

Courtesy Without Copyright

Author : David Fagundes

Date : July 20, 2017

Robert Spoo, [Courtesy Paratexts: Informal Publishing Norms and the Copyright Vacuum in Nineteenth-Century America](#), 69 **Stan. L. Rev.** 637 (2017).

It is now a familiar point that positive law accounts for only part of the systems that regulate human behavior. Robert Ellickson's cornerstone treatise, *Order Without Law*, showed how closely-knit groups construct norm-based rule structures that govern behavior more efficiently than state-created law. In the past decade or so, scholars have investigated a number of areas in which individuals engaged in creative production similarly opt for norm-based systems in lieu of copyright or trademark law.

Professor Robert Spoo's recent article, *Courtesy Paratexts: Informal Publishing Norms and the Copyright Vacuum in Nineteenth-Century America*, represents a fascinating and important contribution to this growing literature. Spoo's article harkens back to the mid- and late 1800s, a time when foreign authors received no copyright protection in the United States. In the absence of formal legal protection for foreign authors' works, domestic publishers created a series of agreements with each other that the first house to print copies of a foreign author's novel would be able to do so without competition—even in the absence of enforceable copyright law. These informal agreements were expressed and furthered to a large extent by courtesy paratexts: Brief written passages in the front matter of a book in which the book's author would affirm that the publisher was acting within the courtesy of the trade to print their work, and exhorting readers to buy only authorized editions to assure the author and publisher alike their fair remuneration.

This brief description cannot do justice to the richness of Spoo's account of courtesy paratexts, and the courtesy of the trade generally, during this fascinating and sometimes chaotic moment in the history of publishing. Part of the great merit of this article lies in the opportunity it affords to hear the voices of famous nineteenth-century authors speaking directly to readers outside the context of their familiar writings. All of them are fascinating in their own way, but the most memorable may be Rudyard Kipling's paratext. While most authors spoke graciously about the courtesy of the trade and the remuneration it permitted them, Kipling's "discourteous courtesy" (in Spoo's felicitous phrasing) chided that "your country takes the books of other countries without paying for them." Kipling went on to emphasize that "I object to the system altogether," but consented to the courtesy of the trade "because I am helpless."

Beyond the absorbing stories themselves, Spoo's work makes significant substantive contributions to the study of norm-based systems of creative property. One feature of such systems is that they will always be more fragile than traditional law, since they lack state sanction and are stitched together largely by mutual consent. Spoo illustrates the implications of this fragility in detail with the story of Charles Dickens. Dickens, who like Kipling harbored deep frustration with the lack of U.S. copyright protection for foreign authors, decided quite suddenly that he wanted to switch to a new publisher. This violated the courtesy of the trade (the initial publisher was to have exclusive rights to all of that author's works), but since Dickens was a literary giant, he got his way, courtesy be damned. But fragility may function as a feature, not just a bug, of norm-based systems. For example, Spoo points out that while the courtesy of the trade was essentially an anticompetitive scheme, it did not result in publishers charging vastly supracompetitive prices. The reason is that publishers likely knew that if they charged exorbitant prices, readers might object, rogue publishers would be emboldened, and the whole system could collapse.

Spoo's discussion of the impact of the informal trade courtesy system on prices invites even more investigation about its normative implications. The conjecture that publishers did not charge excess prices for fear of reprisal from consumers and rogue printers is an important part of the story. But the entire discussion of price only hints at the bigger

question: was the trade courtesy system on balance welfare-enhancing for consumers of information? It may not have been. Foreign authors understandably loathed their lack of U.S. copyrights, but this absence was unlikely to have decreased their incentives to create, given the robustness of European markets. And U.S. readers did not need higher-end publishers to issue pricey editions of foreign books given the profusion of rogue publishers willing to crank out cheap books at low prices. It is not clear whether this system arose to remedy a market failure at all (at least from readers' perspectives), or whether it was just a collusive arrangement that allowed publishers to extract value that would otherwise been unavailable to them. And it thus also remains a question still worth asking whether the public—which is, after all, meant to be the primary beneficiary of U.S. copyright law—was made better off by the trade courtesy system.

Like all good historical analysis, Spoo's work also helps to shed light on modern problems. He notes that courtesy paratexts persisted in attenuated form into the twentieth century, but neglects to mention that they persist, alive and well, on the internet. Writers of fan fiction, for example, typically preface their works with disclaimers that, among other things, disclaim any intent to infringe the author's copyright, indicate their lack of any copyright ownership in the underlying material, and warn the reader in the event of possibly offensive content. These are courtesy paratexts in modern guise, though the direction of dialogue is different: While the nineteenth-century authors beseeched readers to purchase only authorized editions despite any legal compulsion to do so, modern-day fan fiction are written by readers imploring authors not to take issue with the unauthorized use, despite their (possible) legal entitlement to do so.

While I could continue extolling the virtues of Spoo's article, I will conclude instead by saying that beyond its substantive merits, this article was a joy to read. Let's be honest: Many—perhaps most—law review articles are like kale. They're good for you but consuming them can be a chore. Spoo's sparkling account of courtesy paratexts, and the system of informal norms that governed the publication of foreign novels in the late 1800s generally, is as elegantly written as it is meticulously researched and academically significant. Courtesy paratexts provide yet another reminder of the varied ways that closely-knit groups create extralegal systems of regulation to govern creative production when they find law unavailable or impractical.

Cite as: David Fagundes, *Courtesy Without Copyright*, JOTWELL (July 20, 2017) (reviewing Robert Spoo, *Courtesy Paratexts: Informal Publishing Norms and the Copyright Vacuum in Nineteenth-Century America*, 69 *Stan. L. Rev.* 637 (2017)), <http://ip.jotwell.com/courtesy-without-copyright/>.