
COOK AND THE (LITERARY) PIRATES

Isabella Alexander and Mark Leeming¹

Abstract: The published accounts of Captain James Cook's three voyages are seminal texts from the age of exploration. This paper explores the attempts by their authors, publishers, and the Admiralty to control the publication and circulation of these accounts using the relatively new law of copyright and the legal and non-legal disputes to which their publication gave rise.¹

In 2022, Cook's *Endeavour* is in the news again.² But it is not the first time that that ship and its voyages have excited legal controversy. This year coincides with the 25th anniversary of Ray Parkin's work on the ship and Cook's first voyage.³ The book tells parallel stories of two journeys – Cook's in the 18th century, and Parkin's two centuries later, to confirm his instinct that the "replica" tall ships illustrating the voyage for the bicentenary were badly wrong. He was guided by what appeared to be casual doodlings of the ship in the sketchbook of Sydney Parkinson, one of three artists who travelled with and were employed by Joseph Banks. Through tenacity, hard work and a little luck, he was able to confirm, by reference to the primary surviving documents – including receipts for the lengths of timber purchased when the ship was built – how the vessel must have looked and what it was like to travel in it. His modestly understated account is also immensely readable, recognised by its being named the NSW Book of the Year in the NSW Premier's Literary Awards for 1999, and also in a recent second revised edition.

Parkinson's seemingly casual sketches of the ship⁴ give an immediate insight into life on board 250 years ago. So too does the actual log on which the Tahiti observations were recorded.⁵ We are so used to receiving information on a screen, or in a contemporary edition of a book, that to look at an original literary or artistic work summons an unusual immediacy with the people who created that artefact and what it reveals. The author best known as Patrick O'Brien, writing historical fiction set a couple of decades later, had first editions of Jane Austen on his writing table.⁶ The theme of this article is closely connected with the distinction between the physical thing itself and the information contained in it.

For most readers, piracy in connection with Cook's voyages connotes what was a very real threat of naval hostilities. But lawyers' language is different from ordinary people's language, and it is natural for a lawyer immediately to think of copyright and literary piracy. As it turns out, there are very direct links between Cook's three voyages, copyright and literary piracy.

THE FIRST VOYAGE

Ray Parkin had a seaman's instinct to guide his research into the designs of the *Endeavour*. Uncovering what happened in the copyright litigation is much easier because of what appears on the face of the extant documents. Sydney Parkinson's *Journal*, published on 11 June 1773, contains a preface by his brother Stanfield which refers in florid terms to a Chancery injunction preventing publication. The injunction was sought by Sir John Hawkesworth, a former collaborator with Samuel Johnson, who was commissioned by the Admiralty to write up an account of Cook's first voyage of 1768-71, based on Cook's diary, Banks' journal and Parkinson's drawings. It contained accounts of other, earlier voyages too, but the Cook material was new. It was published two days before Parkinson's *Journal*, on 9 June 1773. The extraordinarily knowledgeable Derek McDonnell at Hordern House said that little if anything was known of the injunction. But if there had been one, it

¹ **Isabella Alexander** is Professor in the Faculty of Law at University of Technology Sydney; **Mark Leeming** is Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney. Contact: isabella.alexander@uts.edu.au; justice.leeming@courts.nsw.gov.au.

must have been granted within a narrow window between July 1771, when the *Endeavour* returned to England, and publication in June 1773. The National Archives at Kew contain the bill and answer and the injunction itself, and, most propitiously, the affidavits. Understanding those documents in their context is not so difficult. And so it seemed then, and seems today, passing strange that, evocative as these vestiges of the world a couple of centuries ago are, there is so little interest in the contest concerning the earlier accounts of Cook's first voyage. For it was perfectly clear from the fraying ribbons around the legal records in the National Archives that they had lain unopened for many, many decades.

In order to understand those records, it is necessary to place them in context.

First, the dispute between Hawkesworth and Parkinson was decided by perhaps the weakest Lord Chancellor in the 18th century, Henry Bathurst, famous for building Apsley House (later bought by the Duke of Wellington), but described by Holdsworth, a legal historian not prone to exaggeration, as "the one Chancellor of the eighteenth century whose ability was obviously inadequate".⁷

Secondly, law reporting was then (as it still largely is) a commercial operation, and depended on the viability of a market for a record of what a judge said in delivering judgment. There was no market for Lord Chancellor Bathurst's judgments. But it seems likely that there was no judgment in any event. Rather the injunction was granted as a matter of course, and dissolved without reasons.

Thirdly, the legal records need to be read carefully; after all, the two litigants were in serious dispute. But enough hard details appear, as well as competing versions of the points which were in issue, to enable a fairly precise account of what had occurred. Sydney Parkinson was employed by Banks as a draftsman for the voyage, and kept his diary and his own personal drawings and sketches.⁸ Sadly, he died on the homeward voyage (with many others of the crew), from illnesses contracted in Batavia. His next of kin was his brother Stanfield, but there was a dispute between Stanfield and Joseph Banks as to ownership of the diary, and ultimately Banks paid £500 for ownership of it, Parkinson's personal effects, and outstanding wages.

£500 was an immense amount of money, but it was dwarfed by the advance received by Hawkesworth for the authorship of the official account: £6,000 plus author's copies worth £75. There was something of a sensation when the *Endeavour* returned. The Admiralty ordered all seamen to surrender their journals, but one disobeyed the order, and a brief anonymous account (it is believed to be by James Matra,⁹ who later played a role in the decision to despatch the First Fleet)¹⁰ was published *within 3 months* of the *Endeavour's* return, and rapidly translated into French and German the following year. Captain Bentinck wrote to Cook on 10 October 1771 that "The subject is so interesting that there is no putting the book down, at the same time the inaccuracy with which it is wrote makes it most tiresome and indeed the most provoking reading I ever met with".¹¹

Unquestionably, Banks had ownership of Parkinson's diary; but he also let the grieving brother have access to it to read Sydney's account. Unquestionably, Stanfield had a copy made of the diary, which was then published by Richardson and Urquhart. After an attempt at mediation failed, there was a suit in chancery, with both sides retaining the leading silks of their day.

There were at least two aspects to the dispute. One was whether Banks had extracted a promise from Stanfield that he would only peruse the diary, and not take a copy.¹² Another was whether Banks merely had ownership of the physical diary, but not the copyright in the unpublished text.¹³ In the late 18th century, when the foundations of copyright law were being developed, a short-term injunction (until the defendant filed his answer) would be granted as of course if a plaintiff came to court with a prima facie case, but not so if the plaintiff merely had a claim for breach of contract. It requires little imagination to infer that Hawkesworth and his publisher wanted to be first to market with

an official account of the voyage, and so an injunction delaying the rival publication would have been at the forefront of their minds. Indeed, that was what Horace Walpole assumed at the time. He wrote that the publishers, Strahan & Co. “will take due care that we should read nothing else”.¹⁴ That must have contributed to the decision to place the claim in copyright at the forefront of the bill. And in due course, on 4 February 1773, an injunction was obtained.

Stanfield Parkinson filed his answer, and on 12 May moved to set aside the injunction. There was argument on 28 May 1773 and the Chancellor dissolved the injunction, once again probably without giving reasons. Both books were published the following fortnight. Many thought Hawkesworth’s account was terrible. Horace Walpole wrote: “I have almost waded through Dr Hawkesworth’s three volumes of the voyages to the South Seas. The entertaining matter would not fill half a volume ...”.¹⁵ Famously, Cook himself was surprised, and mortified. Much of Banks’ account was falsely attributed to him, there were basic nautical blunders, and there was an outright lie at the beginning, that “the manuscript has been read to him at the Admiralty for his approval”.¹⁶

Hawkesworth died of an opium overdose later that year, Stanfield also died shortly after. That brought an end to the litigation. Hawkesworth’s volumes were not especially commercially successful, in part because of the defects people noticed, in part because of the competition from Parkinson, and in part because abridgements were published shortly thereafter, cannibalising the market.

The second copyright piracy case based on the *Endeavour*’s first voyage, *Strahan v Newbery*, is reported, perhaps because (a little unusually), the Chancellor called in Blackstone J to assist him. Consistently with Walpole’s assessment, Newbery had published an abridgement of Hawkesworth’s volumes,¹⁷ stripping away the excess and significantly reducing the price. This time, the litigants were the two rival publishers. The court held that an abridgement of Hawkesworth, “where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work”.¹⁸

There’s one last mysterious aspect to this second copyright piracy case arising from Hawkesworth. It is that the publisher of the law report was in fact Strahan himself, who was the losing party – he had paid £6000 to Hawkesworth and was doing his best to prevent competing (and much cheaper) abridgements to be placed onto the market. In the law report which he himself published, rather than calling the case by its true name *Strahan v Newbery*, it is described merely as ‘Anonymous’. If you walk up and down Phillip Street in Sydney, you can without much effort hear lawyers talking of their own triumphs; they are much more reticent to disclose their defeats. That much seems to have been just as true in 1774 as it is today.

THE SECOND VOYAGE

The contests over accounts of Cook’s voyages did not end there. Beaglehole calls the publication of *A Voyage towards the South Pole and round the world*,¹⁹ the account of Cook’s second voyage of 1772-75, “one of the great events in the history of Pacific exploration”, but it came into being following a rather bitter contest over its authorship. Joseph Banks, and his Swedish colleague Daniel Solander, had planned to join Cook on his second expedition. However, as is well known, Cook refused to sail with Banks’ modifications to the vessel, and then Banks refused to sail at all. A replacement naturalist had to be found quickly, and the Admiralty selected the Prussian-born naturalist Johann Reinhold Forster and his son Georg to accompany Cook and help him to fulfil the Admiralty’s instructions (also given on the first voyage) to

carefully ... observe the Nature of the Soil, and the Products thereof; the Beasts and Fowls that inhabit or frequent it, the fishes that are to be found in the Rivers or upon the Coast and in what Plenty; and in case you find any Mines, Minerals or valuable stones you are to bring home Specimens of each, as also such

Specimens of the Seeds of the Trees, Fruits and Grains as you may be able to collect, and Transmit them to our Secretary that We may cause proper Examination and Experiments to be made of them.²⁰

Also travelling with Cook were the astronomers William Wales and William Bayly, as well as the artist William Hodges.

Johann Forster seems to have been a rather difficult personality (his biographer Michael Hoare calls him “the Tactless Philosopher”²¹) and his voyage saw considerable conflict with his shipmates. However, he does seem to have been treated rather shabbily by the Admiralty. Forster understood that he had been promised authorship of the account of the voyage upon return to Britain, receiving the benefit of all of the profits that might flow from it. The Forsters believed that Cook had changed his mind about allowing someone else to write up the story of the voyage when he heard how much money Strahan had paid Hawkesworth, and that Lord Sandwich had taken against Johann Forster when he refused to donate to Sandwich’s mistress some specimens of the voyage intended for the Queen. After proposing that the account of the journey would be split into two – Cook would produce the ‘nautical’ part and Forster the ‘philosophical’ part – the Admiralty then stated that Forster’s work was not up to scratch and insisted it be edited. The changes made under the oversight of Daines Barrington were entirely unacceptable to Forster, who considered his manuscript had been mutilated.²² Indeed, his entire authorial persona was emasculated, as his son Georg later explained:

Where is the man of such finished impudence, who will consent freely to be represented to the world as in a state of insanity? And yet this was the only light in which an author could appear, who should have ventured to publish such a manuscript as my father’s after it had been castrated by Mr Barrington.²³

Having reached this impasse, Forster offered to sell his own manuscripts to the Admiralty for £200 and to forego his promised profits for a lump sum of £1000.²⁴ Forster attempted to acquire proofs of the copper plates – some of which were based on his own drawings – knowing their commercial value to any book of the voyage, but was prevented by the Admiralty, which demanded they be returned.²⁵

In the end, it was Cook who produced the ‘official’ account with editorial assistance from Canon John Douglas, which was again published by Strahan. To avoid breaching Forster’s agreement with the Admiralty, his son Georg wrote a separate account, entitled *A voyage round the world*.²⁶ He beat Strahan into print but was furious to discover that Cook’s *A Voyage towards the South Pole* was being sold at the same price (2 guineas), despite containing 63 engraved plates. Georg accused the Admiralty of interfering to lower the price to below cost so as to undercut Georg in the market.²⁷ On this occasion, the Admiralty’s interference in the market seems to have been successful. Copyright was unnecessary to enforce authorship claims, as each party was working from his own materials, but it was not irrelevant because it underpinned the contractual relationships in play.

THE THIRD VOYAGE

No naturalists were sent on Cook’s third voyage of 1776-80 – possibly apocryphally, Cook is said to have exclaimed to his second lieutenant James King, “Curse the scientists and all science into the bargain”. However, he did choose John Webber, a landscape and figure artist, to accompany the expedition. Cook, of course, could not write up the account of the third voyage, having been killed in Hawai’i on the way home. The Admiralty directed the account to be written again by Canon Douglas from Cook’s journals, as well as those of William Anderson, the ship’s surgeon, which would form two volumes, with a third to be written by King. This official account was to be published by George Nicol and Thomas Cadell (Nicol had been appointed as bookseller to King George III in 1781). The Admiralty agreed to the request of Cook’s widow that she might be able to receive some of the expected profits from the work.²⁸

However, publication was so long delayed that it was inevitable other publishers would step in to meet the public demand for an account of the voyage – particularly high in light of Cook’s popularity and his gruesome demise. One account was published in 1781, initially anonymously, but later claimed by John Rickman, a lieutenant on the *Resolution*. Rickman alleged that the Admiralty “maligned” his publication to stop it competing with the official account.²⁹ A second account was written by William Wade Ellis, surgeon’s mate on the voyage, which particularly annoyed Banks, who wrote to Ellis reproaching him and saying he would no longer be of assistance to him.³⁰ The official version³¹ was eventually published in June 1784 and sold at a price of £4/14/6. Nicol later wrote to Banks regretting the decision to price the book so low, saying he could have made three times as much money.³²

Not long after this, abridged versions began to appear. The publisher of one of them, Kearsley, explained his aim was to make the work more accessible, writing in the introduction:

The price of the splendid and elegant quarto Edition lately printed by order of the Lords of the Admiralty, under the patronage of His Majesty, is unavoidably (from the numerous and expensive engravings) so very high, that the majority of the Public are excluded from the pleasure of reading it: and it is an undoubted fact, that not one person in fifty can with convenience, or propriety, make the purchase, however eager their curiosity to peruse it.³³

A bill in Chancery was brought against Kearsley by the Attorney-General Richard Pepper Arden. However, the Lord Chancellor (Edward Thurlow) said the facts did not establish that the Lords Commissioner owned the property rights. He thought that it appeared that the *Voyages* were published as a present to the public.³⁴ In an attempt to remedy the situation, Nicol, the publisher of the official account, made his own Complaint to the Court, arguing that he had the right to bring a suit as the Lords Commissioner had “authorised and empowered” him to publish the book. Lord Chancellor Thurlow heard both Complaints together on 16 August 1784 and granted an injunction until Kearsley should put in an Answer.³⁵

This injunction was still in force when Nicol moved against another consortium of booksellers. John Stockdale and associates had begun to publish a book in monthly numbers subtitled “a Copious Comprehensive and Satisfactory Abridgement” of Cook and King’s *Voyage to the Pacific Ocean*.³⁶ By December, the defendants had printed off three or four thousand copies of each number, of which fifty-four thousand copies had sold at £36 per 1000.³⁷ The defendants responded to Nicol’s Bill of Complaint that they were perfectly entitled to publish abridgements, following the earlier decision in *Strahan v Nicol*. In addition, they were justified in doing so because the high prices of the official version were unreasonable and unaffordable, and that since the plates had been engraved using public money, the book ought to be a gift to the public. In addition to strong argument that abridgements were not an infringement of copyright, the question of ownership was a problem for the Admiralty, as was the arrangement made with Cook’s widow. The Lord Chancellor refused to find in favour of Nicol because he was neither an owner of the copyright nor an assignee of it.³⁸ Stockdale and his partners were delighted by the extra publicity, placing notices in *The Times* complaining of the suit brought against them, and then informing the public of the injunction’s dissolution.³⁹

Although ownership could not be established satisfactorily for the purposes of the infringement suit, the Admiralty made good, in part, on their commitment to Mrs Cook. On 28 July 1785, a memorandum was drawn up in the presence of Lord Sandwich, Lord Howe (who had succeeded Sandwich as first Lord), Sir Joseph Banks and Admiralty Secretary Philip Stephens. It stated that the profits would be divided as follows: one half to Cook’s family, with Mrs Cook holding the principal during her life, and after her death, being divided equally amongst surviving children; one quarter to the heirs of Captain King (who had died the preceding October); and one eighth to the legal representatives of Captain Charles Clerke.⁴⁰ The final eighth, after a sum was deducted

for Mr Anderson's executors, was to go to 'Mr Blyth' (identified by Cook's biographer Beaglehole as William Bligh) in recognition of his surveying and cartographic services.⁴¹ Despite the Admiralty's failure to close the door on competing abridgements, the work generated considerable profits, as noted above. By 1801 it was in its third edition and producing about £40 profit a year.⁴²

The moral of the story, for the Admiralty at least, was that if they wanted to be able to control the narrative of the voyages they commissioned, and the profits they could potentially generate, they needed to think more carefully about copyright. If the story's 'author' was not an employee, then copyright would not automatically be owned by the Admiralty; but neither would it be owned by the publisher, absent a contractual arrangement with the author. Moreover, even if copyright ownership could be sorted out, the Admiralty would still be unable to prevent travel accounts from being abridged, serialised and reproduced in different formats. This approach to copyright, which is considerably more permissive than that of the present day, speaks to the premium 18th century courts and society put on public access to information about the world around them.

NOTES

- ¹ This paper is based on a presentation given on 3 March 2022 at the State Library of New South Wales as part of the "Mapping the Pacific" exhibition and conference. Parts are based on Alexander, 2020 & forthcoming, and Leeming, 2005.
- ² Tomazin, 2022.
- ³ Parkin, 1997.
- ⁴ Parkinson, BM9345/ff 50 and 57, reproduced in Parkin, above.
- ⁵ This was included in the exhibition accompanying the *Mapping the Pacific* conference at the State Library of NSW.
- ⁶ See King, 2000, 272-277, emphasising that O'Brien wished not merely to own, but to read and re-read the early editions.
- ⁷ Holdsworth, 1938, Vol. XII, 314.
- ⁸ For a summary of the debate whether the numerous botanical sketches were undertaken by Parkinson or his assistants, see Parsons, 2018, ch. 2.
- ⁹ See Frost, 1995, 6.
- ¹⁰ His letter to Banks of 28 July 1783, his proposal of 23 August 1783, and his testimony to the Beauchamp Committee in 1785 are reproduced in Frost, 1995, 110-122.
- ¹¹ Bentinck to Cook, 10 October 1771, quoted in Beaglehole, 1974, 290.
- ¹² The affidavit of a witness, Dr John Fothergill, said that the diary was provided "with an Express Injunction that no other use than a bare perusal and to satisfy his curiosity should be made of them" (affidavit sworn 28 January 1773, UK PRO C31/187 f 80). Stanfield disputed this in his answer.
- ¹³ This turned on whether the deed extended to an assignment of intangible property, and was complicated by a question of timing too complex for this account.
- ¹⁴ Walpole to Rev. Mason, 15 May 1773, in Walpole, 1955, vol. 28, 86.
- ¹⁵ Walpole to Rev. Mason, 5 July 1773, in Walpole, 1955, vol. 28, 96.
- ¹⁶ See Beaglehole, 1974, 439.
- ¹⁷ Anonymous, 1773-74.
- ¹⁸ (1774) Lofft 775; 98 ER 913.
- ¹⁹ Cook, 1777.
- ²⁰ Beaglehole, 1999, cclxxxii-iii.
- ²¹ Hoare, 1976.
- ²² Edwards, 1994, 108-12; Williams, 2013, ch. 5; Forster, 1778.
- ²³ Forster, 1778, 14-15.
- ²⁴ Forster, 1778, 17. See also Hoare, 1976, 161.
- ²⁵ Hoare, 1976, 163; Forster, 1778, 17.
- ²⁶ Forster, 1777.
- ²⁷ Forster, 1777, 18-19.
- ²⁸ Beaglehole, 1974, 691.
- ²⁹ Rickman, 1781.
- ³⁰ Ellis, 1782.
- ³¹ Cook & King, 1784a.
- ³² Letter from G. Nicol to Sir Joseph Banks, 14 January 1801 (Auckland Libraries Heritage Collections GMS 71).
- ³³ Kearsley, 1784, iii.
- ³⁴ Complaint of Richard Pepper Arden, UK PRO C12/964/2 (31 July 1784); GT Exch Ch Reports, 324.
- ³⁵ Complaint of George Nicoll, UK PRO C12/135/18 (11 August 1784); C33/462/461r; *Nichols v Kearsley* [1784]

Dickens 645.

³⁶ Cook & King, 1784b.

³⁷ Answer of Stockdale, Scatcherd, Whitaker, Fielding and Hardy UK PRO C12/132/23 m2 (19 January 1785).

³⁸ *Nicol v Stockdale, Scatcherd, Whitaker, Fielding and Hardy* [1784] UK PRO C12/132/23; 3 Swans 687; Lincoln's Inn Misc MS 109, p. 211; *Nicol v Stockdale et al.* 15 January 1785, from Mr Romilly's Notes.

³⁹ *The Times*, 1 January 1785, p. 3; *Morning Post*, 18 January 1785.

⁴⁰ Upon Cook's death, Clerke has assumed command of the voyage, but died himself on the homeward voyage.

⁴¹ Beaglehole, 1974, 692. Memorandum for the division of profits arising from the sale of the book of Captain Cook's late voyage, 28 July 1785 (Auckland Heritage Collections GMS 59).

⁴² Letter from G. Nicol to Sir Joseph Banks, 14 January 1801 (Auckland Heritage Collections GMS 71).

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