During the first half of the nineteenth century, British authors had little prospect of protecting their publications abroad, especially in America. However, depending upon the state of the law as interpreted by the British courts, foreign authors including Americans could secure a valid copyright in Britain. During the years 1815-54 publishers and their solicitors were never quite sure how the Court of Chancery or the Common Law Courts would rule in a particular case, and this disconcerted everyone on both sides of the Atlantic. Broadly speaking, up to 1835 legal decisions went against foreigners securing a copyright. Then with D'Almaine v. Boosey and later with Bentley v. Foster (1839) the balance tipped in favour of foreign authors. The only prerequisite was that a work had to be published in Britain prior to or simultaneous with its appearance abroad.

The passage of the International Copyright Act of 1838 introduced additional complications. Some solicitors construed it as displacing all previous legislation and legal opinion, and maintained that reciprocity was henceforth the only basis upon which Britain would confer copyright on foreigners. But there were those who did not agree with this strict construction and so uncertainties continued.

For the British book trade this meant that American books were a risky speculation. Three types of publishers and booksellers took an interest in American literature. First, there were those like Bentley, Murray, and Blackwood who took special pleasure in promoting American authorship. Of these Bentley was the most heavily committed, often issuing a half dozen American titles a year. The second group
was attracted to American authorship not so much for the prestige it might bring them but rather due to the ease of reprinting non-copyright works. These firms were the so-called ‘pirates’ whose methods were usually the same as their counterparts in North America. Their interests were contrary to the other two groups because they thrived on copyright uncertainty whereas the others championed the rights of foreign authors. The third group were principally importers of American books although they also published a few, copyrighting them if they could. Firms like John Miller, John Chapman, and Sampson Low made a speciality of Americana just as other firms specialized in law, medical, or other foreign books.

British literary piracy is usually lost sight of beside Dickens’s well-publicized criticism of the American reprint trade. But the same economic depression which created a market in America for cheap books and periodicals also gave rise to a similar though more modest effort in Britain. Publishers such as George Routledge, Henry George Bohn, H. G. Clarke, and William Smith capitalized on the increasing number of British readers whose main criterion for buying literature was its low price. Sometimes they would ‘borrow’ from their own countrymen like Dickens, but it was generally considered safer to go farther afield and publish pieces with dubious copyrights which were written by American authors. In addition to putting out periodicals and one-volume works, series of volumes labelled Railway Libraries, Cheap Series, or Popular Series began to pour from their presses. Mostly fiction, these series sold for a shilling or two per volume and were run off in as many as 5,000 to 6,000 copies at a time. When one considers that every other reprinter could also have issued the same work this is not an insignificant number. Occasionally the reprinters would strike it rich as they did in 1852 with Uncle Tom’s Cabin by the American authoress Harriet Beecher Stowe. Within just a few years one million copies had been sold, dwarfing the sales of any contemporary work on either side of the Atlantic. In 1853 the Illustrated London News reported:

At present the whole race of English booksellers, with few exceptions worth mentioning, are greater literary pirates than the Americans. No sooner does a tolerably good book appear in America, than the whole tribe of English publishers pounce upon it, and rival each other who shall first stock the market with it. There is nothing to pay the author. The book trade goes on swimmingly; and the English public have cheap ‘Uncle Toms’. In the meantime
the English writer is at a greater discount than ever in his own country, and sinks a step lower in the social scale.

Somewhat more typical was Nathaniel Hawthorne’s *Scarlet Letter*. Scarcely known in Britain, Hawthorne was unsuccessful at first in securing a London publisher and British copyright. But once his book proved popular in America it was not long until British publishers took notice. Within several years two London importers, Delf and Chapman, advertised the American edition; Routledge, J. Walker, and Bohn republished the book under their own imprint; and reprints were issued in Edinburgh as well as in Dublin. Fortunately Routledge’s records specifically mention their commitment in this case, indicating the sales of at least one of the reprinters involved. His initial edition in the spring of 1851 was 2,000. In August another 2,000 copies were struck off, and the same number were again called for in September. November saw an issue of 4,000 copies. The next July 2,000 more were ordered, followed by the same number in both August and September. In 1853 the demand finally began to slacken, necessitating only two printings of 2,000 in February and July. However, these numbers so impressed Routledge that he even ventured to try 2,000 copies of Hawthorne’s campaign biography of Franklin Pierce!²

Three other American authors, Emerson, Irving, and Melville were unwitting contributors to one of the major legal battles within the London book trade. It began in February 1850 when Henry G. Bohn arranged to publish an English edition of Ralph Waldo Emerson’s *Representative Men* as the first number in his new Shilling Series only to discover it shortly thereafter in Routledge’s Popular Library. Bohn regarded this as a breach of trade courtesy by a fellow reprinter and decided to retaliate. Knowing that Routledge’s new series was to include a number of works by Washington Irving, Bohn simply helped himself to one of them.

Soon the two rival firms were in a race to reprint other Irving titles, especially the revised editions which were being issued by G. P. Putnam of New York and John Murray of London. They flooded the market with 1s. or 1s. 6d. volumes, overlooking what John Murray, whose father had paid handsomely for their copyright in the 1820s, and Richard Bentley, who became Irving’s publisher in the 1830s, might do about it.

Murray and Bentley knew that the courts differed on the subject but they determined to take their chances. During June and July 1850
they gathered evidence in the time-honoured fashion of sending innocuous-looking clerks to the shops of Bohn and Routledge with instructions to purchase copies of the disputed books. Bills of complaint and affidavits were sworn to, and at the end of July Bohn and Routledge were advised by the Court of Chancery that they would be forced by an injunction to cease publication of the offending works unless they could submit sufficient evidence to prove their innocence. Hearings were held on 7–8 August and the defendants managed to raise so many awkward points that Vice-Chancellor Knight Bruce felt that he could not grant an injunction against them. The only consolation left to Murray and Bentley was the knowledge that they could still seek damages in one of the three Common Law Courts, and in the meantime Bohn and Routledge would be forced to keep accurate accounts of the profits made from the sale of the books in question.

The case is significant because it embodies so many of the legal issues faced by the courts during the first half of the nineteenth century. Fortunately a good deal of the background correspondence survives between plaintiffs and their solicitors and between plaintiffs and defendants, permitting a close analysis of the situation. Always implicit were the rights of foreign authors, the growth of cheap reprints, and the survival of trade courtesy within the London book trade. And as time went on each party became more obstinate, expended more money and energy, and even showed a determination to take the case all the way to the Court of last resort, the House of Lords.

By the time the Vice-Chancellor had denied an injunction to Murray and Bentley, the situation was grave indeed. Both Bohn's and Routledge's cheap series had grown to alarming proportions, and there was no telling which works they would appropriate next. As long as the courts were ambiguous the pirates were willing to risk appropriating American books which were readily available and required no translation. By the end of July 1850 the two series contained the following:

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>1850</th>
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<tbody>
<tr>
<td>1.</td>
<td>Emerson</td>
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<td>2.</td>
<td>Irving</td>
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<tr>
<td>3.</td>
<td>Sparks</td>
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<td></td>
<td><em>Representative Men</em></td>
<td>February</td>
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<td></td>
<td><em>Life of Mahomet</em></td>
<td>February</td>
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<td></td>
<td><em>Franklin's Autobiography</em></td>
<td>March</td>
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<td></td>
<td>Author</td>
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<td>4</td>
<td>Willis</td>
<td>People I Have Met</td>
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<td>5</td>
<td>Irving</td>
<td>Successors of Mahomet</td>
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<tr>
<td>6</td>
<td>Irving</td>
<td>Goldsmith</td>
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<td>*7</td>
<td>Irving</td>
<td>Sketchbook</td>
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<tr>
<td>*8</td>
<td>Irving</td>
<td>Tales of a Traveller</td>
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<td>9</td>
<td>Irving</td>
<td>Tour of the Prairie</td>
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<td>*10-11</td>
<td>Irving</td>
<td>Granada</td>
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<td>*12-13</td>
<td>Irving</td>
<td>Columbus</td>
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<tr>
<td>*14</td>
<td>Irving</td>
<td>Companions of Columbus</td>
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<tr>
<td>*15-16</td>
<td>Taylor</td>
<td>Eldorado</td>
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<tr>
<td>**17</td>
<td>Irving</td>
<td>Capt. Bonneville</td>
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<tr>
<td>18</td>
<td>Irving</td>
<td>Knickerbocker's History</td>
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<tr>
<td>**19</td>
<td>Irving</td>
<td>Alhambra</td>
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<tr>
<td>20</td>
<td>Irving</td>
<td>Conquest of Florida</td>
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**Routledge's Popular Library**

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<thead>
<tr>
<th></th>
<th>Author</th>
<th>Title</th>
<th>Month</th>
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<tbody>
<tr>
<td>1</td>
<td>Irving</td>
<td>Goldsmith</td>
<td>January</td>
</tr>
<tr>
<td>2</td>
<td>Emerson</td>
<td>Representative Men</td>
<td>February</td>
</tr>
<tr>
<td>3</td>
<td>Irving</td>
<td>Mahomet</td>
<td>March</td>
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<tr>
<td>*4</td>
<td>Irving</td>
<td>Bracebridge Hall</td>
<td>March</td>
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<td>5</td>
<td>Melville</td>
<td>Omoo</td>
<td>March</td>
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<tr>
<td>6</td>
<td>Melville</td>
<td>Typee</td>
<td>April</td>
</tr>
<tr>
<td>7</td>
<td>Irving</td>
<td>Successors of Mahomet</td>
<td>April</td>
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<tr>
<td>*8</td>
<td>Irving</td>
<td>Tales of a Traveller</td>
<td>April</td>
</tr>
<tr>
<td>*9</td>
<td>Irving</td>
<td>Sketchbook</td>
<td>May</td>
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<tr>
<td>*10-11</td>
<td>Irving</td>
<td>Columbus</td>
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<tr>
<td>*12</td>
<td>Irving</td>
<td>Granada</td>
<td>May</td>
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<tr>
<td>13</td>
<td>Irving</td>
<td>Crayon Miscellany</td>
<td>May</td>
</tr>
<tr>
<td>*14</td>
<td>Irving</td>
<td>Companions of Columbus</td>
<td>May</td>
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<tr>
<td>15-16</td>
<td>Taylor</td>
<td>Eldorado</td>
<td>June</td>
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<tr>
<td>17</td>
<td>Irving</td>
<td>Salmagundi</td>
<td>June</td>
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<tr>
<td>18</td>
<td>Irving</td>
<td>Knickerbocker's History</td>
<td>June</td>
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<tr>
<td>**19</td>
<td>Irving</td>
<td>Captain Bonneville</td>
<td>July</td>
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<tr>
<td>**20</td>
<td>Irving</td>
<td>Alhambra</td>
<td>July</td>
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<tr>
<td>**21</td>
<td>Irving</td>
<td>Astoria</td>
<td>July</td>
</tr>
<tr>
<td>22</td>
<td>----</td>
<td>Life of Sir R. Peel</td>
<td>July</td>
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One of the reasons Murray was denied an injunction by the Court of Chancery was the uncertainty regarding the dates of publication of the books in dispute. The courts had long since decided that one of the essential prerequisites for a British copyright was prior publication in the United Kingdom. Some of Irving’s early works appeared in the United States before their publication in London, while others such as the Sketchbook, Mahomet, and Goldsmith came out in parts, sometimes issued first in America and other times in Britain. Murray ultimately rested his case on six of Irving’s works, as designated by the asterisk in the lists, as well as two of Melville’s stories. Bentley sought to protect three of Irving’s other books, marked with a double asterisk.

The problem was to prove that these works had been published in Britain prior to their appearance in the United States, an ostensibly simple matter. But when Murray applied for assistance to Irving and his New York publisher, G. P. Putnam, his answers were far from reassuring. In June 1850 Putnam wrote:

*So far I have not been able to procure documents that would be legal evidence of time of publication in this country – for the record of the entry of copyright does not prove the day of publication – inasmuch as three months latitude is allowed by law – and no legal proof can be had from official persons on that point.*

He sent Murray some advertisements of Irving’s early works and trusted that more could be learned from the publishers who had originally issued the books. Putnam soon learned, however, that one of the publishers was dead and another had lost his business records in a fire. Besides, Putnam explained, the problem of contested copyright arose so infrequently in America that authors and publishers were not accustomed to keep detailed account books and publication notices. Ultimately it was up to Irving and Melville themselves to sign affidavits attesting to the validity of the information they provided for Murray and Bentley, and even this might not satisfy a judge and jury in a British Court of Common Law.

Even if Murray and Bentley could prove, as was not always the case, that their editions of Irving and Melville appeared first in Britain, they still could not avoid the equally important issue of residency and nationality. The British courts were divided on the rights of foreign authors, and who was to say that the recent decision of Boosey v. Purday (1849) which was so unfavourable to foreign authors would not be upheld
again. Yet here was an area of ambiguity which Murray hoped to exploit at least in the case of Irving if not Melville. Melville had lived in Britain occasionally but not when *Typee* and *Omoo* were going through the press. However, Irving had spent a good deal of the 20s and early 30s resident in Britain and on the Continent, so much so that contemporaries sometimes wondered if he was not an American expatriate. Between 1829–31 Irving had even served with the American Legation in London. Residency was very important, as many British legal authorities felt that a foreign author considerably strengthened his copyrights if he was present when the works appeared. Murray wished to go one step farther and argue that Irving could even claim British citizenship on the basis of having parents who were British subjects. Murray’s solicitor, Alfred Turner, and his barrister, Fitzroy Kelly, both doubted that a court would accept Irving’s claim to British citizenship, but they thought it worth a try as long as it did not involve excessive expense in gathering the evidence.

In addition to the claims of prior publication and Irving’s nationality, there was the basic question of Bentley’s and Murray’s title to their own publications. This was easiest to prove because they each kept good records and could produce contracts, original manuscripts in some instances, and letters exchanged between themselves and authors. Murray had further to demonstrate that he had duly inherited part of his father’s business in 1843 and later bought out the other part of it from relatives.

As might be expected, Bohn and Routledge based their case on the obverse of the above. They denied the right of any foreigner to a copyright in Britain and challenged the dates of publication. They noted that Irving had been living in America more or less continuously since the 1830s except for a few years as American Consul to Spain. On the issue of nationality Bohn and Routledge were on particularly strong ground, for Irving had made it patently clear to the reading world that he was an American by birth as well as inclination and privately he told Murray that he would not become a direct party to litigation in Britain.

The task of Bohn and Routledge was a good deal more difficult when it came to publication dates. After all, they had no direct access to Irving or his current publisher, Putnam, and the burden of proof ultimately rested with the reprinters. If they could not show that the works in question first appeared in America, then Murray’s and Bentley’s account books would be taken as *prima facie* evidence. Bohn managed to extract some biographical information about Irving from the Secretary of the
American Legation in London until he was put on his guard and thereafter refused further co-operation. An even better lead proved to be two authorities on American bibliography, John Chapman and Thomas Delf, who as booksellers were importing Irving's works from America. If Bohn could prove that Murray had knowingly tolerated the sale of imported editions, Murray's case would be undermined seriously because the law held that a plaintiff was required to bring action against a reprinter within one year of the reprint's appearance. Since Chapman and Delf had been importing American editions of Irving for the past few years, Murray's only plea could be ignorance that these were on sale in London.

To buttress his position, Bohn tried to show that Murray had actually neglected Irving's works since the 1830s, reissuing only two books prior to the revised edition published in New York by Putnam in which Murray only shared. Again since Murray presumably imported these, it raised the problem of the status of an import.

Eventually all the arguments came back to whether a foreigner or his London publisher could secure a valid copyright in Britain. If this were admitted, then the evidence fell into place and both Bentley and Murray were confident that they could prove their allegations. Herein the plaintiffs had an advantage because they were prepared to co-operate in litigating the question. The defendants, on the other hand, mistrusted one another and were always in ruthless competition.

These were the arguments and the state of the case in August 1850 when the Court of Chancery granted Murray permission to seek satisfaction in another court. The Vice-Chancellor explained that he could do little else because his Court of Equity was not in a position to deal with serious conflicts of evidence. If Bohn and Routledge had failed to answer the bill of complaint or had responded feebly, an injunction would have been issued as a matter of course. But the defendants had introduced too many knotty problems which only a judge and jury could arbitrate.

Murray's solicitor, however, was dissatisfied. Turner felt that the Vice-Chancellor had rushed the case and given too much credence to Bohn's and Routledge's answers. Not only that, but in failing to grant an injunction the court was allowing the situation to get worse pending the case coming to trial. On the other hand, he confided to Murray: 6

*We gained however considerably by the Chancery proceedings, because it has*
shown the whole of our opponents case and disclosed to us many facts which we were ignorant of and which, if they had suddenly come out at a Trial of Law, might have at once thrown us out of Court – and we have obtained these without disclosing our case which we should have done if the matter had been more fully argued – a thing which was to be avoided. . . . It is now for us to make best use we can of the next two months.

Copyright cases could be brought before any of the three Common Law Courts: Queen's Bench, Common Pleas, or Exchequer. Since 1845 the Barons of the Exchequer had been consistently turning thumbs down on the rights of foreign authors, so there was no point in approaching them. Common Pleas had upheld a foreign author in 1848, which recommended it, but Queen's Bench, under its new Chief Justice Lord Campbell, seemed to offer an even better prospect. Not only was it caught up with its arrears of business and therefore promised a quick decision, but more important, Campbell was a distinguished scholar and biographer whose publisher happened to be John Murray.

The case was thus scheduled in Queen's Bench for November 1850. Sir Fitzroy Kelly, the eminent barrister and QC, was asked by Turner to plead Murray's case. Kelly was a Member of Parliament as well as a former Solicitor General and had gained a reputation for trying cases before the House of Lords. This was probably in the back of Turner's mind should Murray's litigation be carried all the way to the highest court.

November came and went without a trial. By February 1851 Kelly decided to take an extended holiday in the Mediterranean. Turner observed: 'it is equally impossible to say when the Actions may be read – as our opponents of course will not facilitate, and it is most likely that Melville's case from its being the most simple may be tried first'.

At the beginning of April a new wrinkle was introduced by Bohn's legal counsel. As Turner explained to Murray: 'The pleadings have by the course he [Bohn] has pursued assumed the form of a Demurrer and this is put down for argument of this month.' A Demurrer was, as one contemporary defined it, 'a kind of pause or stop, put to the proceedings of an action upon a point of difficulty, which must be determined by the court, before any further proceedings can be had therein'. In effect Bohn was questioning Murray's right to a trial if no law had been broken. If aliens could not secure a copyright, as suggested by recent decisions of the Court of Exchequer, and if Irving and Melville were
clearly aliens, then there was no basis for litigation. It was a delaying
tactic, Turner said, for 'whatever decision the Court comes to on this
being only a point of formal pleading will not prevent either party from
going on before a Jury on the general facts of the Case'.

The Demurrer was not heard by Lord Campbell in Queen's Bench
until 9 May 1851, and by that time Sir Fitzroy Kelly was back in England
and able to argue Murray's case. Lord Campbell did not decide the matter
but requested time to consider the arguments, thus leaving the proceedings
in a state of suspension.

Several weeks later another copyright case, that of Boosey v. Jefferys,
intruded itself upon Murray's and Bentley's affairs. Almost a year before,
Boosey, another publisher, had tried to protect the copyright of a
foreigner, but failed. Now, in May 1851, he was carrying an appeal to
a Court of Error. Whatever decision was rendered in this case on this
level would certainly influence, perhaps decisively, the disposition of
Murray's case. Alfred Turner gave vent to his own frustration.

_I am vexed at the position of the Case of Boosey v. Jefferys - however,
it cannot be helped - We have done all we can, which is to supply the Counsel
for Boosey . . . with Sir Fitzroy Kelly's argument . . . I have great hopes that
our case will not be decided immediately as the Judges in Boosey v. Jefferys
will probably take time to consider their decision._

Turner fervently hoped that the Court of Error would uphold the
rights of foreigners, thereby virtually assuring Murray's victory over
Bohn and Routledge. With surprising rapidity the court made known its
decision. On 20 May 1851 it reversed the lower court's ruling and
unanimously acknowledged the right of an alien author to a British
copyright.

At this point the tenuous alliance between Bohn and Routledge
began to crack. Even before the announcement of the decision in the
Court of Error Routledge had intimated his willingness to settle out of
court, but Bohn had apparently managed to keep him in line. In late
May and early June Routledge again contemplated an out-of-court
settlement in view of the mounting legal costs and the worsened pro-
pects for a favourable judgment. On 12 June Turner reported, 'After
some negotiation we have so far arranged with Mr Routledge that we
stopped further litigation with him.' Routledge agreed to cease the
reprinting of Murray's copyrighted works; to destroy the stereotype
plates; surrender the printed copies on hand; pay the legal fees for
both sides; and allow Murray to announce publicly that Routledge had come to terms. It was estimated that Routledge had made £1,500 profit on the sale of Irving's works and £500 on those of Melville. On this basis Turner 'arranged the penalty [bond] of £2,000 if he violates his agreement'. A few days later Bentley was able to impose a similar settlement on Routledge. Months passed while Routledge procrastinated, trying to salvage things as best he could. Instead of destroying his stereotype plates he sold them as scrap metal, and after withdrawing his reprints from the British market he exported some of them to America. Periodic threats from Bentley and Murray had their effect, and by the end of 1851 Routledge had essentially complied with the out-of-court settlement. This in turn accounts for the rarity of his Popular Library volumes, together with Bohn's Shilling Series, in the bibliographies of Irving or Melville.

For a time Bohn proved obdurate, refusing to settle out of court. Even if the Court of Error had determined that a foreign author could secure a British copyright, there was still a wide range of uncertainty as to whether Murray's and Bentley's editions of Irving were published in England prior to their appearance in America. As we shall see, another of Bohn's motives for procrastination had to do with the possibility of another copyright case, Boosey v. Jefferys, being appealed to the House of Lords. This left Murray no alternative but to force the issue by requesting that a commission of inquiry be sent to the United States to get written affidavits from the authors concerned. Murray's counsel admitted that this would be expensive, although in the long run it might justify the outlay. Turner explained:

it will be most important that it should not be done on written questions but viva voce, that any uncertain or doubtful answer may be followed by a proper question to clear up the point and leave the final reply as much in our favour as possible, which no doubt will be the result if ably done. But to do this properly . . . a Counsel must go out, as less than that would not be safe.

Bohn did all he could to block the dispatch of a commission even though he had the right to choose some of its members. However, the Court of Queen's Bench approved Murray's request at the end of July and Joseph Needham, one of the barristers on the case, agreed to undertake the task provided that he was paid £200 compensation for his work, his absence from his family, and his sacrificed holiday. One begins to appreciate the spiralling legal costs that were being incurred when
it is realized that this fee was equivalent to a year’s salary or more for an office clerk. Turner apologized to Murray for causing him such worry and expense, ‘but I am quite satisfied it is a just cause as a private matter and a most important one in a Literary and National point of view’. In the meantime, the pressure on Bohn was increased, as Turner reported: ‘I have arranged with Mr. Bentley’s Solicitor that he shall apply to the Court of Chancery for an injunction against Bohn in respect of such works of Washington Irving as he claims Copyright in – as Bohn’s defence to this may be useful both to Bentley and you – and if he succeeds and gets his injunction it may influence Bohn’s mind towards some surrender’.

Details for the month of August are lacking, but on the 27th we have the undeniable evidence of Bohn’s submission. In a formal agreement signed by both parties Bohn offered to purchase the copyrights of Irving’s works from Murray for £2,000 provided that Murray drop all litigation. Each party paid its own costs. Murray would transfer his surplus stock of Irving volumes to Bohn but would still reserve the right to reprint certain titles in the Colonial and Family Libraries.

It was a hollow victory for Murray. He wrote disconsolately to Irving:

Mr Bohn has offered me terms that are satisfactory to me and not humiliating to him. He has destroyed for me all value in your works, and I make over to him the copyright.

I regret to part with them, but it seemed to me the only way to get out of the squabble, which was becoming very serious, my law expenses alone having run up to £850.

One good, at least, has been elicited out of the contest – it has settled the right of foreigners to hold copyright in this country: for I am assured by my counsel, Sir Fitzroy Kelly, one of the soundest heads at our bar, that the recent decision of our judges is not likely to be reversed by the House of Lords, or any other tribunal.

Alfred Turner was in little doubt as to why Bohn ultimately capitulated. Although the commission to America cost Murray almost £400 in travel expenses, fees, and the like it was ‘the blow which made Bohn strike [his colours]’. Turner admitted:

though I felt great confidence both in the justice and in the real Law of the Case, I was not free from much anxiety when I saw the fearful expenses which
might attend the struggle—and I feel not a little indebted to you for the
courageous and manly way in which you supported me in what you
properly regarded as a struggle for principle against a dark attempt to infringe
the rights of property.

It was not surprising that Murray regarded publishers like Bohn and
Routledge as unscrupulous adventurers who despoiled the literary
property of others in the name of cheap literature and getting even with
American piratical publishers. When it was Bentley’s turn to settle he
began by dramatically accusing Bohn of scurrilous acts of literary piracy.
But Bentley’s solicitor warned him, however, to temper his language.
‘Bohn is a pirate but he is not a felon! Your illustration, therefore,
of a man robbing you of your watch, seems to me to lack a very rank
ingredient in order to work it into an analogy.’

Devey advised instead
hard but respectful out-of-court bargaining, and by the beginning of
October a settlement was reached. Bentley received £400 for his copy­
rights of the three Irving works in question, and the other terms were
similar to those imposed by Murray six weeks before.

In view of Bohn’s determined opposition to Murray and Bentley
prior to his acquisition of the Irving copyrights, it is ironic to find him
in 1855 defending his ownership on the very grounds he once argued
against:

The Works of Washington Irving, having for the most part been composed
and published during his long residence in the Country, are, by the recent
decision of the House of Lords, pronounced English copyright. The whole
being, now, the property of Henry G. Bohn he is the only legal
publisher of them, and will take the necessary measures against infringements
of his rights.

The copyright case which ultimately was heard by the House of Lords
was Jefferys v. Boosey. It might well have been Murray and Bentley
versus Bohn and Routledge, but these veterans were spared the strain
and expenses of an appeal to the highest court and the burden fell in­
stead on two music publishers, Thomas Boosey of 28 Holles Street,
Cavendish Square, and Charles Jefferys, 21A Soho Square. It was not
entirely coincidental that most of the copyright cases involving foreigners
during the first half of the nineteenth century had to do either with
American authors or European musical composers. In a sense, both
wrote in a language common to the British or sufficiently universal
to be understood by them. There was no need to translate either, and as a result they were the natural targets of unauthorized republication.

The facts in the case of Jefferys v. Boosey were these: In 1831 the Italian composer Bellini sold the copyright of his opera La Sonnambula to a fellow citizen of Milan, Ricordi, who in turn gave the British right of publication to the London publishers, Boosey & Son. Boosey took care to register the opera at Stationers' Hall in accordance with the Copyright Act of 1842 and to publish the work in England prior to its appearance in Italy. In 1848 another London publisher, Jefferys, printed 20,000 copies of one of the melodies from the opera and began competing with Boosey's edition. The latter had printed about 50,000 copies but felt none the less that the Jefferys's publication seriously undermined the authorized one. In the autumn of 1849 Boosey took the case to the Court of Exchequer and sought to collect damages of £500 from Jefferys. A judge and jury rejected Boosey's right to an exclusive copyright in a foreign composition. Boosey appealed against this verdict in a Court of Error, and as we have previously noted, the lower court's decision was reversed. Jefferys thus had the next move: either he could settle on the basis of the last decision, or he could appeal to the House of Lords which promised much delay and expense. Eventually he decided to try the latter.

The special significance of the case lies not so much in the legal argument as in the interplay of personalities and procedures. To begin with, fifteen Common Law judges, one Lord Chancellor, four ex-Chancellors, and numerous barristers and solicitors became involved during the five years of litigation. Equally noteworthy was the fact that the House of Lords was indeed the court of last resort, and solicitors warned their clients to avoid becoming entangled in its lengthy and expensive appeal process. This was especially true in the early 1850s when there was growing alarm within the legal profession over the Lords' handling of appeals. In 1856 this discontent culminated in a full-fledged Parliamentary inquiry and a report recommending reform of the appellate procedure, but by then Jefferys v. Boosey had already been decided. Had it reached the House of Lords a year or two earlier or later the decision might have been different. An analysis of the case stage by stage may indicate why.

Bellini's La Sonnambula actually involved Boosey in three lawsuits. The first took place in January 1849 and Boosey successfully defended his copyright against Davidson in the Court of Queen's Bench. The second was against Purday in June of the same year. This time the hearing
was in the Court of Exchequer and Boosey lost. Toward the end of 1849 Boosey brought Jefferys to trial, also in the Court of Exchequer. Chief Baron Pollock who handed down the adverse decision in Boosey v. Purday was absent this time and Baron Rolfe heard the case. Again, however, the judge and jury decided that a foreigner was not entitled to a British copyright.

It is worth noting that by 1849 the Court of Exchequer had persistently ruled against foreigners in three major copyright cases: Chappell v. Purday (1845), Boosey v. Purday (1849), and Boosey v. Jefferys (1849). However, two Common Law Courts: Common Pleas in Cocks v. Purday (1848) and Queen’s Bench in Boosey v. Davidson (1849) favoured the rights of foreigners. In addition, the Court of Chancery also supported a foreign author in the case of Ollendorff v. Black (1850), thus apparently equalizing the weight of legal opinion.

This was the situation in the spring of 1851 when the Court of Error received Boosey v. Jefferys on appeal. The Court of Error met in a room at Westminster known as the Exchequer Chamber. Contrary to its name, it was not part of the Court of Exchequer but served as the place where appeal cases from the three Common Law Courts were held. Judges for such cases were drawn from the two courts not directly involved in the appeal. Thus, in Boosey v. Jefferys the judges were from the Queen’s Bench and the Court of Common Pleas. Since each of the three courts was staffed by one Chief Justice and four puisne justices, ten of these were eligible to serve for a particular appeal case. For Boosey v. Jefferys, Lord Chief Justice Campbell and Justices Patteson, Wightman, and Erle represented Queen’s Bench; and Justices Cresswell, Maule, and Williams came from Common Pleas. These seven judges surprised many by repudiating the decision of the Court of Exchequer and unanimously affirming a foreigner’s right to bring various actions, including a defence of his copyright, into a British court. Lord Campbell observed that under statute law the British Parliament could even legislate on behalf of foreigners provided that such laws applied to the sale and distribution of literature within the United Kingdom. Why, he asked, should a foreign author have to cross the English channel and reside in Britain in order to secure a valid English copyright? The distance between Calais and Dover should not make any difference when it came to protecting literary property within the British market.

When this decision was announced most authors and publishers assumed that the issue was settled. So many judges had supported Boosey’s
claim that it seemed most unlikely that a subsequent appeal would be made to the House of Lords. Yet Jefferys, Bohn, and others who were interested in the unrestricted publication of foreign works immediately began to take the necessary steps to appeal. They called a small preliminary meeting in May and made further elaborate plans for a large public gathering to be held at the beginning of July. Edward Lytton Bulwer was recruited as Chairman of this meeting, and it was carefully designed to attract as many prominent guests as possible. Few publishers would attend, of course, since most of them favoured authorized editions with duly registered copyrights. But authors were divided in their loyalties. Bulwer himself was most anxious to promote an Anglo-American copyright agreement, but at the same time he saw no reason why Britain should protect American authors if America was unwilling to reciprocate. He wondered whether perhaps a certain amount of pressure in the form of republication of American works by anyone in Britain would induce American authors, publishers, and politicians to take seriously the issue of international copyright.

At the time of the public meeting in early July, Henry G. Bohn was in the midst of his own struggle against Murray and was thus Jefferys’s natural ally. He and the others present firmly resolved to appeal the copyright issue to the House of Lords, but at the same time they realized that it was not fair to expect one publisher on his own to bear the full expenses of such an appeal. Therefore they formed an association to assist the financing of the undertaking. It was called the Society for Obtaining an Adjustment of the Law of Copyright, and in its prospectus it declared: 'the Society is wholly free from any personal motive and does not desire to infringe upon the property of anyone'. But it looked critically upon the judgment of Lord Campbell and the Court of Error for 'their most mischievous decision'. The Society’s Secretary was Charles Stevens, a barrister in Grays Inn who specialized in copyright law. It was not generally known that he was also Jefferys’s counsel who had not only handled the appeal before the Court of Error but would also carry the appeal to the House of Lords.15

A preliminary hearing took place more than a year later in March 1852 with Richard Comyn representing Boosey and Stevens as counsel for Jefferys. Final permission was then granted and the two parties began to prepare in earnest for the formal presentation. There was no hurry, however, as at least two years generally elapsed before such a case reached the Bar of the House of Lords.
By the nineteenth century the appellate jurisdiction of the Lords was something of a misnomer. The whole House could listen to an appeal, but only those who were ‘learned in the law’ were permitted to vote, which in practice meant only the Lord Chancellor of England and any ex-Chancellor of either England or Ireland. Depending upon the vicissitudes of politics and the frequency of forming new cabinets, there were from one to four ex-Chancellors in the House of Lords at any given time. Each new Chancellor was automatically given an hereditary title which justified his presence thereafter in the upper chamber. Because Chancellors were essentially politicians with legal training who worked their way up through the ranks climaxing their careers with the Chancellorship, they often returned to power after spending some years in opposition. Occasionally there was no Chancellor at all for a few months due to the indecision or inability of the Government in power to appoint one. When *Jefferys* v. *Boosey* finally reached the Lords in 1854 there were six men eligible to judge the case: four ex-Chancellors – Brougham, Lyndhurst, St Leonards, and Truro; one ex-Chancellor of Ireland – Chief Justice Campbell; and the current Lord Chancellor – Cranworth.

Indulging in a bit of historical conjecture as to what might have happened had *Jefferys* v. *Boosey* come before the Lords in either 1850, 1851, or 1852 one can imagine a very different outcome. Had it been tried in 1850 Brougham might have been the sole Law Lord hearing appeals, a situation troubling to many including Lord Campbell who wrote in his diary for 7 July 1850:

*Most portentous of all, Lord Brougham sits alone deciding cases in the House of Lords! I prevented him from summoning the Judges – but he has been hearing several writs of error and appeals without any assistance. This is a mere mockery, and must bring the appellate jurisdiction of the House of Lords into sad discredit. . . . Brougham says truly that he is as good as when he was Chancellor – but then he made very indifferent work of it. Now he resembles a man who, having escaped from Bedlam, thinks himself a great judge.*

A few months later Thomas Wilde became Chancellor and assumed the title of Lord Truro. When he was Chief Justice of the Court of Common Pleas he rendered a decision in *Cocks* v. *Purday* favouring the rights of foreign authors. Had *Jefferys* v. *Boosey* come up in the latter part of 1850 or the beginning of 1851 the likelihood would have been that Truro would have sided with Boosey.

From February to December 1852 St Leonards was the Lord Chancellor.
He was, according to Lord Campbell, ‘a consummate master of his art but the most vain, conceited and arrogant of mankind’. There was nothing in his background which predisposed him one way or the other with respect to the law of copyright, and, in any case, he soon relinquished the Great Seal.

Lord Cranworth was in office when Jefferys v. Boosey came before the Lords. Among the recent Chancellors, Lord Campbell held him in highest respect as a jurist who was diligent though admittedly ‘not a man of powerful intellect’. There was something else about Lord Cranworth: formerly, as Baron Rolfe of the Court of Exchequer he had rendered the initial decision in Boosey v. Jefferys in the spring of 1850, and at that time he felt that foreigners living abroad had no right to an English copyright. This gave heart to Jefferys and clearly strengthened his determination to appeal.

During the years 1853–4 those Lords besides Cranworth who took the most active part in hearing appeals were St Leonards and Brougham. According to Lord Campbell:

Brougham coalesced with Cranworth, so as to bring about a decision by a majority; but when he was absent, the two others disagreeing, the vote was one to one, and they unwisely resolved, instead of having the case re-argued before all the law lords, to allow on such occasions the judgment always to be affirmed [i.e. reversing the Court of Error]. But when Brougham was present, he attended so little to what was going on, and so indiscreetly betrayed his ignorance by irrelevant questions put to the bar, that the joint opinion of himself and the Chancellor carried little weight with it, and the law was more and more unsettled by every fresh decision of the court of last resort.

This sort of dalliance brought the appellate jurisdiction of the Lords increasingly under fire. As Richard Bethell, the Solicitor-General, observed in 1855: ‘judicial business was conducted before the Supreme Court of Appeal in a manner which would disgrace the lowest court of justice in the Kingdom’. He elaborated further in his testimony before the Parliamentary Select Committee, as described by Lord Granville.

The Solicitor-General was examined yesterday as to the defects of the Appellate Jurisdiction. He, with his most mincing manner and most perfect aplomb, supposed the case of two learned Lords, one of whom [Cranworth] gave judgments without hearing the arguments, ran about the House, conversed with lay Lords, and wrote notes and letters; the other [St Leonards], who made declamatory speeches, thumped the table, asked whether anyone would venture
to say that was law which had just been laid down by the Lord Chancellor, and who in short entirely forgot the dignity of a judge of the highest Court of Appeal.

The subjects of Bethell's innuendoes were present at the time and were understandably furious, while Lord Derby and ex-Chancellor Lyndhurst were reported to have sat back and laughed quietly to themselves. Despite these allegations the House of Lords' jurisdiction spelled serious consequences for all litigants, and Jefferys and Boosey were aware of this as they prepared their cases during 1853-4. At this point they had no idea which of the Law Lords would attend. There could be as few as one or as many as six. In the interim, the Chancellor, viewing the subject of copyright sufficiently complex and significant requested the Common Law judges to be present for the three-day formal pleading of the 'cause' which was another hurdle to get over before the case could proceed. Accordingly, ten of the fifteen judges obliged, although their function was purely advisory since they had no vote in the final determination. From the Court of Exchequer were Pollock, Parke, and Alderson; from Queen's Bench, Coleridge, Crompton, Erle, and Wightman; and from Common Pleas, Jervis, Maule, and Williams. These ten judges read their opinions before the Law Lords on 29 June 1854. As might have been expected, the three Exchequer Judges who had already heard the cases of Boosey v. Purday and Boosey v. Jefferys a few years before stood firm in their denial of British copyright to a foreigner. They were joined by Jervis, the Chief Justice of the Court of Common Pleas. Six justices favoured Boosey's position, four having already listened to the arguments in the Court of Error: Justices Erle, Maule, Wightman, and Williams. They reiterated their original support of Boosey, and were joined by Coleridge and Crompton.

In spite of the numerical preponderance of six to four the Lord Chancellor was later to say: 'I do not go into the particular facts of these [copyright] cases: they are fully commented upon in the very able opinions of the judges. I consider it quite sufficient to say that these cases seem to me only to show that the minds of the ablest men differ on the subject.' Like his fellow Law Lords, Cranworth merely acknowledged the opinions of the Common Law judges but did not admit being influenced by them. Law Lords deliberated exclusively among themselves and wrote their own briefs, finally rendering their independent and irrevocable decision.
Of the six eligible Law Lords, three took an active role in the copyright case: Lord Chancellor Cranworth, Lord St Leonards, and Lord Brougham. This was consistent with their general level of attendance to law business. During 1853 Cranworth had been present for 67 days relating to legal affairs, St Leonards for 36 days, and Brougham for 40. In 1854 their respective attendance was: 78, 43 and 71.

The other three ex-Chancellors were far less involved. In 1853 Lyndhurst devoted five days to law business in the Lords, Truro thirteen, and Campbell three. None of them had taken part in a single appeal case during 1854 while *Jefferys v. Boosey* was under consideration. Whether their interest would have changed the outcome is difficult to say, because Cranworth, St Leonards, and Brougham rendered a unanimous decision. However the absence of Lord Campbell might have made a difference. His previous involvement with the case may have influenced him to stay away and possibly the other Law Lords inadvertently scheduled hearings and conferences which conflicted with his responsibilities as Lord Chief Justice of the Queen's Bench. Had he and Truro been involved it is reasonable to assume that they both would have sided with Boosey. We cannot know how Lyndhurst would have voted.

For the three Law Lords active in the case, the issue of residency ultimately assumed greatest importance. Alluding to the distance between Calais and Dover, Lord Cranworth admitted that it was not great but he argued that the law had to draw arbitrary lines and what better demarcation was there than the frontier of a nation? Any suggestion that there was a residual Common Law right to copyright was quashed, and the sole applicable criterion for copyright protection was declared to be statute law. They agreed that only if a foreigner travelled to Britain and remained there long enough to witness the publication of his work was he entitled to copyright protection. Otherwise he could neither claim a copyright himself nor sell the right to a British subject, including a publisher. Their verdict, rendered on the first day of August 1854, sustained Jefferys's position and denied British copyright to foreign authors.

The effect of *Jefferys v. Boosey* was to throw open the floodgates to the republication of American works. Reprinters no longer feared court injunctions, and publishers like Sampson Low could only appeal to a sense of honour within the trade not to reprint a new work assigned to him by Harriet Beecher Stowe.
In ordering copies of this work [Sunny Memories of Foreign Lands], the public are respectfully requested to specify the Author's Editions; as, in consequence of a recent decision in the House of Lords, finding that Foreign Authors had no legal protection for their works in this country, the Author has no redress except such as is afforded by public discrimination in purchasing Authors' editions.

On their part, Mrs STOWE's Publishers have taken care to print such Editions of the present work as can satisfactorily compete with any that can be brought against them.

Many other American works were also subjected to rapid reprinting, among them Ann Stephen's Fashion and Famine and Maria Cummin's The Lamplighter each of which saw seven imprints!

Publishers of American books like Richard Bentley were overwhelmed by the decision of the Lords. They had counted on a reiteration of the decision by the Court of Error in 1851, and now they were faced with having to renegotiate all their contracts with American authors. While so doing they tried to stay afloat by producing cheap editions of their own earlier works in order to compete with reprinter like Routledge. During the autumn of 1854 Bentley published five shilling editions of Prescott's three major works, Ferdinand and Isabella, Mexico, and Peru, printing 5,000 copies of each only to have Routledge follow suit and issue the very same works in similar quantities.

Prescott had become Bentley's most valuable literary property since the death of J. F. Cooper and so this was a particularly bitter blow. Prior to Jefferys v. Boosey Bentley had contracted with Prescott to publish the first two volumes of Philip II, agreeing to pay the substantial sum of £1,000 per volume. Now this contract was void. Prescott was anxious to salvage as much of the fee as possible and was therefore annoyed by Bentley's revised and what seemed to him trifling offers. Negotiations dragged on, and in an effort to placate Prescott and at the same time protect his own investments, Bentley turned to legal counsel. His solicitor, Devey, together with Alfred Turner and an eminent barrister, James Willes, agreed that a valid copyright could perhaps be secured if Prescott visited London at the time of publication. Bentley even offered Prescott the original £1,000 per volume plus £200 travelling expenses if he would agree to come. However, Prescott was growing old and was in poor health. His vision continued to fail. Having made a trip to Britain as recently as 1850 he felt it too soon to return, and besides he
knew there were other publishers like Routledge who would make him handsome offers which he would find hard to resist. Thus, during the summer of 1855 Bentley released Prescott from any remnant of binding contract and obligation. Later Prescott discovered that he could only secure £100 a volume from Routledge, and so, because of their publishing relationship which had dated from 1837, Bentley reconsidered and offered Prescott £125 a volume. Nevertheless, Prescott became increasingly restive. He heard rumours about Bentley’s impending bankruptcy and asked his literary agent in London, the banker Russell Sturgis, to investigate. When Bentley discovered this blatant mistrust he was incensed.

Had the mischief you supposed happened to me you certainly should have heard from me and here perhaps you will permit me to say that it would have been more in accordance with the long-continued friendly terms of our correspondence if, when any injurious reports about me reached you, you had addressed yourself to me direct.

On the following day after the receipt of your letter I called on Mr. Sturgis and explained to him that you were entirely in a mistake in supposing that ‘I had found it necessary to place my property in the hands of trustees’. I beg to assure you that I have not done so. It is true that at a certain time of my spontaneous act and before any claim on me was unsatisfied, I consulted my principal creditor Mr. Spalding and he and a few others at once kindly accorded to me the time considered requisite to meet my engagements with them — no accommodation from others being required and all Authors paid.

In spite of these assurances, Prescott continued to be wary and increasingly gravitated towards Routledge’s orbit, eventually accepting Routledge’s offer to publish Volume III of Philip II. By this time Bentley could do little other than transfer to Routledge the stereotype plates together with his stock and moral claim in Prescott’s earlier works. Routledge paid Bentley £2,600 on the assumption that henceforth Bentley would acknowledge Routledge’s title in name if not in law. For Bentley it must have been the final irony to have the arch-pirate, Routledge, claiming the de facto right to publish his last successful property in American literature.  

Bentley’s financial position in the years 1854–8 was not secure. He was forced to take on trustees not of his own choosing who met regularly to make decisions and to supervise the transaction of almost every contract. Thanks to a Minute Book that recorded these proceedings it is
possible to trace the somewhat melancholy state of his affairs. His problems stemmed from several sources. Since the late 1840s the business had significantly worsened. Cheap reprints and price-cutting eroded profits. His 'Standard Novels' had once been an innovation, but in time almost every publisher copied the idea and undersold him. Finally, the loss of his copyright property in American authors hurt him irreparably.

In the years immediately following Jefferys v. Boosey Bentley did everything he could to obtain redress for his losses. To begin with, he wrote to Denis Le Marchant, chief clerk of the House of Commons, asking for suggestions. Was there no way for Parliament to remedy the situation? Le Marchant replied: 'I quite agree with Mr. Gladstone in considering your case one of singular hardship with respect to the American copyright, and yet unhappily no minister could bring it within the category of public wrongs. It is as irremediable a calamity as the illness of your poor son.' Bentley next approached Lord Brougham for assistance, which may seem curious, but it must be remembered that by 1855 Brougham had a reputation, whether deserved or not, of a political and social reformer as well as a prominent author. In two lengthy letters Bentley described his dilemma. Over the years he had paid considerable sums to American authors: James Fenimore Cooper had been the most highly remunerated, to the amount of £12,590; next came Prescott with £2,495, followed closely by Irving with £2,450; Melville received £660; Bancroft, £600; and Rush, £300. This £19,095 could be supplemented by a dozen smaller payments to lesser-known American authors. He continued:

I was the most largely engaged of any London publishers in the purchase of the copyright . . . of American authors, paying for them at the same rate as those of English authors. . . . These contracts were made in reliance on the decision of the various courts [prior to Jefferys v. Boosey]. Some of the works then purchased by me were only recently acquired, and therefore have not repaid the consideration given for them. By the late decision the provision which I had thought . . . I had made for my family in the latter years, has been at once taken from me. Editions upon editions of the works purchased by me are now issued by pirates, and an annual amount taken from me which I am not able to ascertain exactly, but I know to be very large. [Bentley later estimated that he stood to lose about £1,000 income per annum.]

I know that it is only necessary to point out a hardship like this to you, who are known to have interested yourself very kindly on many occasions to
befriend those whom your Lordship considered to suffer unjustly, to pardon me for troubling you with this long letter.

If you would kindly interest yourself for me, I feel convinced that your Lordship would be able to point out the peculiar hardship of my case; and that some compensation should be awarded to me for thus throwing open to the public what was at the time of the several purchases believed to possess all the value of English copyrights.

Brougham was sympathetic but could do nothing. Neither could Gladstone eleven years later.

As far as I can judge the question really raised is whether the right which you thought—(and apparently thought with good reason) that you possessed can be revived.

The circumstances seem to involve great hardship! But I am not aware of any analogous case in which Parliament has given compensation in money for damage accruing through the decision of a Court of Law.

As the largest publisher of American works in Britain, Bentley lost most by the decision of the House of Lords. In the absence of an Anglo-American copyright agreement, he and other publishers once looked to the law courts for the defence of their foreign copyrights. But now that avenue was blocked. As with the United States and Canada, cheap reprints won the day. Anglo-American copyright seemed farther away than ever.