE REGISTERS, *supra* note 67, at 19, 24, 25, 26; MYERS, *supra* note 326, at 244. It appears, however, that approval came to be perfunctory. *See* Stationers v. Salisbury, Comb. 221, 222, 90 Eng. Rep. 440, 441 (K.B. 1693) (“Tis never the better for that, for that is done of course.”).

329. 1 TRANSCRIPT OF THE REGISTERS, *supra* note 67, at xxxi.

330. *See supra* Part IV.B.

which spans over one hundred years until infringement suits began to be filed in the Chancery beginning around 1660—reflects the decisions of copyright holders judging other copyright holders. The members of the Court of Assistants were themselves printers and booksellers³³¹ and were thus well aware of what sorts of remedies were “adequate” to compensate the victims of copyright infringement. Moreover, the court did not create a hierarchy of remedies favoring damages over injunctions, but instead freely awarded both remedies. This approach is not surprising given that the Assistants were not involved in the same sort of jurisdictional turf battle which perplexed the Chancery and common-law courts. The Assistants simply granted the remedy they believed was most effective, and often that was an injunction.

1. Method of Proceeding

The court’s method for hearing cases resembled mandatory mediation followed by optional arbitration.³³² By ancient custom and ordinances of the Company, “[a]ll complaints had to pass through [the Court of Assistants] before they could be referred to the wider legal system.”³³³ An ordinance of the Company from 1678 stated the rule most clearly:

[W]hen any difference or differences shall hereafter arise between any member and members of this Company for any Copy, Right, or any thing relating to Printing, Book-selling or Book-binding, That then before any Action or suit be commenced, they shall first make their application to the . . . Court of Assistants . . . upon pain that every member that shall for any of the Causes aforesaid commence any Suit or Suits, without application made as aforesaid, shall forfeit and pay to the [Company] the summe of Ten pounds.³³⁴

Records of previous ordinances were lost in the Great London Fire of 1666, but bibliographers in the field believe the 1678 ordinance reflected

331. Over time, the Stationers who became Assistants were more likely to be booksellers than printers, largely because booksellers came to hold the most valuable copyrights and therefore the most power. See Michael Treadwell, *Printers on the Court of the Stationers’ Company in the Seventeenth and Eighteenth Centuries*, 21 J. PRINTING HIST. SOC’Y 29, 30 (1992).

332. See RECORDS FROM REGISTER B, *supra* note 327, at xlvi–xlvii. See also CYPRIAN BLAGDEN, *THE STATIONERS’ COMPANY: A HISTORY, 1403–1959*, at 54–55, 163 (1960); PATTERSON, *supra* note 10, at 34.

333. JOHNS, *supra* note 80, at 221.

334. STATIONERS’ CO., *THE ORDERS, RULES AND ORDINANCES 18–19* (London 1678). The original manuscript records demonstrate that “Copy, Right” should have been “Coppo Right.” Court Book D, f. 304v (1677/8). In a later printed version, “Copy, Right” was changed to “Copy=Right.” STATIONERS’ CO., *THE ORDERS, RULES AND ORDINANCES 20* (London 1692).

prior practice.³³⁵ Indeed, in 1664, the Assistants expressed their preference in *Gough v. Orme* that disputes between Stationers not be litigated in the principal courts.³³⁶ Though complainants were in theory permitted to proceed elsewhere after mediating, most litigants agreed to submit their disputes to the Court of Assistants because of the speed of decision, the cost savings, the panoply of remedies available (including discovery), and a communal culture that pressured them to do so.³³⁷

Parties could nominate the referees who would investigate and mediate the case in an effort to settle it³³⁸ and, failing that, the referees would then submit their findings to the Court of Assistants for decision.³³⁹ Often the parties also agreed to post bonds or to otherwise forfeit monies if they later reneged on an agreement to abide by a decision. In the matter of *Lobley v. Chapman*, for instance, the parties submitted themselves to the

335. See RECORDS FROM REGISTER B, *supra* note 327, at xlvi n.1. The practice certainly existed long ago in other livery companies. See ORDINANCES OF SOME SECULAR GUILDS OF LONDON FROM 1354 TO 1496, at 51, 60 (Henry Charles Coote ed., London, Nichols & Sons 1871); ENGLISH GILDS: THE ORIGINAL ORDINANCES OF MORE THAN ONE HUNDRED EARLY ENGLISH GILDS 21, 76, 183, 279–80, 318, 450–51 (Joshua Toulmin Smith ed., London, N. Trubner & Co. 1870).

336. *Gough v. Orme*, Court Book D, ff. 98v–99r (1664). As this appears to be the only time before 1678 that the Assistants expressly stated this preference in their records, one must wonder whether it came as a result of the sudden increase of copyright litigation in the principal courts that began after 1660. The 1678 ordinance may have also been in response to this trend. Even though the ordinance undoubtedly reflected prior practice, the Company's own records suggest the 1678 ordinance may have been the first time the mandatory-mediation rule actually appeared as an express bylaw of the Company. See Court Book D, f. 270v (1676) (indicating that the provision be "added" to the Company's by-laws).

337. See JOHNS, *supra* note 80, at 200–13. Few entries exist in the records prior to 1678 in which a Stationer sought or obtained liberty to proceed in the regular court system. See *Waye v. Gonnell*, Register A, f. 32r (1558–59); *Askell v. Singleton*, Court Book B, f. 428r (1577); *Garbrand v. Stansby*, Court Book C, f. 39v (1615); *Bure v. Stansby*, Court Book C, f. 39v (1615). There are also only a handful of entries demonstrating that the Company had fined Stationers for proceeding to litigate without leave. See *In re Cotton*, Court Book B, f. 402r (1604); *Harrison v. Butter*, Fine Book, f. 3v (1608/9); *Sparkes v. Archer*, Fine Book, f. 11r (1615/6). After the 1678 bylaw, we begin to see entries discussing leave to proceed more regularly (albeit not always in copyright cases), which seems to parallel the increasing trend of Stationers seeking aid in the ordinary court system. See *Fabian v. Harris*, Court Book D, f. 317r (1678); *Pawlett v. Royston*, Court Book D, f. 331v (1678); *In re Herringman*, Court Book E, f. 156r (1682); *In re Pawlett*, Court Book E, f. 160r (1682); *In re Pawlett*, Court Book F, f. 3v (1683); *Heyrick v. How*, Court Book F, f. 42v (1685); *Wells v. Royston*, Court Book F, f. 47v (1685); *Brewster v. Bassett*, Court Book F, f. 99r (1687/8); *Bradill v. Parker*, Court Book F, f. 152v (1691); *Dring v. Smith*, Court Book F, ff. 177v–178r (1692); *Norton v. Miller*, Court Book F, f. 182r (1692).

338. *Legatt v. Leach*, Court Book D, f. 34v (1658); *Twyford v. Walbanke*, Court Book C, f. 274r (1652/3); *Wyndet v. Oswald*, Court Book B, f. 447r (1588).

339. *Twyford v. Walbanke*, Court Book C, f. 274r (1652/3); *Sparke v. Slater*, Court Book C, f. 209r–v (1644); *In re Badger*, Court Book C, ff. 170v–171r (1640); *Hurlock v. Oulton*, Court Book C, f. 166r (1639); *Macham v. Beale*, Court Book C, f. 103v (1629); *Bill v. Harrison*, Court Book C, f. 95v (1627).

order of the court “upon paine that if either of them breake the same order[,] That then he shall forfait [twenty pounds] to such use as the said [court] . . . shall Appoint.”³⁴⁰ In another case, the parties were each ordered to post a bond of ten pounds to be forfeited if they did not abide by the orders of the court.³⁴¹

2. Remedies Dispensed

What, then, were the remedies dispensed by the Court of Assistants? Penalties for one, as the court was specifically empowered to levy under the Company’s ordinances. Take, for example, the following entries, dated between 1558 and 1564:

William Coplande ys fyned [twenty pence] for pryntinge the Sarmon of Repentaunce of master Bradfordes

....

Owyn Rogers for pryntinge of halfe a Reame of ballettes of a nother mans Copye by waye of desceate [i.e. deceit] ys fyned at [twenty pence]

....

Recyvd of owyn Rogers [two shillings] for his fyne for that he prented the booke of husboundry beyng master Totteles

....

Recyvd of John sampson [twenty pence] for his fyne for pryntinge of other mens copyes³⁴²

Compensatory damages were also awarded, however. For example, in a case where one party printed a work that contained infringing portions of the work of another, the Court of Assistants ordered the infringer to pay the aggrieved party three pounds, six shillings, and eight pence in “Recompence of the Iniury,” and to remove the infringing portions in all future printings.³⁴³ In another case, with a similar form of infringement by

340. *Lobley v. Chapman*, Court Book B, f. 434v (1580).

341. *In re Bartley*, Court Book B, f. 434v (1580). *Accord In re Hills*, Court Book F, f. 69r–v (1686); *Chettle v. Danter*, Court Book B, f. 457r (1592/3). Obtaining a bond or other written agreement was important as otherwise a party could find itself without a method of enforcing the promise at common law should the other side renege. For example, after the Court of Assistants ordered Abraham Veale to pay William Seres ten pounds in recompense for infringing Seres’s patent in books of private prayer, Veale refused to pay, despite having agreed to submit. Seres had to resort to a claim in the Court of Chancery, stating that “forasmuche as your said orator hath not any bond or wryting of the said Abraham wherby to compell him to stand to the award of the said Wardens and Assistauntes he therefore is with out all remedye by thordre and course of the common lawes of this Realme.” *Seres v. Veale*, C3/166/87 (Ch. 1560).

342. Register A, ff. 31r, 35r, 76v, 104r (1558–64).

343. *Denham v. White*, Court Book B, f. 435r (1581/2). *Accord In re Meredith*, Court Book F, f.

incorporation, the court ordered the infringer to give two-thirds of the infringing copies to the copyright owner, presumably for the owner to dispose of as he pleased.³⁴⁴ The case of *Hodgkinson v. Kembe* is curious in that the Assistants gave the infringer the choice of paying the plaintiff damages or delivering half of the illicit impression, but with the plaintiff then being obliged to “pay to Mr Kembe for the Paper and Printing thereof according to proportion” and at the ordinary rate.³⁴⁵

Most important for our purposes, the court regularly awarded interim impoundments and preliminary injunctions. We see, for example, an order requiring the infringing copies to be brought to the Company “where they shall remayne & be sequestered untill further direction shall be given by this \Court/ touching the same.”³⁴⁶ And in other cases, the defendant’s printing equipment or materials are impounded pending a hearing.³⁴⁷ Another case, *Man v. Fisher*, exemplifies a preliminary injunction. There, the court ordered that while the case was being heard, “none of the Copies bee in the meane tyme Printed.”³⁴⁸ Indeed, it appears preliminary injunctions were standard fare. As Adrian Johns notes in his work *The Nature of the Book*, upon the receipt of a complaint, “the beadle, the clerk, or, in serious cases, a warden would be dispatched to the alleged offender’s printing house to stop any more work from being done on the piece in question” until the matter could be heard.³⁴⁹

163r (1691); *Legatt v. Leach*, Court Book D, ff. 31v, 34v (1658); *Ponsonby v. Legatt*, Court Book B, f. 477v (1600); *Denham v. Dason*, Court Book B, f. 438v (1585); *James v. Ward*, Court Book B, f. 434v (1581).

344. *Jackson v. Welbey*, Court Book C, f. 32v (1613). Other cases also ordered the infringer to compensate the owner with a specified number of books from the infringing impression. *E.g.*, *Lee v. Hancocke*, Court Book C, f. 238r (1646); *Smithicke v. Michell*, Court Book C, f. 101v (1628); *Jaggard v. Barret*, Court Book C, f. 87r (1625); *Aspley v. Burby*, Court Book B, f. 477r (1600/1); *In re Copland*, Register A, f. 47v (c. 1559–60).

345. *Hodgkinson v. Kembe*, Court Book C, f. 285r–v (1653). *See also* *Whapland v. Watkins*, Court Book B, f. 428r (1577) (providing the plaintiff the option of receiving twenty-six shillings and eight pence in money or thirty shillings worth of books chosen by him).

346. *In re Book of Martyrs*, Court Book C, f. 118r–v (1631/2). *Accord* *Bishop v. Butter*, Court Book C, f. 169r (1639); *In re Daltons Country Justice of Peace*, Court Book C, f. 131r (1634/5). *Cf.* *Griffin v. Mearne*, Court Book D, f. 190r (1671) (ordering infringing books to be held by plaintiff pending arbitration).

347. *Daulman v. Alsop*, Court Book C, f. 128v (1634); *Daulman v. Clifton*, Court Book C, ff. 129v, 130r (1634).

348. *Man v. Fisher*, Court Book C, f. 127v *bis* (1634).

349. JOHNS, *supra* note 80, at 222. *Accord* *Child v. Chiswell*, Court Book G, f. 27r–v (1699); *In re Amery*, Court Book D, f. 266v (1676); *In re Tylers*, Court Book D, f. 239r (1674); *In re Royston*, Court Book D, f. 148r (1668); *Solders v. Flesher*, Court Book D, f. 43r (1659); *Leake v. Walbancke*, Court Book D, f. 23v (1657); *Dod v. White*, Court Book D, f. 20r (1657); *Young v. Brewster*, Court Book D, f. 9r (1655/6); *Twylford v. Walbanke*, Court Book C, f. 274r (1652/3); *Vavasour v. Fletsher*, Court Book C, f. 227v (1645).

Permanent injunctions were also ordered. I have mentioned one already, where the court ordered a party to remove infringing portions of a derivative work for future printings.³⁵⁰ A similar order can be found in the case of *Jaggard v. Barret*, where the court stated that “mrs Barret is not to printe yt [i.e., the infringing work] any more without [mrs Jaggard’s] Consent, onely so much as is not mrs Jaggards she may printe at her pleasure.”³⁵¹ In another case “the Court did order that Thomas Jones should not ymprint or Cause to be ymprinted in the booke Called the fathers blessinge any thinge that is in the booke called the Practice of Pietye which belongeth to John Hodgettes.”³⁵² And in *Smithicke v. Michell*, the court ordered that the defendant deliver fifty copies of the infringing work to the plaintiff and that “the booke shall not be printed any more without Consent of both the said parties.”³⁵³

Failure to comply with injunctions could lead to harsher penalties, as was demonstrated in a high-profile dispute between two prominent Stationers. John Haviland accused John Beale, an Assistant on the court, of having infringed his copyright in Francis Bacon’s *Essays*.³⁵⁴ The court preliminarily enjoined Beale from printing the work.³⁵⁵ Beale violated the injunction, however, and the court stated in response that

forasmuch as he still proceeds in the printing of the same in Contempt of the said Order[,] This day the Court taking his disobedience into Consideracion have thought fitt That [the Warden and others] doe presently repair unto Mr Beales house & take downe the Barr & Spindle of his presse & the same bring unto the hall untill further order.³⁵⁶

One month later a recalcitrant Beale was offering what he had already printed for sale, so the court fined him twenty nobles, suspended him from his position as an Assistant,³⁵⁷ and impounded the remaining books.³⁵⁸

350. Denham v. White, Court Book B, f. 435r (1581/2).

351. Jaggard v. Barret, Court Book C, f. 87r (1625).

352. Hodgettes v. Jones, Court Book C, f. 53r (1618).

353. Smithicke v. Michell, Court Book C, f. 101v (1628). For other examples of permanent injunctions, see Harris v. Maxwell, Court Book E, f. 105v (1680); *In re Cottrell*, Court Book D, f. 257r (1675); Bourne v. Bellamy, Court Book C, f. 104v (1629); Aspley v. Burby, Court Book B, f. 477r (1600/1); Denham v. Dason, Court Book B, f. 433r (1579).

354. Haviland v. Beale, Court Book C, f. 167r (1639).

355. *Id.*

356. *Id.* at f. 167v.

357. *Id.* at f. 168r.

358. *Id.* at f. 168v. The dispute is treated further in William A. Jackson, *Counterfeit Printing in Jacobean Times*, in RECORDS OF A BIBLIOGRAPHER 83, 86–90 (William H. Bond ed., 1967).

3. Opportunity to Influence the Chancery

Importantly, litigants were not the only ones who favored the tribunal. Perhaps not surprisingly, the Lord Chancellor and others did as well. Cases that had been filed in the courts—be it in the High Commission, Star Chamber, Chancery, or elsewhere—were often referred back to the Court of Assistants for disposal there, undoubtedly because of its expertise in the matter.³⁵⁹ As Adrian Johns notes, the Court of Assistants had “developed its own principles of argument and its own archive of precedents,” and the principal courts were keenly aware that “[n]o other body even approached the expertise of this court in dealing with every element of print culture.”³⁶⁰

I have already described one instance of a referral, coming from the Court of High Commission,³⁶¹ but there were others. For example, in 1600, a suit brought in the Court of Star Chamber was referred back to the Court of Assistants for resolution.³⁶² The same happened in a second case involving Bacon’s *Essays*,³⁶³ and perhaps in another involving the *ABC with the Little Catechism*.³⁶⁴ Others who referred disputes to the Assistants included the Lord Mayor of London,³⁶⁵ as well as Parliament.³⁶⁶

More important for our purposes, the Court of Chancery was also “apt to refer problems to the Company for their expert report.”³⁶⁷ This occurred,

359. Indeed, “[t]he basic practice in Star Chamber . . . which Wolsey established and his successors retained, was that the points at issue, having been identified, would be referred either to legal experts for adjudication and report, or to arbitrators or mediators for solution by compromise between the parties.” GUY, *supra* note 309, at 47.

360. JOHNS, *supra* note 80, at 221. The Court of Assistants on occasion expressly directed that precedents first be found in its records before it would decide on a course of action. In one case, for example, the court stated that the

Master and Wardens . . . bee comitted to looke into the Presidents of the Court to see what has bin done in the like Cases of persons Printing the Companys Psalmes and Bookes without their Leave and what Punishments had bin inflicted upon such persons and to Report the matter of Fact with their opinion therein to the next Court.

Court Book G, f. 62r (1701). *See also In re Parkhurst*, Court Book F, f. 194v (1693); *In re Starkey*, Court Book F, f. 130r–v (1689/90).

361. *See supra* text accompanying notes 294–95.

362. *Ponsonby v. Legatt*, Court Book B, f. 477v (1600), f. 482r (1602). *See also Ponsonby v. Legatt*, STAC5/P65/14, STAC5/P5/6 (Str. Ch. 1600).

363. *In re Beale*, Court Book C, f. 172v (1640).

364. Loewenstein suggests that the suit pending in the Star Chamber between Day and Ponsonby over the *ABC with the Little Catechism*, *see Daye v. Harrison*, STAC5/D28/7, m. 3 (Str. Ch. 1585/6), “seem[ed] to have been turned back to the Stationers’ Court of Assistants for review,” LOEWENSTEIN, *supra* note 65, at 41. He does not cite any source for this proposition, and I unfortunately have not been able to find a record supporting it.

365. *Edwards v. Hodges*, Court Book C, f. 86v (1625).

366. *Fussell v. Tomlins*, Court Book D, f., 47r–v (1659).

367. C.J. Sisson, *The Laws of Elizabethan Copyright: The Stationers’ View*, 15 THE LIBRARY 8, 11 (5th Ser. 1960).

for instance, in a case brought in 1616 involving a dispute over the ownership of the copyright in Rider's *Dictionary*. A suit was brought in the Chancery,³⁶⁸ but Sisson has noted that "something like a meeting of the Court of Assistants was held in the Court of Chancery to serve as guidance to that court for its judgement upon the issues raised."³⁶⁹ The Lord Keeper later referred a second suit regarding the *Dictionary* to the Court of Assistants in 1625.³⁷⁰ There is even an example of an infringement suit being sent for arbitration as late as 1724.³⁷¹ It is perhaps because of this practice of referring cases that it is not uncommon to see litigants dropping their lawsuits on their own and remanding their disputes to the Court of Assistants.³⁷²

This deference to the Court of Assistants is not surprising as it tracked the way the principal courts treated specialized courts hearing merchant disputes. In his survey of the law merchant, Thomas Scrutton made an observation that could very well have been made regarding copyright enforcement:

If you read the law reports of the seventeenth century you will be struck with one very remarkable fact [O]ne finds . . . hardly any commercial cases. . . .

The reason why there were hardly any cases dealing with commercial matters in the Reports of the Common Law Courts is that such cases were dealt with by special Courts and under a special law.³⁷³

The rules Scrutton was speaking of were known as *lex mercatoria* or the Law Merchant, a form of trade customs which merchants early on applied in a system of courts that best suited their profession, such as the fair courts and courts of pie-powder.³⁷⁴ And like the judges in the Court of Assistants,

368. Barnes v. Norton, C4/39/73 (Ch. c. 1616) (replication only).

369. Sisson, *supra* note 367, at 11–12. For orders discussing the interactions between the Court of Chancery and the Court of Assistants, see Barnes v. Norton, C33/131, f. 1071r (Ch. 1617), C33/133, f. 1199r (Ch. 1618).

370. Legat v. Islip, Court Book C, f. 85v (1625).

371. Baskett v. Salmon, C33/341, f. 441r–v (Ch. 1724). This reference was to individual Stationers rather than to the Court of Assistants itself.

372. *E.g.*, *In re Janneway*, Court Book E, f. 150r (1682); *In re Weaver*, Court Book C, f. 136v (1635); *Stansby v. Barnes*, Court Book C, f. 44v (1616); *Windet v. East*, Court Book C, f. 8v (1605/6); *Dexter v. Bradock*, Court Book B, f. 479v (1601); *Reynoldes v. Jeffes*, Court Book B, f. 458r (1593/4).

373. Thomas Edward Scrutton, *General Survey of the History of the Law Merchant* (1891), reprinted in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7, 7–8 (Ass'n Am. Law Sch. ed., photo. reprint 1992) (1909).

374. William C. Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 447 (1958).

the judges who decided mercantile disputes were merchants themselves.³⁷⁵

In time, mercantile disputes began to migrate into the principal courts, much as copyright disputes did. Merchants first favored the Court of Chancery over the common-law courts because of its extensive jurisdiction.³⁷⁶ Gerard Malynes thus wrote in 1622 that “Merchants causes are properly to be determined by the Chauncerie.”³⁷⁷ He also noted, however, that cases brought there would then “commonly [be] referred to Merchants, to make report of the state thereof vnto the Lord Chauncellor.”³⁷⁸ Over time, the customary laws of the merchants as developed in their tribunals were absorbed into the jurisprudence of the Chancery,³⁷⁹ and were later explicitly adopted in the common-law courts during the eighteenth century.³⁸⁰

It would not be much of a stretch to conclude something similar occurred as infringement suits transitioned from the Court of Assistants to the Chancery circa 1660–1680. Though the records are silent on this point, we can imagine plaintiffs arguing in those early Chancery cases that the Chancellor had to interfere by injunction either in lieu of or regardless of any remedy at law as it was the course they had become accustomed to receiving during the past one hundred years in the Court of Assistants and elsewhere. The Chancery would have known of the practice of the Assistants because of the referral of cases there, the Chancery’s former involvement with the printing decrees of the Star Chamber, and its familiarity with the Company’s bylaws. It is also plausible that during oral argument in those early cases litigants would have even referred to the records of the Court of Assistants.³⁸¹

Scrutton, who also wrote on the subject of copyright law, made a similar argument in his treatise with respect to the recognition of a common-law copyright (as opposed to the remedies available for infringement), and I believe his reasoning to be equally applicable here. He

375. *Id.* at 448, 450.

376. Francis M. Burdick, *What is the Law Merchant?*, 2 COLUM. L. REV. 470, 485 (1902).

377. GERARD MALYNES, *CONSUETUDO, VEL LEX MERCATORIA, OR THE ANCIENT LAW-MERCHANT* 467 (London, Adam Islip 1622).

378. *Id.* See also Jones, *supra* note 374, at 451 (noting that cases in the regular courts were often “decided by reference to merchants as arbitrators or by the use of merchant juries”).

379. Burdick, *supra* note 376, at 485.

380. See Scrutton, *supra* note 373, at 13–15.

381. *Cf.* *Millar v. Taylor*, 4 Burr. 2303, 2313, 98 Eng. Rep. 201, 207 (K.B. 1769) (noting that William Blackstone, counsel for the plaintiff booksellers, had “argued very materially from the books of the Stationers Company; and read many entries”); *Harper v. Blackwell* (Ch. 1596), *reprinted in* 1 CASES CONCERNING EQUITY, *supra* note 189, at 257 (arbitral awards were admissible evidence in Chancery).

believed that a common-law copyright existed prior to the Statute of Queen Anne despite the absence of any express recognition by judicial decision largely because of the customs and practices of the Stationers' Company and the decrees and ordinances that supported it: "[w]hen a custom, having reached a certain degree of general acceptance and long duration, comes before the Courts they are bound to recognize and give effect to it, unless it is clearly unreasonable."³⁸²

Would copyright holders have expected any less relief from the principal courts than they received from the Court of Assistants? Hardly. They would have demanded the same remedy from the Lord Chancellor. Litigants were, as Thomas Barnes has emphasized, the real determinants of the course of the law. "What the litigants wanted and were prepared to pay for, the lawyers would propose and the courts would dispose."³⁸³ John Guy added that litigants would not "themselves [have] cared whether their judgments were doctrinally pure . . . as long as they met immediate personal needs and were enforceable."³⁸⁴

VII. REMEDILESS AT LAW: 1649–1800

Copyright holders eventually stopped submitting their infringement claims to the Court of Assistants, and by the start of the Restoration in 1660 had begun to bring their claims in the Chancery. The decline of the Assistants as the ideal infringement forum was due to several factors.³⁸⁵ For one, "the authority of the Company's Court was not always sufficient for the protection of its members."³⁸⁶ The court only had jurisdiction over the Company's own members and thus could not compel any other person to appear before it.³⁸⁷ The principal decline, however, came following the lapses of the Printing Act in 1679 and 1695, and the enactment of the Statute of Queen Anne in 1710. The Court of Assistants lost its investigative powers and its copyright ordinances were no longer

382. SCRUTTON, *supra* note 108, at 4. A majority of the judges who heard *Donaldson v. Becket* reached the same conclusion, only to be overruled by the peers. *See supra* text accompanying notes 112–15.

383. Barnes, *supra* note 311, at 8.

384. J.A. GUY, CHRISTOPHER ST. GERMAN ON CHANCERY AND STATUTE 77 (1985).

385. *See* R.C. Bald, *Early Copyright Litigation and Its Bibliographical Interest*, in THE BIBLIOGRAPHICAL SOCIETY OF AMERICA 1904–79, at 172, 172–80 (1980).

386. RECORDS FROM REGISTER B, *supra* note 327, at xlvii.

387. PATTERSON, *supra* note 10, at 35. It is likely for that reason that some of the cases noted previously were brought in the Star Chamber rather than the Court of Assistants. This also probably explains why the case *Wolfe v. Payne*, C33/29, f. 143v, C33/30, f. 143v (Ch. 1563/4), was brought in the Court of Chancery. Though the plaintiff, Reyner Wolfe, was a Stationer, *see* DUFF, *supra* note 73, at 171–72, I could find no evidence suggesting the defendant Richard Payne was as well.

supported.³⁸⁸ Moreover, authors, who were now made the initial beneficiaries of copyright, had no use for the tribunal as they were not members of the Company.³⁸⁹ The Chancery became the forum of choice, and, as I explain below, the common-law courts continued to have no significant remedial role in infringement cases.

A. UNAVAILABILITY OF THE PENALTIES AT LAW

I have already noted that one of the principal remedies available to copyright holders was the one-two punch of penalty and forfeiture.³⁹⁰ These remedies were first made widely available to litigants by virtue of the ordinances of the Company of Stationers and the Star Chamber decrees. By virtue of those very instruments, however, the penalties were only recoverable for much of the early history of copyright in either the Court of High Commission, the Court of Star Chamber, or the Court of Assistants. But beginning in 1649, eight years after the abolition of the High Commission and Star Chamber, Parliament made these remedies recoverable in the common-law courts—first in the Upper Bench and in 1653 in any court of record. This forum assignment continued through the end of the eighteenth century. But in one of the great ironies of the law, these remedies were unrecoverable in most cases.

The operative penalty provision in 1789 was the Statute of Queen Anne, as amended, which provided that if any person

shall print reprint or import or cause [the same] . . . without the Consent of the Proprietor . . . or knowing the same to be so printed or reprinted . . . shall sell publish or expose to Sale or cause [the same] . . . then such Offender . . . shall forfeit such Book or Books . . . to the Proprietor . . . who shall forthwith damask and make Wast Paper of them[.] And further that every such Offender . . . shall forfeit One Penny

388. Nevertheless, the Court of Assistants reasserted its authority to hear infringement complaints in 1722. In *Tonson v. Darby*, Court Book H 126–28 (1722), a subcommittee of the Assistants quoted the 1678 bylaw and stated that it was the “Opinion of this Committee that any Difference arising at any time hereafter between any Members of this Company relating to the Copy Right of any Book or Books, should be laid before this Court for their Opinion and Determination.” *Id.* at 127. Failure to do so, they threatened, “shall be adjudged to have Forfeited the favour of this Court.” *Id.* at 127–28. Several infringement cases were heard thereafter. *See Bowyer v. Osborn*, Court Book H 268–69, 286, 287–88 (1727–1727/8); *Hett v. Saunders*, Court Book H 273 (1727); *Clark v. Midwinter*, Court Book H 276, 279, 285–86 (1727); *Buckley v. Innys*, Court Book H 300–01 (1728); *In re State Tryalls*, Court Book H 395–97, 399, 400, 404–05 (1730/1). The threat seems to have waned after 1731, however, as I could find no infringement complaints in the Court of Assistants after that date.

389. It must be acknowledged, however, that before 1800 the vast majority of Chancery suits were not brought by authors but by the booksellers to whom the copyrights were sold.

390. *See supra* Part IV.B–C.

for every Sheet[,] . . . the one Moiety thereof to the Queens most Excellent Majesty . . . and the other Moiety thereof to any Person or Persons that shall sue for the same to be recovered in any of Her Majesties Court of Record at Westminster by Action of Debt Bill Plaint or Information³⁹¹

To be eligible to recover these remedies, a plaintiff had to have registered a work with the Company of Stationers, deposited nine copies of the work, and brought the claim within three months of the offense.³⁹²

Notably, the penalties and forfeitures were only recoverable in the “Court[s] of Record at Westminster,” which meant in the King’s Bench, Court of Common Pleas, and Exchequer, but not the Court of Chancery. Though the Chancery kept records of its proceedings, its equitable side was not considered a “Court of Record.” The term carried a special meaning and was originally reserved for courts that recorded their proceedings in Latin on a parchment roll, which the equitable side of the Chancery did not.³⁹³ Exclusion of the Chancery from this concept persisted into the nineteenth century³⁹⁴ and was understood by copyright litigants to mean that the penalties could only be had at law.³⁹⁵ Indeed, this understanding was reflected in *Tonson v. Baker* in 1710.³⁹⁶

Despite the fact this provision had been sought by the booksellers,³⁹⁷ it is generally agreed that litigants almost never used it. The Solicitor General of England in 1747, William Murray (later Lord Mansfield), stated in a

391. Statute, 1710, 8 Anne, c. 19, § 1. *See also* Statute, 1739, 12 Geo. II, c. 36, § 1. The language of statutes governing prints, portraits, and works held by the universities was the same in all material respects. *See* Engraving Copyright Act, 1735, 8 Geo. II, c. 13, § 1; Copyright Act, 1775, 15 Geo. III, c. 53, § 2. In Scotland, the penalties were to be sought in the Court of Session. 8 Anne, c. 19, § 6.

392. 8 Anne, c. 19, §§ 2, 5, 10. Letters patent also typically contained penalty provisions.

393. *See* 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 71 (London 1797).

394. *See* 2 HENRY MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY 840 (3d ed., London, J. & W.T. Clarke 1837).

395. *See* PETITION FOR DANIEL MIDWINTER ET AL. 6 (1747) [hereinafter PETITION] (“[T]he Remedy for these Penalties is only at Law.”), reprinted in LITERARY PROPERTY DEBATE, *supra* note 149; *Midwinter v. Hamilton*, 2 Kam. Rem. 154, 161 (Sess. 1748) (“[E]very action that can be commenced in pursuance of this act must go before the courts of common law, and be determined by a jury.”). It is true that the Chancery ordered a party to damask books in the case *Knaplock v. Curll*, C33/339, f. 12r–v (Ch. 1722), but insofar as it was purportedly ordered under the Statute of Queen Anne, it was erroneous. In any event, it was an anomaly, as I could find no other such orders emanating from the Court of Chancery after 1710. *Accord* *Tonson v. Collins*, 1 Black. W. 321, 329–30, 96 Eng. Rep. 180, 183–84 (K.B. 1761). Incidentally, the issue of whether the Chancery was a court of record under the copyright statutes was raised but not decided in *Colburn v. Simms*, 2 Hare 543, 558–59, 67 Eng. Rep. 224, 231 (Ch. 1843).

396. *See supra* text accompanying note 263.

397. *See* DEAZLEY, *supra* note 10, at 16, 35; JOHN J. LOWNDES, AN HISTORICAL SKETCH OF THE LAW OF COPYRIGHT 31–32 (London, Saunders & Benning 1840).

legal opinion offered to booksellers bringing a case in the Court of Session that “[t]his Method of proceeding . . . has scarce ever been practiced since the making of the Act.”³⁹⁸ Similarly, in 1770, an anonymous author commenting on the state of literary property remarked that the penalties clause “was seldom or never put in force.”³⁹⁹ I myself could find only a handful of clear examples of actions for the penalty in an English court,⁴⁰⁰ along with a few others that are inconclusive.⁴⁰¹ Even actions for the penalty for patent infringement, pursuant to either the Printing Act of 1662 or the patent itself, were relatively rare.⁴⁰²

Various reasons have been offered for why the penalties were not sought, some that are more sensible or likely than others. Solicitor General Murray, for instance, noted that the penalties were dependent on registering the work with the Stationers’ Company, a procedure he labeled as “attended with so many Difficulties.”⁴⁰³ He probably was alluding to the burdensome deposit requirement of nine copies. Scholars have since shown that the number of registered books did in fact under represent the number of books in print, thus supporting Solicitor General Murray’s statement.⁴⁰⁴

398. PETITION, *supra* note 395, at 4.

399. OBSERVATIONS OCCASIONED BY THE CONTEST ABOUT LITERARY PROPERTY 16 (Cambridge, Univ. of Cambridge 1770).

400. *Coleman v. Wathen*, 5 T.R. 245, 101 Eng. Rep. 137 (K.B. 1793); *Brooke v. Milliken*, 3 T.R. 509, 100 Eng. Rep. 705 (K.B. 1789); *Trusler v. Murray*, *cit.* 1 East 361–62 n.(b), 102 Eng. Rep. 140–41 (K.B. 1789); *Watson v. Sayer*, Mansfield MS f. 478 (K.B. 1776), *reprinted in* 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS 744 (1992).

401. The other suits I encountered dealt with engravings, and most are after 1777 when an action for damages was created by statute. It is thus unclear whether the plaintiff had sought the penalties or damages; in any event, none succeeded. *E.g.*, *Sayre v. Moore*, 1 East 361–62 n.(b), 102 Eng. Rep. 139, Mansfield MS f. 501 (K.B. 1785) (defense verdict), *reprinted in* 1 OLDHAM, *supra* note 400, at 770–71; *Sherwin v. Sayer*, Mansfield MS f. 498 (K.B. 1783) (settled), *reprinted in* 1 OLDHAM, *supra* note 400, at 770; *Benner v. Fielding*, Mansfield MS f. 487 (K.B. 1781) (nonsuited), *reprinted in* 1 OLDHAM, *supra* note 400, at 759–60. In one engraving case, it is clear the plaintiff sought the penalty, but once again the action failed. *See Sayer v. Dicey*, 3 Wils. K.B. 60, 95 Eng. Rep. 933 (C.P. 1770) (nonsuited).

402. For actions on the Printing Act, see *Roper v. Streater*, *cit.* *Skinner* 234, 90 Eng. Rep. 107, *cit.* 4 Bacon’s Abr. 208 (K.B. 1670), *cit.* 2 Chan. Cas. 67, 22 Eng. Rep. 849–50 (H.L. 1672) (law patent); *Mayo v. Hill*, *cit.* 2 Show K.B. 260, 89 Eng. Rep. 928 (K.B. 1672) (English Bible and psalms patent); *Stationers v. Seymour*, 1 Mod. Rep. 256, 86 Eng. Rep. 865, *cit.* 2 Show K.B. 260, 89 Eng. Rep. 928 (C.P. 1675), 3 Keble 792, 84 Eng. Rep. 1015 (C.P. 1677) (almanac patent). The Stationers also brought actions directly on their 1615/6 patent. *See Stationers v. Marlowe*, 1 Lilly’s Mod. Entries 63, *cit.* 2 Show K.B. 261, 89 Eng. Rep. 928–29 (C.P. 1680) (win); *Stationers v. Gayne*, CP40/2992, m. 441r, *cit.* C7/580/112 (C.P. 1681) (loss); *Stationers v. Lee*, *sub nom.* *Stationers v. Wright*, *cit.* *Skinner* 234, 90 Eng. Rep. 107 (K.B. c. 1683) (win); *Stationers v. Parker*, *Skinner* 233, 90 Eng. Rep. 107 (K.B. 1685) (win). The wins formed the basis for the Stationers’ arguments in subsequent Chancery cases that the validity of their patent had already been upheld at law; the loss, of course, was cited by defendants.

403. PETITION, *supra* note 395, at 4.

404. *See* *Shel Rogers*, *The Use of Royal Licenses for Printing in England, 1695–1760: A Bibliography*, 1 THE LIBRARY 133, 133 (7th Ser. 2000).

It is also clear that the penalty of a penny a sheet eventually fell behind inflation,⁴⁰⁵ and that in some cases the three-month statute of limitations was too short.⁴⁰⁶

Some judges also believed that the penalty was inadequate as it was not exclusively available to a copyright owner and could be recovered by any common informer, thus somehow suggesting that a common stranger would usurp the remedy intended for an aggrieved copyright holder.⁴⁰⁷ But this fear seems to have been overblown, as I encountered no evidence of an absolute stranger to the copyright suing for the penalty in place of the rightful copyright owner. Harry Ransom has also surmised that plaintiffs were discouraged by a provision in the Statute of Queen Anne that awarded full costs to a prevailing defendant.⁴⁰⁸ The practice differed little in the Chancery, however, because even though costs were discretionary,⁴⁰⁹ the usual course was to award them to the prevailing party,⁴¹⁰ just as it was at law.

There exists a more fundamental reason why litigants did not pursue the penalties available at law, one not previously remarked upon by copyright historians. In the vast majority of cases, copyright holders simply could not obtain the penalties, even if they had wanted them, due to an odd interplay between the common-law courts and the Chancery on issues of evidence and discovery which often resulted in a lack of proof.

As Jeremy Bentham noted with some sarcasm, the rules of evidence at law were “devised to exclude the testimony of every one who was likely to know anything about the matter.”⁴¹¹ Evidence could “not be received under

405. *Reasons for Amending an Act of Parliament Made in the 10th Year of the Late Queen: An Act for Encouragement of Learning &c.*, MS Carte 207, f. 19r (c. 1737) [hereinafter *Reasons for Amending*] (“The offenders against this Statute are not sufficiently discouraged for all the Discouragement they meet with in this Act is only forfeiture of the Books and a penalty of a [penny] a sheet which is a penalty so trivial that a Man will not think it worth his while to bring an Action at Law . . .”).

406. *THE CASE OF AUTHORS AND PROPRIETORS OF BOOKS 2* (c. 1753), reprinted in *ENGLISH PUBLISHING, THE STRUGGLE FOR COPYRIGHT, AND THE FREEDOM OF THE PRESS: THIRTEEN TRACTS 1666–1774* (Stephen Parks ed., 1975).

407. *Beckford v. Hood*, 7 T.R. 620, 628, 101 Eng. Rep. 1164, 1168 (K.B. 1798).

408. *RANSOM*, *supra* note 96, at 103–04 (citing Statute, 1710, 8 Anne c.19, § 8).

409. *See Jones v. Coxeter*, 2 Atk. 400, 26 Eng. Rep. 642 (Ch. 1742).

410. *See Vancouver v. Bliss*, 11 Ves. Jr. 458, 463, 32 Eng. Rep. 1164, 1166 (Ch. 1805). Thus, the Chancery could award prevailing defendants costs when: (1) plaintiffs voluntarily dismissed their own bills, e.g., *Atkins v. Stationers*, C33/231, f. 459r (Ch. 1669); (2) the court dismissed the bill for want of prosecution, e.g., *Rawlins v. Walthoe*, C33/304, f. 295v (Ch. 1705); (3) the court dismissed the bill on a demurrer, see 1 JOSEPH HARRISON, *THE ACCOMPLISH'D PRACTISER IN THE HIGH COURT OF CHANCERY* 325 (2d ed., London, A. Strahan & W. Woodfall 1745); or (4) the court dismissed the bill after a full adjudication of the merits, e.g., *Stationers v. Carman*, C33/444, ff. 427r–428v (Ch. 1775).

411. *KERLY*, *supra* note 189, at 261 (paraphrasing Bentham).

oath from parties to the action, their spouses, or those with any interest in the outcome of the case.”⁴¹² Essentially, then, the only way to prove the number of infringing works or sheets would be through the defendant’s voluntary confession, which was unlikely, or through the receipt of information from a witness who was entirely disinterested, also an unlikely occurrence. This very problem appears to have been noted in a decision of the Court of Session, which stated that pursuers were “not . . . able to bring evidence by witnesses of any act transgressing the statute” of Queen Anne.⁴¹³ Thus, the principal way to prove what had occurred was by discovery in equity.⁴¹⁴

Strongly rooted in its own history, however, was the Chancery’s refusal to order an answer (or discovery) that might lead to a penalty or forfeiture. The first evidence of the principle at work may be found in cases where the defendant’s answer could result in imprisonment.⁴¹⁵ But this eventually morphed to cover any penalty or forfeiture, even those meted out civilly. Lord Hardwicke explained the principle in *Selwyn v. Honeywood* as follows:

It is an established rule, that no man is obliged, in a Court of Equity, to discover matters which may subject himself, or tend to subject himself, to any penalty, whether it be loss of property or office, [by Act of Parliament or otherwise,] or which may subject himself to any punishment of another sort The plaintiff may make proof by other persons of the fact, but is not entitled to the defendant’s confession.⁴¹⁶

Cases in which this principle is mentioned or applied are legion,⁴¹⁷ and a similar principle was recognized in the United States.⁴¹⁸

Thus, in order for a suit to proceed in equity, the plaintiff had to state

412. Déirdre M. Dwyer, *Developments in the Principles of Civil Evidence in Nineteenth Century England* 5 (July 2007) (unpublished manuscript), available at http://www.law.harvard.edu/programs/ames_foundation/BLHC07/Index.html. *Accord* 2 ISAAC ’ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS 703 (2d ed., London 1793) (“As in the case of an informer on a penal statute, in which case the same person cannot be informer and witness, because he is entitled to a part of the penalty, and so is interested in the event.”); JOHN STRANGE, A COLLECTION OF SELECT CASES RELATING TO EVIDENCE 11 (London, Henry Lintot 1754).

413. *Midwinter v. Hamilton*, 2 Kam. Rem. 154, 155–56 (Sess. 1748).

414. See *East India Co. v. Atkins*, 1 Strange 168, 176–77, 93 Eng. Rep. 452, 457 (Ch. 1719).

415. See MICHAEL R.T. MACNAIR, *THE LAW OF PROOF IN EARLY MODERN EQUITY* 64–65 (1999).

416. *Selwyn v. Honeywood*, 9 Mod. 419, 425–27, 88 Eng. Rep. 546, 550–51 (Ch. 1744).

417. *E.g.*, *Colburn v. Simms*, 2 Hare 543, 554, 67 Eng. Rep. 224, 229 (Ch. 1843); *Orme v. Crockford*, M’Cle. 185, 194–97, 148 Eng. Rep. 78, 82–84 (Exch. 1824); *Boteler v. Allington*, 3 Atk. 453, 457, 26 Eng. Rep. 1061, 1063 (Ch. 1746); *Bird v. Hardwicke*, 1 Vern. 109, 110, 23 Eng. Rep. 349, 349 (Ch. 1682).

418. *United States v. Saline Bank of Virginia*, 26 U.S. (1 Pet.) 100, 104 (1828) (“The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties.”).

in his or her bill of complaint that they waived the right to pursue any penalties or forfeitures at law. Recognizing this fact, plaintiffs in copyright cases typically waived their rights to the penalty under the Statute of Queen Anne or where similar rights were awarded by letters patent.⁴¹⁹ One example is *Arne v. Roberts*, where a musical composition protected by letters patent was at issue. The plaintiff requested

that the said Henry Roberts and John Johnson may sett forth whether they have not printed published uttered or sold some and what Vocall and Instrumental Musick of your Orators Composition (your Orator hereby waving all Penalties and Forfeitures incurred by the said [Defendants] on account thereof)⁴²⁰

Language waiving the penalties under the Statute was similar.⁴²¹ Indeed, so ingrained was the waiver in the minds of litigants that even complaints based on the common-law copyright recognized by *Millar v. Taylor* waived the penalties, despite there being no such penalty at common law.⁴²² It was also understood that if a plaintiff later reneged on a waiver and took the discovery to law, the Chancery would enjoin the action.⁴²³ When considered in this context, the following remark from a manuscript in the Bodleian Library makes eminent sense: “As the Act [of Queen Anne] lyes[,] it is almost impossible to detect any offender so as to make him lyable to the penaltys.”⁴²⁴

Because an action on the penalties was typically unavailable, the only recourse a copyright holder had for relief, at least until an action on the case for damages was expressly recognized, was by recourse to the Court

419. The plaintiffs' failure in *Gosling v. Walthoe*, C11/318/28 (Ch. 1718), to waive the penalties in their bill led to a hearing on the defendants' objection by plea. The plaintiffs ultimately agreed not to take advantage of the penalties available under a patent for law books and to pay the defendants the costs of having to file the plea. *Gosling v. Walthoe*, C33/331, f. 83v (Ch. 1718).

420. *Arne v. Roberts*, C11/2260/7, m. 1 (Ch. 1741). For examples of waivers under other patents, see *Baskett v. Summerfield*, C11/1327/10 (Ch. 1740/1) (“[Y]our Orator hereby waving and not Insisting upon any of the paines Penaltys or Forfeitures in the said [King’s Printers’] Letters Patent mentioned.”); *Stationers v. Parker*, C11/1394/67 (Ch. 1716) (“[Y]our Orators hereby Offering not to take the Advantage of any penalty whatsoever in the said [Stationers’ 1615/6] Letters patent[.]”).

421. *E.g.*, *Dodsley v. Kinnersley*, C12/496/2, m. 1 (Ch. 1759) (“Your Orators have and do hereby waive and relinquish all the penalties and forfeitures Inflicted or intended to be Inflicted by the said Act of Parliament.”).

422. *E.g.*, *Whiston v. Donaldson*, C12/64/26, m. 1 (Ch. 1771).

423. *See* *Wools v. Walley*, 1 Anst. 100, 145 Eng. Rep. 812 (Exch. 1793). Sometimes litigants had to be reminded of this fact, such as in *Knaplock v. Curll*, where upon entering the final decree in the matter, the court ordered that the “plaintiffs are not to prosecute the Defendant on the penalty of the said Act of Parliament made in the 8th year of her late Majestie.” *Knaplock v. Curll*, C33/339, f. 12r-v (Ch. 1722).

424. *Reasons for Amending*, *supra* note 405, MS Carte 207, f. 19r.

of Chancery. Litigants naturally preferred this course at least insofar as it enabled them to prevent further infringement by injunction. And in this sense it was no harm, no foul. But it also seems that the Chancery, in the meantime, made the discovery obtained from a defendant relevant for a reparative function in the Chancery itself. As previously noted, litigants could request and obtain from the Chancery an award of the defendant's profits to remedy past infringement.⁴²⁵

B. LACK OF A DAMAGES REMEDY AT LAW

Copyright holders had to wait quite some time before they expressly obtained an action for damages in the common-law courts. Engravers, a small class of copyright holders, first received an ordinary damages remedy in 1777 by statute, and the rest received it briefly by judicial decision in 1769, spuriously by judicial decision in 1798, and actually by statute in 1801. Ironically, the delay was most likely on account of the right-holders' own reluctance to go to law in the first place. For one, they contented themselves with the relief available in the several antecedent tribunals and subsequently in the Court of Chancery. Those tribunals granted both preventive and reparative (namely, profits) remedies. Additionally, an award of actual damages was initially thought to be too difficult to obtain.⁴²⁶ When considered in combination with the fact that interlocutory injunctions often obviated the need for an award of damages (or profits), there was thus no urgency to have a common-law court declare that a legal remedy other than penalties was available.

Perhaps most importantly, seeking relief in a common-law court became a risky affair during the lapses of the Printing Act of 1662 and after the statutory terms under the Statute of Queen Anne began to expire. Hundreds of valuable works were protected only, if at all, by a common-law copyright. An action for damages in a common-law court would have necessarily required the supposed common-law right to be tested as well, and that very well could have led to a ruling against the right, thereby affecting not just the work at issue in the action but the hundreds of other at-risk works. Thus, before 1800, copyright holders ventured to law for damages infrequently, and typically only where they could set up a

425. See *supra* notes 183–85 and accompanying text.

426. See MORE REASONS HUMBLY OFFER'D TO THE HONOURABLE HOUSE OF COMMONS, FOR THE BILL FOR ENCOURAGING LEARNING, AND FOR SECURING PROPERTY OF COPIES OF BOOKS TO THE RIGHTFUL OWNERS THEREOF (1709); REASONS HUMBLY OFFER'D TO THE CONSIDERATION OF THE HONOURABLE HOUSE OF COMMONS, SHEWING THE GREAT NECESSITY OF HAVING A BILL FOR THE REGULATING OF PRINTING AND PRINTING-PRESSES (c. 1698).

favorable test case to establish their rights or when the Court of Chancery had forced them to law to determine their rights.

The first serious effort to obtain “damages” was brought not in the common-law courts of England, but in the Court of Session in Scotland, and was not really for ordinary damages at all. In the 1740s, several London booksellers sued members of the Scottish trade for copyright infringement under the Statute of Queen Anne.⁴²⁷ After first seeking the penalties and forfeitures of the statute, they then pressed instead for “damages,” by which they actually meant the defendant’s profits (an equitable remedy).⁴²⁸ After several arguments, the Lords of Session held that “no action lies upon this statute for damages,”⁴²⁹ but only for the penalties. On appeal, the pursuers changed tactics by admitting that no action lay upon the statute for damages, but that such an action for damages could be “founded, not upon the express Words of the Statute . . . but by the common Rules of Law.”⁴³⁰ This too was rejected, albeit *sub silentio*, in a decision handed down the following year.⁴³¹

Having lost in Scotland, the booksellers then turned to the King’s Bench in a case only briefly mentioned before, *Tonson v. Collins*.⁴³² There, the plaintiff brought an action on the case, rather than on the Statute, because the plaintiff’s copyright had expired. The jury returned a verdict of infringement and damages of five pounds, but left to the judges whether the facts as found would make the defendant liable for damages. Admittedly, the plaintiff was more concerned with having the Bench recognize a perpetual *right* at common law than a *remedy* at common law in damages. In any event, neither occurred, as the Bench decided not to proceed due to evidence that the action was a collusive one funded by the plaintiff and acquiesced in by the defendant to result in a favorable precedent for the copyright holders.⁴³³

427. See DEAZLEY, *supra* note 10, at 116–17. Deazley recounts this Scottish copyright litigation using primary sources in great detail with the principal view of describing another instance in which a copyright at common law was rejected. See *id.* at 115–32.

428. *Id.* at 117. The Court of Session operated as a mixed court of law and equity. *Id.*

429. *Midwinter v. Hamilton, sub nom. Booksellers in London v. The Booksellers in Glasgow & Edinburgh*, 1 Elchies App. II, Literary Property No. 3, 2 Elchies 251 (Sess. 1747).

430. PETITION, *supra* note 395, at 9.

431. *Midwinter v. Hamilton*, 2 Kam. Rem. 154, 161 (Sess. 1748). A further appeal to the House of Lords was rejected on other grounds. *Midwinter v. Kincaid*, 1 Pat. App. 488, 492 (H.L. 1750/1). Nevertheless, the decision in *Midwinter v. Hamilton* was later approved in *Payne v. Anderson*, Law Steuart Craigie 524, 528 (Sess. 1787).

432. *Tonson v. Collins*, 1 Black. W. 301, 321, 96 Eng. Rep. 169, 180 (K.B. 1761). See *supra* note 110.

433. *Id.* at 345 n.(d), 96 Eng. Rep. at 191.

A temporary recognition of a common-law right outside the Statute, and thus of a remedy of damages at law, came in *Millar v. Taylor* in 1769, following a referral of the suit from the Chancery to determine the right.⁴³⁴ The plaintiff stated a case in the King's Bench for infringement of a work whose copyright had long since expired under the Statute, claiming damages of two hundred pounds. The jury returned a special verdict of nominal damages and again left it for the Bench to decide whether the defendant was "liable in law to answer for the damages."⁴³⁵ The Bench held three to one that he was. Justice Yates, who dissented, actually spoke most directly on the issue of damages as a remedy. He stated that, in his mind, a plaintiff should be permitted during the statutory term to seek all common-law remedies, including an action for damages.⁴³⁶ But before this decision could have any lasting impact on the book trade,⁴³⁷ it was overruled in *Donaldson v. Becket* in 1774—another case that also began in the Court of Chancery⁴³⁸—which held that there was no right outside the Statute.⁴³⁹

The first time an action for damages at law was recognized with any enduring quality was in 1777, albeit only for a very limited set of copyright holders. Engravers of prints and portraits were given the remedy by statute in order to make their statutory right more effectual.⁴⁴⁰ Proprietors obtained a "special action upon the case, to be brought against the person or persons so offending [to] recover such damages as a jury on the trial of such action . . . shall give."⁴⁴¹ The statute did nothing, however, for the much higher number of litigants who held copyrights in books or equivalents. Those right holders had to wait until 1801, following a specious common-law decision in 1798.

That decision, *Beckford v. Hood*, was brought in 1798 in the King's Bench as an action on the case for "damages."⁴⁴² The plaintiff had authored

434. *Millar v. Taylor*, C33/426, ff. 68v–69r (Ch. 1765), 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

435. *Millar*, 4 Burr. at 2309, 98 Eng. Rep. at 205.

436. *Id.* at 2380–81, 98 Eng. Rep. at 243 (Yates, J., dissenting).

437. See DEAZLEY, *supra* note 10, at 188 (noting the lack of a practical impact of the decision).

438. *Becket v. Donaldson*, C12/61/24 (Ch. 1771).

439. *Donaldson v. Becket*, *cit.* 4 Burr. 2408, 2417, 98 Eng. Rep. 257, 262, 2 Bro. PC 129, 145, 1 Eng. Rep. 837, 847, 17 Cobb. Parl. Hist. 953, 958 n.(*), 1003 (H.L. 1774). Just prior to that, in 1773, the Court of Session had also ruled that there was no such thing as a perpetual common-law copyright. *Hinton v. Donaldson* (Sess. 1773), in THE DECISION OF THE COURT OF SESSION, UPON THE QUESTION OF LITERARY PROPERTY 33–36 (Edinburgh, James Boswell 1774).

440. Prints Copyright Act, 1777, 17 Geo. III, c. 57, § 1.

441. *Id.* The only clear pre-1800 example is *Thompson v. Symonds*, 5 T.R. 41, 101 Eng. Rep. 23 (K.B. 1792).

442. *Beckford v. Hood*, 7 T.R. 620, 621, 101 Eng. Rep. 1164, 1164 (K.B. 1798).

a book titled *Thoughts Upon Hunting* which was still within the twenty-eight-year statutory term. The plaintiff proved that the defendant had published and sold four hundred copies without consent. A jury returned a verdict for the plaintiff subject to the court's ruling on numerous issues of law, including whether registration was required for protection and, importantly, whether an action on the case for damages would lie since the passage of the Statute of Queen Anne. The trouble lay in the principle, largely agreed upon by the parties, that "wherever a new right is conferred by statute, and a particular remedy given to the party grieved to enforce the observance of it, no other remedy can be resorted to."⁴⁴³

Ignoring an *in pari materia* argument concerning the recently enacted special action for engravers, the King's Bench seemingly created a damages action at law for copyright infringement. The court held that a remedy separate from the penalties was required to effectuate the author's right, particularly because the action for penalties was not specifically vested in the author of a work "but to any person who may get the start of him and sue first."⁴⁴⁴ The decision also made the remedy recoverable even where the work was unregistered, so long as the statutory term had not expired.⁴⁴⁵ Three years later, in 1801, Parliament appeared to codify the holding in *Beckford* by providing the proprietor of a copyright with a "special action upon the case to be so brought . . . in any court of record . . . [to] recover such damages as the jury on the trial of such action . . . shall give."⁴⁴⁶

Though it would seem that *Beckford* expressly recognized an action for ordinary damages at law in lieu of penalties (which is how it was later interpreted),⁴⁴⁷ there is an irony to the case that only reveals itself if one looks to the original court records. The court of first resort in the case was actually the Chancery, not the King's Bench. The suit began with the Chancellor's award of a TRO, but the question then arose following the defendant's answer as to whether the plaintiff could maintain the suit

443. *Id.* at 623, 101 Eng. Rep. at 1165 (argument of plaintiff's counsel).

444. *Id.* at 628, 101 Eng. Rep. at 1168.

445. *See id.* at 627–29, 101 Eng. Rep. at 1167–68.

446. Statute, 1801, 41 Geo. III, c. 107, § 1. *Accord* Statute, 1814, 54 Geo. III, c. 156, § 4. The House of Lords later reaffirmed *Beckford* in a case appealed from Scotland. *See Cadell v. Robertson*, 5 Pat. App. 493, 504 (H.L. 1811). The U.S. Supreme Court, however, reached the opposite conclusion and rejected *Beckford*—holding that no action for damages was available under the U.S. Copyright Act for maps, as the only remedies provided by the Act were penalties and forfeiture. *Globe Newspaper Co. v. Walker*, 210 U.S. 356, 362–64, 367 (1908).

447. *E.g.*, EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 473–74 (photo. reprint 1987) (1879); CURTIS, *supra* note 312, at 306.

because he had not registered the work.⁴⁴⁸ The Chancery ordered the action at law to determine that issue, and the action was to be framed as seeking “profits arising from the Sale of the book”—an *equitable remedy*—not ordinary damages.⁴⁴⁹ Importantly, after the decision in the King’s Bench, the plaintiff *returned to the Chancery* to obtain the defendant’s profits. The Chancellor referred the matter to a master to help determine the amount due and to tax the costs.⁴⁵⁰ Obviously, whether *Beckford* actually recognized an action at law for ordinary damages was mooted by the 1801 statute. Nevertheless, the foregoing discussion demonstrates that even in 1798 the Court of Chancery remained the remedial forum of choice.

C. A POST-1801 POSTSCRIPT

Given the absence of a widespread, recognized damages remedy until 1801, it should come as no surprise that it was not until 1803 that a Chancellor, Lord Eldon, first spoke of the inadequate-remedy-at-law requirement in the copyright context as the basis for jurisdiction. But rather than suggesting that an affirmative showing of the inadequacy of ordinary damages would now be required for an injunction, as one might expect, Lord Eldon held that the damages remedy was inadequate *per se*:

The principle of granting the injunction in [copyright] cases is, that damages do not give adequate relief; and that the sale of copies by the Defendant in each instance not only taking away the profit upon the individual book, which the Plaintiff probably would have sold, but may injure him to an incalculable extent, which no inquiry for the purpose of damages can ascertain.⁴⁵¹

Several years later, he again reiterated that copyright infringement could not “be made effectual by any action for damages.”⁴⁵² And the same was held in other copyright cases as well.⁴⁵³ Cases continued to reject any objection that an adequate remedy could be had at law in copyright cases late into the nineteenth century.⁴⁵⁴ Indeed, I could not find a single reported English case between 1801 and 1900 that denied an injunction solely on the ground that damages were adequate.

448. *Beckford v. Hood*, C12/670/33, C33/497, f. 583r–v (Ch. 1797).

449. *Id.* at C33/497, f. 583r–v, *as amended by* C33/500, f. 33r (Ch. 1797).

450. *Id.* at C33/500, f. 504r–v (Ch. 1798).

451. *Hogg v. Kirby*, 8 Ves. Jr. 215, 225, 32 Eng. Rep. 336, 340 (Ch. 1803).

452. *Wilkins v. Aikin*, 17 Ves. Jr. 422, 424, 34 Eng. Rep. 163, 164 (Ch. 1810).

453. *See, e.g., Lawrence v. Smith*, 1 Jac. 471, 472, 37 Eng. Rep. 928, 928–29 (Ch. 1822); *Rundell v. Murray*, Jac. 311, 314, 37 Eng. Rep. 868, 869 (Ch. 1821).

454. *E.g., Buxton v. James*, 5 De G. & Sm. 80, 83–84, 64 Eng. Rep. 1027, 1029 (Ch. 1851).

It seems likely that Lord Eldon was articulating what had already become a concurrent jurisdiction in copyright cases. In this sense, the Chancery's practice resembled other areas in which it exercised a concurrent jurisdiction with the common-law courts, such as in cases involving accounts,⁴⁵⁵ dower,⁴⁵⁶ and fraud.⁴⁵⁷ These were subjects where the Chancery had always provided the remedy in equity because there had historically been no adequate (or at times any) remedy at law. Through long and continuous practice, its jurisdiction in those areas became incontestable,⁴⁵⁸ even where an adequate remedy at law developed.⁴⁵⁹ As John Mitford summarized in 1787:

The courts of equity having gone the length of assuming jurisdiction in a variety of complicated cases of account, of partition, and of assignment of dower, seem by degrees to have been considered as having on these subjects a concurrent jurisdiction with the courts of common law in cases where no difficulty would have attended the proceeding in those courts.⁴⁶⁰

Not long after, Charles Barton wrote that “[t]his observation [would] apply to a variety of other cases at present cognizable in our Courts of Equity.”⁴⁶¹

455. *Morrice v. Bank of Eng.*, 3 Swans. 573, 574, 36 Eng. Rep. 980, 980 (Ch. 1736).

456. *Mundy v. Mundy*, 2 Ves. Jr. 122, 128–29, 30 Eng. Rep. 554, 557 (Ch. 1793).

457. *Hobbs v. Hull*, 1 Cox 445, 445–46, 29 Eng. Rep. 1242, 1242 (Ch. 1788); *Bright v. Eynon*, 1 Burr. 390, 396, 97 Eng. Rep. 365, 368, 2 Keny. 53, 60–61, 96 Eng. Rep. 1104, 1107 (K.B. 1757); *Colt v. Woollaston*, 2 P. Wms. 154, 156, 24 Eng. Rep. 679, 680 (Ch. 1723).

458. See *Barker v. Dacie*, 6 Ves. Jr. 681, 688, 31 Eng. Rep. 1256, 1259 (Ch. 1802) (“It depends in some degree upon the usage and the inherent jurisdiction of the Court . . .”).

459. *Atkinson v. Leonard*, 3 Bro. C.C. 218, 224, 29 Eng. Rep. 499, 502 (Ch. 1791) (“[I]t does not follow, because the court of law will give relief, that this court loses the concurrent jurisdiction which it has always had.”); *Campbell v. French*, 2 Cox. 366, 368, 30 Eng. Rep. 168, 169 (Exch. 1792) (“[A]lthough of late years the Courts of Law thought fit to admit of defences to actions upon mere equitable grounds, yet that could never oust the jurisdiction of the Courts of Equity, which, in all events, had the prior jurisdiction, and therefore, at least, had still a concurrent jurisdiction on such subjects; and therefore it was not of course to be taken as an answer to a bill praying relief, that the matter might be taken advantage of at law.”). See also *Baxendale v. W. Midland Ry. Co.*, 3 Giff. 650, 661–62, 66 Eng. Rep. 568, 573 (Ch. 1862).

460. MITFORD, *supra* note 142, at 111.

461. CHARLES BARTON, AN HISTORICAL TREATISE OF A SUIT IN EQUITY 18–19 n.(d) (London, W Clarke & Son 1796) (but not identifying what those other areas might be). The principle of concurrent jurisdiction was also recognized in the United States. In 1828, for example, the Indiana Supreme Court acknowledged that

[t]here are a variety of causes where Courts of law, and Courts of equity, have concurrent jurisdiction. And in such cases, a suitor has his election, to which tribunal he will apply for justice; and it is no objection to his relief in chancery, that he can have full relief at law.

Peck v. Braman, 1 Blackf. 544, 548 (Ind. 1828). Several other jurisdictions also recognized the principle. See *Bently v. Dillard*, 6 Ark. 79, 85 (1845) (“But if a court of law and a court of equity have concurrent jurisdiction over the subject matter, the party may make his election as to the tribunal which shall determine the controversy, and cannot be compelled to submit to an adjudication at law when he

Though Lord Eldon and subsequent Chancellors did not expressly label the Chancery's copyright jurisdiction as concurrent, the records support such a reading. The common-law courts played no significant remedial role in copyright-infringement suits for the entire known 230-year history of copyright enforcement before 1789. For the first one hundred years or so, those courts played no role at all; prerogative courts and arbitral courts, nearly all of which the Chancellor was to varying degrees associated, heard the cases. Thereafter, when the common-law courts began to play a role, that role was to help determine the existence of the plaintiff's right, and not the proper remedy. One can find support for this assessment, albeit in dictum, in a lone statement by Lord Chief Justice De Grey in *Donaldson v. Becket*. In speaking of copyright injunctions he noted that he was of the opinion that it was "[no] objection that the party applying for it has a remedy at law."⁴⁶²

VIII. REFLECTIONS AND CONCLUSION

Let us go over what we now know. First, the records of the Court of Chancery demonstrate that in 1789, and in all the years preceding it in which the Chancery heard infringement cases, any significant analysis of the inadequate-remedy-at-law requirement is remarkably absent from all of the court's orders, decrees, and reported decisions. Though there are limited records of what was actually said in hearings for injunctive relief, the issues that drove the outcomes of injunction requests largely concerned the merits of the case, such as a question over title or infringement. The Chancery never denied nor dissolved an injunction on the ground the plaintiff had an adequate remedy at law, nor did it grant a demurrer or plea on that basis either. This is to be contrasted with other substantive areas of equity where use of the requirement is evident, leading to the distinct impression that in copyright cases legal remedies were deemed inadequate as a matter of law.

Second, the most sensible explanation for this discovery can be seen when one steps back and looks at the history of copyright enforcement from a macro level. Unlike other areas where the inadequacy requirement featured prominently, the common-law courts played no real remedial role

prefers going into chancery."); *Crary v. Smith*, 2 N.Y. 60, 62 (1848) ("That the respondent might have obtained satisfaction in a court of law is no objection to a resort to Chancery, provided it is a case of concurrent jurisdiction."); *Accord Parish v. Ellis*, 41 U.S. (16 Pet.) 451, 454 (1842); *Gregg v. Sayre's Lessee*, 33 U.S. (8 Pet.) 244, 252 (1834); *Thomas v. Ferqueran*, 25 Ky. (2 J.J. Marsh.) 28, 28 (1829); *Ludlow v. Simond, 2 Cai. Cas. 1*, 38 (N.Y. 1805); *Picket v. Morris*, 2 Va. (2 Wash.) 255, 269 (1796).

462. *Donaldson v. Becket*, 17 Cobb. Parl. Hist. 953, 989 (H.L. 1774).

during the entire 230 years of copyright enforcement before 1789. The earliest cases were brought in antecedent tribunals where the remedy at law, if there was one, would have been irrelevant. This is especially true of the Court of Assistants which, as a specialized arbitral body, simply dispensed whatever remedies like-minded copyright holders would have wanted, which often was an injunction. Convincing the Chancery to do the same when cases began to be brought there after 1660 would not have been difficult. Moreover, the fact that the legislature failed to provide a workable and widespread legal remedy until 1801 simply made equity jurisdiction more certain.

Even after an ordinary damages remedy was recognized at law, and the Chancery began to speak shortly thereafter of the inadequacy rule in that context, Lord Chancellor Eldon ruled that infringement could not be remedied by any action for damages. Indeed, it seems clear that the jurisdiction of the Chancery had become concurrent and incontestable by 1789, and that the court was thus immune to the argument that equity could not issue a copyright injunction where there was an adequate remedy at law.

What should be made of this historical evidence? If the Supreme Court takes its own admonition seriously that 1789 is the window of time during which we must assess English Chancery practice, then federal courts must consider eliminating the inadequate-remedy-at-law requirement as a threshold requirement for all copyright injunctions (with the exception of TROs without notice which require irreparable injury by virtue of Rule 65). This follows because in and before 1789 injunctions in copyright cases issued without regard to the remedies available at law, which were deemed inadequate *per se*. Eliminating the inadequacy requirement would thus bring courts in line with traditional equitable principles, rather than running afoul of them.

Whether such a course is *normatively* desirable is a matter that commentators must still address. Much has already been written on the subject,⁴⁶³ and more will likely come in light of the Supreme Court's recent decision in *eBay*. This Article merely removes the historical albatross that has impeded the doctrinal development of copyright remedies. Those who favor eliminating the inadequacy rule as a threshold requirement can use the historical evidence to support their normative claims. Or, insofar as the better normative argument might be to retain the requirement, then the evidence presented here can be seen as demonstrating a need to codify it.

463. See *supra* note 11.