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Abridgments and Abstracts: Copyright Implications

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A significant sector of publishing practice involves the production of abridgments and abstracts, either as stand-alone works or as part of other works. This article examines the copyright implications of the practice. The perspective is British and Commonwealth law, with the occasional glance at the United States.

It is convenient to separate the discussion of abridgments from abstracts, although there is no fixed line between them. As a working definition, an abstract is the abbreviated representation of a work that gives its essential ideas, but is not concerned to preserve any element of the source work's form or expression; an abridgment, while also involving condensation of a literary, musical or dramatic work,¹ draws on the source work's form or expression. The two typically differ in purpose. An abstract of an opera is meant to be read as information about the opera; the reader will then be encouraged (or not) to see a performance or read the book. An abridgment of an opera is, however, designed to be read or performed as a lighter substitute for the full work.

The article looks at the history, law and practice of abridgments, and follows this with a similar (abridged) discussion of abstracts.

History of Abridgments

Before the advent of printing, those who transcribed manuscripts took great liberties with them. The idea was not just to copy the author's words but to take down, with whatever personal editing one chose, so much of the manuscript as was thought personally valuable.²

Old practices died hard. Even after the first Copyright Act of 1710, British publishers frequently abridged one another's works without thinking to ask for anyone's permission. This did not always go unchallenged. In 1739, a publisher complained that the *Gentleman's Magazine* had run a version of Joseph Trapp's sermons, condensing his

37 pages down to 13. Samuel Johnson worked for the magazine and, when asked whether the complaint was valid, confidently said copyright had not been infringed. There was a strong public interest in having abridgments:

The design of an abridgment is to benefit mankind by facilitating the attainment of knowledge; and by contracting arguments, relations or descriptions into a narrow compass, to convey instruction in the easiest method, without fatiguing the attention, burdening the memory, or impairing the health of the student.

Whatever injury the first publisher suffered had to give way to the public interest in having knowledge disseminated as widely and cheaply as possible. A review could legitimately cite as much of Trapp's work as the *Gentleman's Magazine* had printed, so an author or publisher could hardly complain if the abridgment were published without the (perhaps adverse) criticism. Anyway, writers tended to verbosity, so an abridger did a public service in condensing them: indeed, without the threat of abridgment, writers would have no incentive to be brief!³

The very next year, 1740, Lord Chancellor Hardwicke sounded much like Johnson when he sent an unauthorised version of Matthew Hale's *Historia Placitorum Coronae* (*Pleas of the Crown*) to referees to decide whether it was 'colourably shortened only' or a 'real and fair abridgment'. A 'scissors and paste' version would be stopped, but the impugned version was not 'so flagrant': it was titled *Modern Crown Law*, some repealed statutes and other text were removed so that Hale's 275 sheets became 35, and Latin and French quotations were translated into English.⁴ The referees held the abridgment to be fair and an injunction was refused.⁵

The Johnson/Hardwicke line held through the 18th century, whether the judge sat in Chancery or a common law court, or was pro-publisher or not.⁶ In 1774, Hardwicke's successor Apsley joined with Blackstone J (of *Commentaries on the Laws of England* fame) to endorse Hardwicke's views. A quarter-size abridgment, conveying 'in language as good or better than in the original, and in a more agreeable and useful manner', of Hawkesworth's *Voyages*, did not infringe the latter's copyright:

The act of abridgment is an act of understanding, employed in carrying a large work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader, which made an abridgment in the nature of a new and meritorious work. ... An abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism

3 E.L. McAdam Jr., *Dr. Johnson and the English Law*, Syracuse University Press, 1951, 13 to 14, indicating Johnson's opinion was first published posthumously in *Gentleman's Magazine* in 1787.

4 *Gyles v Wilcox* (1740) 2 Atk. 142, 143.

5 *Tonson v Walker* (1752) 3 Swans. 672, 679, explaining *Gyles v Wilcox*, previous note. In *Tonson*, the 'abridgment' of annotations to an edition of John Milton's *Paradise Lost* was held 'colourable' and 'evasive', and was enjoined.

6 So pro-publisher Willes J in *Millar v Taylor* (1769) 4 Burr. 2303, 2310, and anti-publisher de Grey CJ in *Donaldson v Becket* (1774), in *The Literary Property Debates: Six Tracts 1764-74*, Garland, 1975, Part F, at 46, both concluded that genuine abridgments did not infringe copyright. See too *Bell v Walker & Debreut* (1785) 1 Bro. CC. 451.

1 It is uncommon to talk of 'abridging' an artistic work. Certainly in law, reducing the size of an artistic work has been treated separately from literary abridgments. The latter were historically more excusable than the former: *Gambart v Ball* (1863) 14 CB (NS) 306.

2 M. Ethan Katsh, *The Electronic Media and the Transformation of Law*, OUP, 1989, 172 to 173.

upon the original work, nor against any property of the author in it.⁷

A doctrine like this may have been fine for a work like Hawksworth's — 'a mere compilation of trash', as Thurlow called it⁸ — in an era when writing was the pursuit of the leisured classes or turned out by a reviled Grub Street hack. But in the 19th century, attitudes changed as writing for money became a respectable calling and Parliament expanded notions of copyright. Economic harm to the publisher and the author, especially when the author depended on royalties from sales, could not be dismissed as breezily as it had been in the 18th century.

Erosion occurred on various fronts. First, the doctrine of non-infringing abridgment was confined largely to literary and dramatic works: copyright in an opera was held infringed in 1835 by arranging popular pieces from it as dance music,⁹ and in 1861 reduced scale versions of artistic works were also held to infringe the latter copyright.¹⁰ Second, unpublished works were excluded from the doctrine. This was made clear in 1849 when Queen Victoria and Prince Albert successfully obtained an injunction against the publication of a catalogue (a type of abridgment) containing surreptitiously obtained details of their private artwork.¹¹ Third, the view that a charge of infringement against an abridger could be defended by showing the abridgment itself had copyright¹² started dissipating: Kelly CB in the exchequer chamber in 1868 saw nothing incongruous in saying a derivative work could both have and infringe copyright.¹³ Thus, as the century progressed, the law of 'fair' abridgments began to be redefined, so that by century's end the mantle of 'benefactor to mankind, by assisting in the diffusion of knowledge' had largely slipped off the abridger's shoulders.¹⁴

Writers too started aligning themselves against abridgments, although self-interest and irony lay close to the surface. As a magazine employee at the start of his career, Samuel Johnson could act as the champion of abridgers; by the 1770s, the compiler of the dictionary and the champion of writing as a profession found he had no time for them. To Boswell's comment that an abridgment 'was only cutting the horns and tail off the cow', Johnson retorted, 'No sir, 'tis making the cow have a calf'.¹⁵ By then, Johnson's *Rasselas (The Prince of Abyssinia, a Tale)* had been reprinted with impunity, downsized to a tenth by leaving out all the 'moral and useful' reflections; the judge pointed out that Johnson's publisher, who owned the copyright, was complaining of something he himself did to others' works.¹⁶ In 1844 Charles Dickens, the

scourge of Chancery and its delays, seemingly had little trouble getting an immediate injunction from the Vice-Chancellor, stopping the publication of an unauthorised rival half-size edition of *A Christmas Carol*.¹⁷ Yet the sensitive Dickens, not one easily to change a good *idée fixe*, never stopped complaining of the experience: 'I shall not easily forget the expense and anxiety and horrible injustice of the *Carol* case; where, in asserting the plainest right on earth, I was really treated as if I were the robber instead of the robbed.'¹⁸

The heirs of US judge Joseph Story had more cause to complain. Story, who asserted that abridgments catering to the same market as the original were illegal,¹⁹ had one of his colleagues, after Story's death, permit Story's *Commentaries on Equity Jurisprudence* (with its section on abridgments) itself to be abridged! In principle, his colleague agreed the copyright owner alone should have the right to decide whether to meet any market demand for an abridgment. Still, the British and American precedents were too strong, he felt, for him to accept that unqualified view. He did, however, stop a third of the abridgment from continuing to be published because that part was 'unfair'.²⁰ The final irony is that Story's opinion that:

a mere selection, or different arrangement of parts of the original work, so as to bring the whole into a smaller compass, will not be held to be [a fair and *bona fide*] abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the work.²¹

while not fully gaining judicial acceptance in the United States, was accepted as 'perhaps expressing satisfactorily' the English law up to the turn of the 20th century!²²

By the last quarter of the 19th century, however, the days of the free-roaming abridger were clearly numbered. In 1875 an Australian court enjoined, as a 'colourable alteration or adaptation', summaries that one newspaper made of longer articles in a rival paper's columns, using many of the same expressions.²³ In 1878 the UK Royal Commission on copyright recommended that no abridgments occur without the copyright owner's consent.²⁴ In 1879 Eaton Drone, in his leading text on US and UK copyright law, said the same and excoriated the whole doctrine of 'fair abridgments' as a discouragement to the dissemination of learning:

What would be an abridgment of Bancroft's History of the United States, but a reproduction of the substantial fruits of forty years' patient toil, and of the great learning of that historian? What would be an abridgment of the American Cyclopaedia, but an appropriation of the wealth of

7 *Hawkesworth v Newberry* (1774) Lofft. 775.

8 Quoted in Augustine Birrell, *Seven Lectures on the Law and History of Copyright in Books*, Cassell, 1899, 134.

9 *D'Almaine v Boosey* (1835) 1 Y. & C. 283, 301 to 302.

10 *Gambart v Ball*, Note 1 above.

11 *Prince Albert v Strange* (1849) 2 De G. & Sm. 652, 693 to 694, *aff'd* (1849) 1 H. & Tw. 1.

12 Implicit in, for example, *D'Almaine v Boosey*, Note 9 above, at 301.

13 *Wood v Boosey* (1868) LR 3 QB 223, 229.

14 *Tinsley v Lane* (1864) 1 H. & M. 747, 754.

15 Zechariah S. Chafee, 'Reflections on Copyright Law', (1945) 45 Columbia LR 503, 511, citing an incident in 1773 from Pottle and Bennett (eds.), *Boswell's Journal of a Tour to the Hebrides with Samuel Johnson*, Viking, 1936, 49.

16 *Dodsley v Kinnear* (1761) Amb. 403, 405.

17 *Dickens v Lee* (1844) 8 Jur. 183, 184.

18 Quoted in H.M. Paull, *Literary Ethics: A Study in the Growth of the Literary Conscience*, 1928, repr. 1968, Kennikat Press, 56.

19 *Gray v Russell* (1839) 1 Story 11, 19.

20 *Story's executors v Holcombe* (1874) 4 McLean 306.

21 *Folsom v Marsh* (1811) 9 Fed. Cas. 342, 345.

22 T.E. Scrutton, *The Law of Copyright*, William Clowes, 1903 (4th edn), 141.

23 *Wilson v Luke* (1875) 1 VLR (Eq.) 127, 141. See 'Impermissible abstracts' below.

24 Report of the Copyright Commissioners (1878), Cd. 2036, at 15, §§ 68 and 69.

information there garnered at a cost of half a million dollars for literary labor alone?²⁵

In Canada, P.B. Mignault (later a judge of the Supreme Court) said much the same in 1881, emphasising the point that an original abridgment could infringe, yet still have its own copyright.²⁶

From 1886 the Berne Convention on Literary and Artistic Works started on its path of fully recognising abridgments by giving the copyright owner the right in Article 10 to control

unauthorized indirect appropriations of a literary or artistic work, of various kinds, such as adaptations . . . when they are only the reproduction of a particular work, in the same form, or in another form, without essential alterations, additions, or abridgments, so as not to present the character of a new original work.

That the switch was almost complete by 1900 can be seen in a Quebec case, where a judge, basing himself on Dickens' *Christmas Carol* case, could casually remark that nobody 'has the right to abridge the works of another',²⁷ a comment that could not have fallen from the lips of any Commonwealth or US judge a century previously. There was still the occasional instance, especially involving facts or news, where a judge would let pass a condensation that kept the source work's ideas but completely changed its expression,²⁸ but these were now glosses on a rule on its last legs. The time was ripe for the law to be changed to bring abridgments fully within the copyright owner's control, especially now that they were temporarily 'out of fashion', at least in England,²⁹ so that any change was unlikely to stir up controversy.

So it proved when the 1909 US and 1911 UK copyright laws passed, followed by legislation in the British dominions based on the UK law. The Acts clearly reflected the thoughts of Drone, Mignault, the UK Royal Commission and the Berne Convention, the US Act giving the copyright owner control over 'any version' of a literary work, the UK over 'any substantial part' or any work 'in any material form whatsoever'.³⁰ From then on, both fair and unfair abridgments came fully within the copyright owner's purview.

Modern Law

Defining an abridgment

Context will determine if a work qualifies as an abridgment. For example, in 1923 the Privy Council in an Indian appeal had to deal with a school edition of Thomas North's English translation of *Plutarch's Life of Alexander* that cut North's translation in half. This, said Lord Atkinson for

the court, was just a 'selection of scraps', not a real abridgment:

Strictly speaking, an abridgment of an author's work means a statement designed to be complete and accurate of the thoughts, opinions, and ideas by him expressed therein, but set forth much more concisely in compressed language of the abridger. A publication . . . the text of which consists of a number of detached passages selected from an author's work, often not contiguous, but separated from those which preceded and follow them by considerable bodies of print knit together by a few words so as to give these passages, when reprinted, the appearance as far as possible of a continuous narrative, is not an abridgment at all.³¹

The issue was whether enough skill and labour had gone into creating the school edition for it to have copyright as an original literary work. Atkinson said there had not. Anyone could copy the selection (but, of course, not the editor's accompanying notes). Had the compiler abridged North's work instead of using scissors and paste, this would have been an original work entitled to copyright.

Today in ordinary parlance the school edition of North's translation would nonetheless probably be called an 'abridgment': Atkinson's 'a number of detached passages selected from an author's work . . . knit together by a few words so as to give these passages, when reprinted, the appearance as far as possible of a continuous narrative' seems almost a textbook definition. True, the work would have no copyright today, any more than it did in the 1920s, but the context in which the issue arose today would typically be different. A publisher acquiring the 'right to abridge' from a copyright owner probably could adopt the method of North's editor and stay within his right. In the United States, the published version would have to be marked as 'abridged' to prevent buyers from mistakenly believing they were getting all of North's or Plutarch's work.³² This seems good practice elsewhere too, lest the version offend local laws against deceptive or misleading labelling.

Condensations, digests and selections

Reprint licences today frequently sell the rights to make an 'abridgment, digest, condensation, or selection' of the source work, without clearly discriminating between these categories. A careful publisher will want to acquire all four of these rights; otherwise, it may find its particular form of paring down is unauthorised and an infringement.

How do these versions differ from one another? According to one US text, abridgments omit whole sections and do not claim to be the complete work; condensations, on the other hand, do claim to represent the whole work, while compressing or editing by omitting words, descriptions or other elements thought inessential.³³

25 Eaton S. Drone, *A Treatise of the Law of Property in Intellectual Productions in Great Britain and the United States*, Little Brown, 1879, 444.

26 P.B. Mignault, 'La Propriété Littéraire', (1881) 3 La Thémis 97, 107 to 109.

27 *Beauchemin v Cadieux* (1900) 2 Can. Comm. Law Reps. 337, 361 (Que. CA), *aff'd* (1901) *ibid.* (Can. SC), citing *Dickens v Lee*, Note 17 above.

28 *Springfield v Thame* (1903) 89 LT 242, 243.

29 Birrell, Note 8 above, at 158.

30 Copyright Act 1909 (US), § 1(b), Copyright Act 1911 (UK), section 1(2). See also Copyright Act 1921 (Can.), section 3(1); Chafee, Note 15 above; Staniforth Ricketson, *The Law of Intellectual Property*, Law Book, 1984, § 9.68.

31 *Macmillan v K. & J. Cooper* (1923) 130 LT 675, 678 (PC).

32 *Re The New American Library of World Literature Inc.* (1955) 51 FTC 583, *aff'd* 227 F.2d 384.

33 Michael Landau (ed.), *Lindey on Entertainment, Publishing and the Arts: Agreements and the Law*, Clark Boardman Callaghan, 1981 (2nd edn), updated annually, at 1-154. For descriptions of how publishers abridge, see Thomas L. Bonn, *Heavy Traffic and High Culture*, Southern Illinois University Press, 1989, 78 to 83 (New American Library); Thomas Weyr, 'The Booming Book Clubs', in *The Business of Publishing: A PW Anthology*, R.R. Bowker Co., 1976, 259, 279 (Reader's Digest Condensed Books).

Whether the public sees it this way is doubtful. During the 1950s the practice of bringing out a paperback containing a shortened version of the hardcover book attracted the attention of the US Federal Trade Commission. It heard that some paperbacks cut the hardcover contents down by as little as 5 per cent, while others cut as much as 66 per cent. The Commission directed publishers somehow to tell the public the paperback was shorter but left it to them whether to mark the item 'abridged' or 'condensed'.³⁴ Without guidelines, publishers chose whichever word felt best for marketing reasons. A further complication is that meanings may differ between countries and even regions, depending on local usage and trade practice. Thus, what the Privy Council in 1923 thought was an 'abridgment' might, in US parlance, be a 'condensation'.

Still, the view of a New York judge, that a condensation, unlike a 'selection', cannot 'leave out the major portion' of the source work,³⁵ sounds about right. The New American Library, licensed to publish only 'condensations' in single or multiple paperback volumes, was stopped from issuing a version of *Joy of Cooking* in four volumes that contained a 'highly selective' fraction of the source work's recipes and omitted much of the text.

In distinguishing 'selection' from 'condensation', the judge did not define 'condensation' for all contracts or contexts; he merely interpreted the word as used in a particular deal. In one provision of that contract, the copyright owner agreed not to license a competing paperback 'abridgment or condensation, or adaptation or selection'; in an earlier contract, the same clause had left out 'selection'. From this, the judge inferred the parties understood these terms to involve different processes and products — although they probably did not appreciate where these subtleties might lead in practice. Whether 'condensation' is the same as 'digest', and how an 'abridgment' differs, if at all, from either, is still up in the air.

Given the temptation among lawyers to find a distinction between what, to most people, would be synonyms, negotiators must strive for greater clarity on these points in their contract to avoid costly disputes down the road.

What may be Abridged

A person may freely abridge any work that is out of copyright. Otherwise the copyright owner's consent to an abridgment — whether a complete rewrite or using 'scissors and paste' or the electronic equivalent — must be obtained because this reproduces a substantial part of the work.

Abridgments that do not reproduce a substantial part of a work are allowed, but what amounts to a 'substantial part' can be contentious. A short description of a work's contents, like an abstract, should pass muster. A good working rule is that an abridgment can be made without the copyright owner's consent if it does not (1) substitute for the source work, (2) harm the work's present market,

and (3) harm a potential market that ought fairly be the author's. Point (3), involving moral judgment, is the most unstable and contentious of all these hurdles. (See further 'Infringement' and 'Conclusion' below.)

An abridgment cannot pass itself off as the unabridged version. When the forthcoming English publication of Frank Harris's *My Life and Loves* was announced in 1964, another publisher acquired the publication right to the abridged and expurgated version. This it proposed to release as *Frank Harris: My Life and Loves*, with a large star on the cover containing the words *The original expurgated and abridged version*. Previous abridgments had appeared in 1947 and 1958 as *Frank Harris: My Life and Adventures*. The second publisher would have been in the clear had the unabridged version had no pre-release publicity. As it was, the publicity had given the latter version a reputation as *My Life and Loves*. Buyers might mistake an abridged version with this title for the unabridged version. A British judge was unimpressed by the second publisher's attempt 'to cash in on the advertisement and reputation' of the unabridged book and halted the issue under the confusing title.³⁶

Copyright in Abridgments Originality

Works that qualify as abridgments, as defined in the case involving North's translation of Plutarch³⁷ (a definition not found in any Copyright Act), should have copyright, but so may other shortened works. A 'scissors and paste' digest may reveal a new pattern or idea not evident in the source work. Although more common where there are several works and authors, this could occur with the works of one author, even a single work. The result should then, if enough skill and labour have gone into the selection or arrangement, be original enough to qualify for a separate copyright.

Whether an abridgment involving industrious collection but little skill in condensation is original may be contentious today. For example, it takes time and money to search and condense public records to compile a mercantile gazette giving a picture of companies' credit rating. Traditionally, this work would have copyright under the relaxed standards of originality prevailing in the Commonwealth.³⁸ In the United States, however, the mechanical work involved in compiling and condensing may not involve enough authorship or originality to warrant a copyright, at least since the *Feist* case in 1991.³⁹ This stricter view could easily spill over into Commonwealth practice, since judges treat originality as a question

³⁴ Note 32 above, at 585, §4 of the findings of fact; at 587, §1 of the order.

³⁵ *The Bobbs-Merrill Co. Inc. v New American Library* (1985) Copyright Law Decisions §25,752, at 19,375.

³⁶ *W.H. Allen & Co. v Brown Watson Ltd* [1965] RPC 191, 194.

³⁷ Note 31 above.

³⁸ *T.M. Hall & Co. v Whittington & Co.* (1892) 18 VLR 525; *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch. 601, 608, suggesting pre-1911 protection of 'a list of registered bills of sale, a list of foxhounds and hunting days, and trade catalogues' would continue after the 1911 UK Act, which first introduced the originality criterion. Similarly, *Walter v Lane* [1900] AC 539, followed under the 1911 and 1956 UK Acts in *Sands & MacDougall Pty Ltd v Robinson* (1917) 23 CLR 49, *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320, and *Television New Zealand v Newsmagazine Services Ltd* (1993) 27 IPR 441, 454 to 455 (on similar New Zealand law).

³⁹ *Feist Publications Inc. v Rural Telephone Service Co. Inc.* (1991) 111 S.Ct. 1282.

of fact and degree and so factor in their views on the merits of a particular work or activity.

Authorship and ownership

The selector or abridger is the author of the work and entitled to the copyright, unless the work is done under a contract of employment, in which case the employer is the copyright owner. The copyright owner of the source work may, of course, also require in her contract that the abridgment copyright be transferred to her. Someone copying the abridgment without the consent of its copyright owner infringes copyright in both the original work and the abridgment. Either owner can sue to protect her separate interest.

Abridgment that infringes copyright

Commonwealth copyright laws typically protect all original work; there is no qualification that the work must be 'lawful' or 'authorised'. The inference is, as a British judge has perceptively noted,⁴⁰ that an original work may be protected even if it infringes another's copyright. This was suggested as long ago as 1868, where Kelly CB said *obiter* — the case involved an authorised work — that an unauthorised arrangement of a musical work, though infringing copyright, would 'certainly' have copyright in England.⁴¹ US law differs: protection is explicitly denied to derivative works to the extent pre-existing material has been used 'unlawfully'.⁴²

The history of the Berne Convention supports the validity of Kelly's 1868 *dictum* today. The first Berne Convention in 1886, in protecting one sort of derivative work — translations — explicitly protected only 'lawful' (that is, 'authorised') versions. By the time of the 1908 revision of Berne, matters had progressed. Not only were other types of derivative works now protected — including 'adaptations' and 'other reproductions in an altered form' (which would include abridgments) — but the reference to 'lawful' was now deleted. Instead, all original derivative works were protected 'without prejudice to the rights of the author of the original work'. The intent, unchanged in later versions of the Convention, was plainly to give the maker of an unauthorised derivative work recourse against copiers, while preserving the source work owner's power to stop both versions.⁴³ US law, in denying copyright to an unauthorised abridgment, therefore offends the Convention.⁴⁴

The point was fully debated in the United Kingdom in evidence taken before the copyright committee chaired by Lord Gorell. In its report in 1909, the committee concluded it was 'doubtful' under UK law whether unauthorised derivative works were protected. The committee, over two dissents, recommended UK law to

be amended to conform with the Berne Convention.⁴⁵ Accordingly, like the Convention, the Copyright Act 1911 and the later Acts of 1956 and 1988 said nothing about a work's having to be authorised or lawful before having protection. Commonwealth statutes modelled on the 1911 and 1956 Acts maintained this silence.

Judicial opinion in the Commonwealth is nevertheless conflicting,⁴⁶ partly because courts have not referred to the Berne Convention or the Gorell committee report. This should be corrected now that Commonwealth courts accept a wider range of material to assist in their interpretation of legislation. The result will be to allow an unauthorised abridgment to have its own copyright. The abridger should get the usual remedies in respect of the copying. He can stop even the copyright owner of the original work from using the abridgment, but this will be cold comfort, since the latter can equally enjoin the abridgment.⁴⁷

Credit Lines; Harmful Abridgments

An abridgment should not be credited to the author without the latter's consent. One that omits parts that the author thinks vital to the work's integrity might also reflect prejudicially on the author's honour or reputation. In either case, the author should be able to obtain relief by injunction or damages for infringement of her moral rights. To avoid problems, it is often sensible to persuade the author to do the abridging herself or to nominate someone she can trust to do it.⁴⁸

Sometimes an objecting author can be placated without too much expense. Contested passages or the author's credit line can be altered on existing stock, and advertising can correct any misimpression relating to sold stock. But prevention is better than cure. Where the author is not the copyright owner, the intending abridger should make sure that either the author has waived her moral rights or both owner and author authorise, preferably in writing, the version and the credit line.

The dangers of abridging without the consent of both the author and the copyright owner are illustrated by the well-known US case involving the British comedy team Monty Python. In 1975 the ABC television network broadcast a programme of three episodes of the 'Monty Python's Flying Circus' comedy show that was 24 minutes shorter than the original 90 minutes. ABC's sub-licence allowed it to edit for offensive material and to insert commercials, but the head licence from Python allowed no such editing. Python successfully sued to stop further similar broadcasts. A licensor cannot grant more rights than it acquires, so the broad editing clause in ABC's sub-licence was ineffective. In any event, airing the programme would lead viewers falsely to believe ABC's edited version

40 Robert Goff J in *Redwood Music Ltd v Chappell & Co. Ltd* [1982] RPC 109, 120.

41 *Wood v Boosey*, Note 13 above, at 229. This was no casual remark: counsel had argued the contrary at 226.

42 Copyright Act 1976 (US), § 103(a).

43 Staniforth Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, Kluwer, 1987, 289.

44 This non-conformity was not noticed in the Preliminary Report of the Ad Hoc Working Group on US Adherence to the Berne Convention, (1986) 33 Jo. Copr. Soc. 183, 261, where the relevant Berne Article, 2(3) of the Paris 1971 revision, is cited.

45 Report of the Committee on the Law of Copyright, Cd. 4976 (1909), at 9 and 10. Mr W. Johnson-Hicks MP (at 31) and Mr E. Trevor L.I. Williams (at 32) dissented. The committee's principal example was the unlawful translation, but it plainly recognised the point concerned all derivative works.

46 Vaver, 'Translation and Copyright: A Canadian Focus', [1994] 4 EIPR 159, 161, referring to some of the authorities.

47 Vaver, previous note, analyses the rights between the unauthorised translator and the source work owner in a way that applies, *mutatis mutandis*, to the unauthorised abridger. See also William J. Braithwaite, 'Derivative Works in Canadian Copyright Law', (1982) 20 Osgoode Hall LJ 192, 205 and onward.

48 Bonn, Note 33 above, at 81.

was Monty Python's work. One judge thought ABC should preface the broadcast with a disclaimer like: 'The members of Monty Python wish to disassociate themselves from this programme, which is a compilation of their shows edited by ABC without their approval'. The court majority disagreed, saying ABC should not show the edited programmes at all:

We are doubtful that a few words could erase the indelible impression that is made by a television broadcast, especially since the viewer has no means of comparing the truncated version with the complete work in order to determine for himself the talents of [Monty Python]. Furthermore, a disclaimer . . . would go unnoticed by viewers who tuned into the broadcast a few minutes after it began.⁴⁹

The US court was willing to protect Monty Python as authors of the programme scripts even if they were not copyright owners. In countries following a strict moral rights regime, Monty Python as authors could claim their right of integrity was violated by the airing of a mutilated programme, since their honour or reputation would be prejudiced and they had not earlier waived their right to object.

Despite this, moral rights are often enjoyed more in theory than practice. Many broadcasters believe that, having paid for a product, they can do what they like with it and are left cold by authors' concerns about artistic integrity. Claims like Monty Python's are rare because copyright owners and authors who get a reputation for being meddlesome will be shunned by the industry. Significantly, Monty Python has reappeared in North America principally on public, non-commercial, television.

Permitted Abridgments

Some abridgments may be treated as fair dealings for purposes of private study, research, criticism, review or reporting current events.⁵⁰ Other times, the abridgment may not take a substantial part of the source work. This is how in Commonwealth states parodies try to justify themselves, with variable success.

An important English decision, further discussed below, found the story summaries and lengthy quotations contained in typical student study aids (*Coles Notes*) infringed copyright in the source works. It was not a fair dealing to include summaries or quotations as full as those found in the aids if the main purpose was simply criticism. As for genuine literary criticism, the judge added:

[T]he appearance in a critic's work of long extracts from an in-copyright work does not mean that the critic has been regarded as entitled to reproduce those extracts. It may be that some licence, free or otherwise, has been granted in respect of the extracts.⁵¹

The judge cited a 1958 agreement between British publishers and authors, which says that extracts exceeding 800 words, while possibly fair dealings, would normally require permission.

This arrangement, no doubt convenient for authors and

publishers, is not an authentic interpretation of the copyright law and cannot bind those not party to it. Literary or other criticism need not engage in word counts, if the critic is plainly reviewing or criticising and not supplanting the copyright owner's market. A critic can sometimes quote even the whole work without seeking permission.⁵² This was what Jacques Derrida felt he had to do in his rambling riposte in 1978 to a journal article of philosopher John R. Searle's criticising Derrida.⁵³ Far from supplanting or harming the market for the source work, criticisms like Derrida's will likely cause readers to return to it to verify the accuracy of the criticism. Derrida is simply replaying a practice stretching back centuries, where reproducing as much as a quarter of the source work was considered fair dealing, if the extracts were interspersed with genuine criticism.⁵⁴ The 1993 decision in the English *Clockwork Orange* case, allowing 8 per cent of the movie to be reproduced in a critical television broadcast,⁵⁵ harkens back to this older practice and applies it to the newer media. In doing so, it corrects the sometimes over-protective attitudes copyright owners adopt in respect of their work.

Extensive quotation of source material forms a justifiable part of literary practice. An author who puts work before the public (or retracts it) cannot be immune from criticism. If someone believes the work or some practice relating to it is, for some reason, bad or misguided, the law should not compel him to seek the author's permission to quote enough to make the point. The author may care about her pocket or may (as in the *Clockwork Orange* case) have different concerns about the criticism and its validity; but it is precisely here that the law should allow, indeed encourage, the critic to quote without her leave, for it is precisely here that the author will refuse permission and that the public interest favours letting the criticism be heard.

Contracts

The standard publisher's contract for a literary work deals expressly with the right to publish or authorise the publication of abridgments or condensations, either as a volume or in a magazine or newspaper. Typically, the publisher acts as the author's agent to license these rights,

52 *Hubbard v Vosper* [1972] 2 QB 84, 98. See also Birrell, Note 8 above, at 181: 'Suppose the volume reviewed be one of sonnets or short lyrics or epigrams, how can a reviewer get on without the privilege of complete quotation? . . . The test must always be: Are the quotations introduced to illustrate the criticism, or a vulgar peg on which to hang the quotations?'

53 Jacques Derrida, 'Limited Inc', (1978) 2 *Glyph* 162. Derrida was aware of the copyright implications of his practice: after saying 'I believe that I will have cited [Searle's article] from beginning to end', he then asks 'Did I have the right(s)?'

54 For example *Whittingham v Wooller* (1817) 2 Swans. 428, 431 (15 per cent of play reproduced in journal); *Bell v Whitehead* (1839) 8 LJ Ch. 141 (25 per cent of periodical article reproduced in another periodical; interlocutory injunction refused, and plaintiff left to go before common law jury if he wanted damages).

55 *Time Warner Entertainment Co. LP v Channel Four Television Corp.* [1994] EMLR 1. David Bradshaw in 'Fair Dealing and the Clockwork Orange Case: "A Thieves' Charter"?' [1994] 1 ENT.LR 1, 11 hopes the decision 'represents the high-water mark' of fair dealing under the 1988 UK Act. Had the case involved the print media of the 18th or 19th centuries, it would have fallen easily between the tides.

49 *Gilliam v ABC* (1976) 538 F.2d 14, 25, n. 13. For the earlier court proceedings, see Henrik Hertzberg, 'Onward and Upward with the Arts: Naughty Bits', *New Yorker*, 29 March 1976, 69.

50 Copyright, Designs and Patents Act 1988 (UK), sections 29, 30.

51 *Sillitoe v McGraw-Hill Book Co. (UK) Ltd* [1983] FSR 545, 559.

and proceeds are split 50/50 between author and publisher.⁵⁶ The 90/10 split recommended by a Canadian writers' union⁵⁷ is optimistic — even the Australian writers' union recommends only 80/20⁵⁸ — but these higher percentages can be aimed for if the author herself is doing the abridgment. In some US contracts, rights to exploit the works outside the United States, including condensations, are split 75/25 between author and publisher.

An author should be explicit, both in her publishing contract and in any licence agreement her publisher grants, if she wishes to retain final approval of any condensed or abridged version.⁵⁹ Even without an explicit provision, she can insist that a licensed version of her work prominently indicate if it has been abridged or condensed⁶⁰ and that it also point out any omissions or changes.⁶¹ Beyond that, the author can probably stop the continued publication of an abridged or condensed version that distorts her intent or is otherwise poorly done. But prior vetting is always better than trying to remedy bad work after publication.

Infringement

As already noted, an abridgment may, even if itself original enough to have copyright, infringe copyright in the source work if it reproduces or adapts a substantial part of the latter. It is irrelevant that many think the abridgment better than its source: a copier infringes even where he improves the source work.⁶²

A leading Canadian example involves the abridgment in 1981 into one volume of a seven-volume report on *The State of Competition in the Canadian Petroleum Industry*. The report, written by the director in charge of Canada's competition laws, was published under the federal government's direction. The abridger produced his version in two weeks by 'scissors and paste'. He did not rewrite or include criticism, and the version probably did not qualify for copyright. It came out four weeks after the government's publication. The government successfully sued the abridger for infringement. The trial judge — a former speaker of the Canadian House of Commons — ordered the abridger simply to pay damages equivalent to the royalties the government would have charged for granting permission, but he was reversed on appeal. As well as damages, the federal court of appeal awarded an injunction, delivery up and costs. Even though the government had distributed many of its copies free and had little economic interest in enforcing its copyright, the appeal court said a copyright owner was normally entitled to an injunction to stop infringement, and the government should have the same remedies in this respect as a private litigant.⁶³

An English case around the same time is equally interesting. It involved the UK distribution of *Coles Notes* student aids for G.B. Shaw's *St Joan*, Alan Sillitoe's *Loneliness of the Long-Distance Runner* and Laurie Lee's *Cider with Rosie*. *Coles Notes* condensed the works down to about 5 per cent, taking striking phrases and changing direct speech into indirect. They also interspersed commentary, questions and criticism. The *Notes*' version of *Cider with Rosie* — and this presumably applied to the other works — did not 'significantly substitute' for *Cider*, but 'an idle student might seek to rely on the *Notes* alone'. The court said the digests infringed the copyright in all the works. The digest of Shaw's *St Joan* also infringed the right of turning the drama into a non-dramatic work.⁶⁴ The judge said he did not think the digests were necessary if the aim were simply to criticise the works, adding:

I am not sorry to reach this conclusion. It does not seem right to me that anyone should be able to put on the market a study aid of this kind, making full and free use of an original work without reference to the copyright owner.⁶⁵

This has been the US position for many years. When Harvard economics professor F.W. Taussig published his *Principles of Economics* in 1911 and immediately prescribed it for his courses, students faced with the daunting task of absorbing the work turned for help to a private tutor. The tutor held 30 sessions; for each he prepared single-page typewritten outlines that, in total, epitomised most of Taussig's book. These were handed out to the students and discussed during the tutorial, but had to be returned at the end of class or shortly after. The tutor also prepared a compendium of these outlines that he lent to students preparing for mid-year and final examinations at Harvard economics courses in which Taussig was prescribed reading. The tutor admitted students might think, contrary to his recommendation, that the outlines substituted for the book itself. Fearing the professor's captive market might erode, Taussig's publisher Macmillan obtained an injunction against the tutor for infringement. Although Taussig's market was not currently harmed, Macmillan wanted to stop more extensive and harmful abridgment practices from developing.⁶⁶

Neither the *Macmillan* nor *Coles* decision was appealed. The defendants had to make their peace with the copyright owner, change their practices to avoid infringement or simply retire from the market. However *Coles* might exhort students not to rely on the *Notes*, it could hardly expect all to listen. To the extent students refrain from buying the source work, the copyright owner's market is injured and she should be entitled to protect it.

In *Coles*, the judge's attention was to some extent diverted from the critical question: did the *Notes* cut into the sale of the original works, or into the performances of *St Joan*? As noted earlier, he relied partly on the 1958 agreement reached between the British Publishers' Association and the Society of Authors that permission should normally be sought for extracts of more than 800 words taken from a work, and partly on his feeling that

56 Charles Clark, *Publishing Agreements*, George Allen & Unwin, 1984 (2nd edn), 18 to 19; Lazar Sarna, *Authors and Publishers*, Butterworths, 1987 (2nd edn), 98.

57 William Klebeck, *An Author's Guide to Book Publishing Contracts*, Saskatchewan Writers Guild, 1981, 37.

58 Colin Golvan and Michael McDonald, *Writers and the Law*, Law Book Co., 1986, 31.

59 Lindsey, Note 33 above, at 1–155, Form 1.10–2.

60 *Re The New American Library of World Literature Inc.*, Note 32 above.

61 *Chesler v Avon Book Division, Hearst Pubs. Inc.* (1973) 352 NYS2d 552, 557.

62 *Alexander v Mackenzie* (1847) 9 SC 748, 759.

63 *R v James Lorimer & Co. Ltd* (1984) 77 CPR (2d) 262.

64 Sillitoe, Note 51 above, at 549 to 551.

65 *Ibid.*, at 564.

66 *Macmillan v King* (1914) 223 F. 862, 867. The judge was gracious enough to allow the tutor to continue lecturing on the book's contents; the students might also continue taking their own notes of the lectures.

Coles' British distributors were 'enriching themselves' by these uses.⁶⁷ Both reasons are suspect.

First, why an agreement reached between some publishers and some authors should affect other publishers, the reading public generally or students in particular, none of whom were parties to or provided input into the agreement, is a mystery. No publisher or author sought to get Parliament's approval to this arrangement. It is reminiscent of the way the London stationers in the 17th and 18th centuries tied up the market by 'gentlemen's agreements' and went to court to claim these were customs that judges should enforce against parties and non-parties alike. Those arguments were ignored from the late 18th century. They have not improved with age:

It seems clear that many copyright holders are actively promoting the notion that users may quote or reproduce copyrighted material only at the sufferance of the copyright owner. If such fallacies go unchallenged long enough, they are likely to become a substitute for the truth. It is important, therefore, that all overly restrictive and spurious guidelines ... be directly refuted.⁶⁸

Second, Coles was no doubt 'enriching' itself, but the law does not generally care about this unless the enrichment occurs *unjustly* and *at the expense of another*. This certainly happens when the source work's market is eroded by competing digests. Where there is no erosion, the copyright owner's claim is then that a digest *might* affect her market and that, as the best judge of this, she should also have the right to control the digest market. This she will do by either preventing it altogether or being paid royalties to cover the prospect of market loss. The argument is ultimately a weak one because it leads logically to the copyright owner's being able to claim that every potentially detrimental use of her work should be within her control, a position no copyright law has ever taken. Unless her fear of market harm has some solid factual basis, the copyright owner should not be able to prevent the circulation of digests.

These arguments are, of course, to some extent theoretical. In practice, business people will avoid litigating them. A publisher wanting to condense will generally pay for a permission and treat it as a cost of doing business, instead of putting a project on hold and paying lawyers and judges for their costly and time-consuming exercises. The *Coles* case, right or wrong, is a reality. It gives a copyright owner enough ammunition to scare most risk-averse publishers into treating with the owner or abandoning the project. Were Shakespeare still in copyright, his heirs could prevent the publication of Charles and Mary Lamb's *Tales from Shakespeare* (1807) for children, and other reductions such as the half-hour version of *Macbeth* mounted in 1994 by the Waterside Theatre Company of Stratford.⁶⁹ Consequences like these remind us that copyright enforcement carries social and aesthetic implications that need to be weighed when the decision whether or not to grant protection is made. Special vigilance and justification is needed where a practice does not undercut the demand or value of a source work, but

instead makes its message available to those who might otherwise pass it by.

Abstracts

Definition

For our purposes, an abstract is an abbreviated representation of a work, typically much shorter than an abridgment, that gives its essential ideas rather than its form or expression. It may be produced by the author of the work or by another person.⁷⁰ Since an abstract normally promotes, without supplanting, the source work, it should not usually infringe its copyright. It may also itself involve enough skill and effort to have copyright as an original literary work.

The typical abstract deals with articles from scientific or other academic journals, or summarises material such as legislation or administrative or judicial decisions, but the range of material is unlimited. Thus, a British record catalogue of the 1930s containing synopses of operas, of which the record company publishing the catalogue had made records, did not infringe the copyright in the opera.⁷¹ Today authors and publishers widely accept the legitimacy of abstracts that do not compete with or diminish the authority of the source work, and that instead draw attention to it and promote its use or purchase.

Abstracts with an opposite effect can be infringing.⁷² Though shorter, they have the same economic impact as abridgments, which cause users to avoid the source work because they feel satisfied with the condensed version. The copyright owner is entitled to prevent this harm to her economic interest, however the condensed version is categorised.

Abstracts distinguished from other forms

Copyright Acts do not generally refer specifically to abstracts, but in practice two types of reduced versions may reproduce a substantial part of the source work and thus will require the prior consent of the copyright owner: extracts and long abstracts.

Extracts

An extract presents an abbreviated form of the work by taking and stringing key sentences from it into a connected piece. It is typically longer than an abstract, 20 to 30 per cent of the source work, compared with the abstract's 5 to 10 per cent or less. An extract like this takes a substantial part of the source work and requires authorisation.⁷³

Of course, taking occasional short extracts may not infringe where it involves only an insubstantial part of a work. This was overlooked in a New Zealand case involving a transcript service that monitored television broadcasts for clients. The courts found that transcribing segments up to 2½ minutes long off news programmes fell within the fair dealing exception for research or private

67 *Sillitoe*, Note 51 above, at 564.

68 L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights*, University of Georgia, 1991, 11.

69 David Ward, 'Cut to the Quick', *Guardian Weekly*, 29 May 1994, at 26.

70 For varieties of abstracts, see Harold Borko and Charles L. Bernier, *Abstracting Concepts and Methods*, Academic Press, 1975, 14 to 24.

71 *Valcarengi v The Gramophone Co. Ltd* (1928–35) MCC 301, 303 to 304.

72 *Wainwright Securities Inc. v Wall St. Transcript Corp.* (1977) 558 F.2d 91.

73 Borko and Bernier, Note 70 above, at 21.

study, but transcripts of longer segments, though for the same purpose, were unfair because they took too much and so infringed the broadcaster's copyright. Among the transcripts the court held to be a fair dealing was a *single 8-second sentence* of financial news.⁷⁴ Taking a sound-bite as short as this should never be infringement; the purpose the taker had in mind or the content of the sentence (' $e = mc^2$ ' or the more mundane fact that the central bank had cut its interest rates) should be irrelevant. No doubt, one might press into service the basic principle that copyright law should not protect ideas that are standardly expressed only in a limited range of ways. Just as fundamentally, when copyright laws allow the copyright owner to control 'any substantial part' of her work, 'substantial' connotes something significant in terms of quantity, quality or both, while 'part' connotes something more than a 'particle'.⁷⁵ So any extract that is not (a) significant in amount, and simultaneously (b) an essential or material feature of a work, is free for all to take and use as they like. The *de minimis* principle, so expressed, performs an important function in counteracting bloated claims to control the basic blocks of communication such as phrases and isolated sentences.

Long abstracts

Some abstracts may run to 25 per cent of the source work and be as much as 10,000 words long, depending on the size of the source.⁷⁶ This will very likely be the taking of a substantial part of the source work, requiring authorisation.

It will be recalled that in the *Coles Notes* case, digests of as little as 5 per cent of the size of the source works were found to infringe copyright. A six-page synopsis of the six scenes and epilogue of Shaw's *St Joan*, however, escaped criticism.⁷⁷ Whether this was because the synopsis did not take a substantial part of the play or for some other reason is unclear.

Copyright in Abstracts

Abstracts as part of literary work

There are abstracts and abstracts. The six-page synopsis of *St Joan*, if produced separately, involved enough original work to have its own copyright as a literary work. If included within a larger work, the synopsis would also be a substantial part of it. Shorter abstracts like the headnotes a legal reporter produces of a judicial decision also generally involve enough time and skill for each to be an original literary work.⁷⁸ Some abstracts of a few lines involving less thought or literary skill may not have their own copyright; even if they did, taking one might be too minor a matter to amount to infringement.

Compilation of abstracts

A short abstract could also be composed as part of a collection of many abstracts. If enough skill or judgment in selecting or arranging the collection is involved, it may itself have copyright as an original compilation.

Taking a single short abstract from a compilation should not infringe because one abstract is not likely a substantial part of it. There might be infringement if the same person systematically took one or two abstracts, whenever he wished, from every compilation as it came out. There would almost certainly be infringement if all or a significant number of abstracts from a single compilation were reproduced without the copyright owner's authority, or without a specific exemption such as fair dealing covering the taker's activity. Take the case of law reports issued in parts, containing a full report of decided cases and an abstract of each case alongside the report. Another publisher cannot issue a collection of some or most of the abstracts, and it does not matter that he rearranges them on a different system.⁷⁹ An injunction may issue against copying future abstracts, even though their copyright does not yet exist.⁸⁰

Infringement

Permissible abstracts

Two leading examples of permissible abstracts involve the opera publisher Ricordi's attempt to enforce copyrights in the United States and the United Kingdom. In 1911 Ricordi sued the US publisher of a book called *Opera Stories*, claiming that a half-page 300-word synopsis of a three-act 46-page opera infringed the opera's copyright. The US courts disagreed. Had *Opera Stories* been a collection of abridgments, it might have been stopped. By an abridgment, the court meant:

[a] colorable shortening of the original text, where immaterial incidents are omitted and voluminous dissertations are cut down, but where the characters, the plot, the language and the ideas of the author are pirated.

Instead, the book:

does not use the author's language, it does not appropriate his ideas and it does not reproduce his characters . . . It gives just enough information to put the reader upon inquiry, precisely as the syllabus of a law report, the review of a book or the description of a painting induces the reader to examine further.⁸¹

In 1931 Ricordi tried again to stop the practice of abstracting operas, this time in the United Kingdom. A record company had produced a catalogue called *Opera at Home*. Its abstracts were more elaborate than those in *Opera Stories*. The description of each opera started with the characters, a history, sometimes the persons who had performed it, and then a summary of the opera, with a few short quotations from the dialogue. Ricordi, although its own book of the opera commenced with a synopsis, failed once more. The abstracts simply outlined the overall

74 *Television New Zealand v Newsmonitor Services Ltd*, Note 38 above, at 448, 467.

75 *Chatterton v Cave* (1878) 3 AC 483, 491 to 492 (HL).

76 Borko and Bernier, Note 70 above, at 11; Robert Collison, *Abstracts and Abstracting Services*, ABC-Clio, 1971, 13.

77 *Sillitoe*, Note 51 above.

78 *Sweet v Benning* (1855) 16 CB 459, 481 to 482; *Hall v Crosbie & Co.* (1931) 66 Irish LT 22.

79 *Sweet v Benning*, Note 78 above, at 482.

80 *T.M. Hall & Co. v Whittington & Co.*, Note 38 above.

81 *G. Ricordi & Co. v Mason* (1911) 201 F. 182, 183, refusing a pre-trial injunction. Same result at the trial: 201 F. 184, *aff'd* (1913) 210 F. 276.

story the audience would perceive on attending a performance, while omitting several incidents. A substantial part of the opera had not been reproduced, nor had the opera been adapted into a non-dramatic work.⁸²

Impermissible abstracts

In the *Ricordi* opera cases, far from substituting for or competing with the source works or in any way harming the copyright owner, the abstracts tended to pique readers into hearing the works, so benefitting the copyright owner. Abstracts that harm the source work's copyright should, however, infringe it.⁸³ Two cases, a hundred years apart and from different sides of the world, illustrate the point.

The first from Australia involved the familiar case of a newspaper's copying another paper's news, thus getting for free something its rival had to pay for or get its journalists to dig up. In 1872 the Melbourne newspaper, the *Argus*, started subscribing to Reuter's daily news service from England. It both published the news and also wrote off part of the cost by selling to other local papers the right to use the telegrams. In 1873, it successfully stopped a newspaper from copying the telegrams outright. Anticipating the *International News Service v Associated Press*⁸⁴ decision in the United States 40 years later, the court said the *Argus* had a common law property right to prevent interference with news it had paid for.⁸⁵

Two years later, however, the *Gipps Land Mercury* stopped paying the *Argus* for using its telegrams. Instead, it had a correspondent buy the *Argus* daily and telegraph summaries of the Reuter's material to it. The *Mercury* published these before copies of the *Argus* could arrive in town. This is how the *Mercury* typically transformed an *Argus* column.

Argus version:

ENGLISH RACING INTELLIGENCE

— London, May 6

The Chester Trades' Cup, of 500 sovs., added to a handicap sweep of 25 sovs. Two miles and a quarter. 81 subs. Mr Heneage's ch g Freeman, by Kettledrum-Haricot, 6 yrs. 6st. 13lb., 1.

GERMANY AND BELGIUM

The Belgian government, in reply to a communication from the Chambers, promises to follow the initiative of Germany in a modification of the ecclesiastical laws.

HEALTH OF THE POPE

The Pope is suffering from weakness.

Gipps Land Mercury version:

Melbourne

The news about town to-day is that the Chester Cup, England, was won by Heney's [sic] Freeman. We also hear that the Belgian Government promises to follow the initiative of Germany in a modification of the ecclesiastical laws. The Pope, it is reported to-day, is suffering from weakness.

If the *Mercury* thought it could get round the former decision by this strategy, it was sorely disappointed. The same judge who decided the prior litigation saw no difference between the two cases. This time, however, he chose to say the *Argus* had a copyright in the telegrams extending to facts gathered at great cost, especially where 'the odour of the defendant's publication is so perfectly identical with the plaintiffs'.⁸⁶ The *Mercury* had made a 'copy, colourable alteration or adaptation' that should be enjoined. The *Mercury* might have sought refuge in the adage that 'there is no copyright in news', but it then would have had to avoid the expressions the *Argus* had used.⁸⁷ The cost of such major rewriting was probably little different from, and more bothersome than, buying the news from the *Argus* in the first place.

A century later, a similar situation arose in New York. Wainwright Securities' business included preparing and circulating financial analyses of leading corporations to its clients. It sued the publisher of the weekly *Wall Street Transcript* in 1976 for systematically abstracting its analyses. The *Transcript's* advertising boasted that its readers would save 'hundreds of hours of reading'. A US judge said the *Transcript's* practice of providing abstracts — really executive summaries that lifted and strung together the key sentences of the source works — 'sucked the marrow from the bone of Wainwright's report'.⁸⁸ A financial newspaper could, no doubt, occasionally use Wainwright's analyses in its stories, but could not systematically take them 'with the obvious intent, if not the effect, of fulfilling the demand for the original work'.⁸⁹ A pre-trial injunction was granted.

Had the *Transcript* been allowed to continue, Wainwright would have had either to adopt costly precautions of secrecy or to shut down its business because many of its customers would have defected. The sort of business information Wainwright produced would become either dearer, less available, less reliable, or all three. Abstracts that end up increasing the cost of, or even eliminating, their source material ultimately serve no useful purpose. The US court, like its Australian predecessor a century earlier, decided the copyright owner of the source work should alone decide the terms, if any, under which abstracts that may compete directly with the source should circulate.

Conclusion

The law relating to abridgments and abstracts does not always work clearly in practice. The uncertainty lies in predicting whether a work is original enough to have copyright, whether enough has been taken to amount to an infringement, and whether the taking is justified — all questions of fact and degree, as judges persist in saying. Any decision is also implicitly premised on a judge's view of the merits and demerits of the activities the parties are engaged in. This may cause risk-averse abridgers and

⁸² *Valcarengi v The Gramophone Co. Ltd*, Note 71 above.

⁸³ Unless, of course, they amount to fair dealings. See 'Permitted Abridgments' above.

⁸⁴ (1918) 248 US 215.

⁸⁵ *Wilson v Rowcroft* (1873) 4 Aust. Jurist Reps. 57, 61.

⁸⁶ *Wilson v Luke*, Note 23 above, at 140. Nobody bothered to point out that there was no evidence that Reuter's had assigned its Australian copyright to the *Argus*.

⁸⁷ *Springfield v Thame*, Note 28 above.

⁸⁸ *H.C. Wainwright & Co. v Wall St. Transcript Corp.* (1976) 418 F. Supp. 620, 625.

⁸⁹ *Wainwright Securities Inc. v Wall St. Transcript Corp.*, Note 72 above, at 96, affirming the previous case.

abstract-writers to pay whatever the source work owner demands, to avoid the higher costs of determining the ultimate validity of a claim; the cost is passed on to users. The challenge is to devise a test that balances owners' and users' rights in such a way that both sides benefit from a work, without either being able to exploit the other through the uncertainties of the law.

The working rule suggested earlier may help clarify matters: an abridgment or abstract can be made without the copyright owner's consent if it does not (1) substitute for the source work, (2) harm the work's present market, and (3) harm a potential market that ought fairly be the author's. Three cautions are needed. First, point (3)

should be judged conservatively lest it entirely swallow points (1) and (2). Second, the relevant harm cannot come from any express or implied criticism contained in or accompanying the abridgment or abstract, since the right to criticise is possessed by all independently of copyright.⁹⁰ Third, agreements reached among publishers and authors, without legislative backing, on what practices need permission should not, given the self-interest of the participants, affect others. Copyright laws should be rewritten in legislatures, not publishers' boardrooms.

90 This is a little like 'fair use' as applied in the United States, for example, the recent parody case of *Campbell v Acuff-Rose Music Inc.* (1994) 62 LW 4169, 4175 to 4176 (US Sup. Ct).