

## Mapping the Pacific

### Cook and the (literary) pirates\* State Library of New South Wales 3 March 2022

Almost as if the Covid-delayed start of this excellent conference were deliberate, Cook's *Endeavour* is in the news again. I do not know the rights and wrongs of the current dispute concerning what has been found in Newport Harbour in Rhode Island.<sup>1</sup> But it is not the first time that that ship and its voyages have excited legal controversy. Another coincidence is that, by reason of this conference taking place in 2022, it coincides with the 25<sup>th</sup> anniversary of Ray Parkin's work on the ship and Cook's first voyage.<sup>2</sup> The book tells parallel stories of two journeys – Cook's in the 18<sup>th</sup> 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 sketchbook of Sydney Parkinson, one of three artists who travelled with and were employed by Joseph Banks, and whose work was central to this afternoon's session. Through tenacity, hard work and a little luck, he was able by reference to the primary surviving documents – including receipts for the lengths of timber purchased when the ship was built – to confirm how the vessel must have looked and what it was like to travel in it. His modestly understated account is also immensely readable, recognised in its award as the NSW Book of the Year in the NSW Premier's Literary Awards for 1999, and in a recent second revised edition. Like me, he was an amateur, and I fear that his story may be more entertaining than mine.

Parkinson's seemingly casual sketches of the ship<sup>3</sup> give an immediate insight into life on board 250 years ago. So too does the actual log on which the Tahiti observations were recorded, on display in the exhibition accompanying this conference. 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. By way of

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\* This presentation was given jointly with Professor Isabella Alexander, who spoke to the context of 18<sup>th</sup> century copyright, and disputes arising out of accounts of Cook's second and third voyages.

1 See *Sydney Morning Herald*, 22 February 2022 “Shipwreck site is new battleground over truth about Captain Cook's Endeavour”.

2 R Parkin, *HM Bark Endeavour* (Melbourne University Press, 1997; updated edition 2020)

3 Parkinson, BM9345/ff 50 and 57, reproduced in Parkin, above.

example, 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.<sup>4</sup> The theme of this presentation is closely connected with the distinction between the physical thing itself and the information contained in it.

Enough of Cook; I am conscious you are waiting for the pirates! For most, piracy in connection with Cook's first voyage connotes what was a very real threat of naval hostilities. But as you may have noticed, 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 first voyage, copyright and literary piracy. The details may be found in an article mentioned in the conference notes (now freely available online) written 20 years ago, based on the actual records of the chancery suit commenced in 1773 in the High Court of Chancery.<sup>5</sup> The prose is quite the opposite of Parkin's enthralling narrative (as stated above, lawyers have a way of making language dull).

Ray Parkin had a seaman's instinct to guide his research into the designs of the *Endeavour*. My task was made much easier by what appeared on the face of the extant documents. 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, 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. Extracts were shown by Katherine Parker earlier this morning. It was published two days before Parkinson's *Journal*, on 9 June 1773. Further, I was told by the extraordinarily knowledgeable Derek McDonnell at Hordern House, who showed me a copy, that little if anything was known of the injunction. I accepted his implicit challenge. If there were to have been an injunction, it must have been within a narrow window between July 1771 when the *Endeavour* returned to England, and publication in June 1773, and when I found a couple of free days in Kew, I searched the records, and found the bill and answer and the injunction itself and, with great good luck, the affidavits, and wrote up an account of what occurred. Although the catalogue is now available remotely,<sup>6</sup> there is still no way, so far as I am aware, of viewing the records without

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4 See D King, *Patrick O'Brien – A Life Revealed* (Henry Holt & Co, New York, 2000), pp 272-277, emphasising that O'Brien wished not merely to own, but to read and re-read the early editions..

5 M Leeming, "Hawkesworth's Voyages: The First 'Australian' Copyright Litigation" (2005) 9 *Australian Journal of Legal History*, 159, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1028195](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028195).

6 See for example <https://discovery.nationalarchives.gov.uk/details/r/C9624511> which is the record for Parkinson's answer to Hawkesworth's bill.

physically attending the National Archives. But once you are there, viewing the documents is straightforward, and understanding them in their context is not so difficult. And so it seemed then, and seems today, passing strange that there is so little interest in the contest concerning the earlier accounts of Cook's first voyage. I still find it astonishing that, evocative as these vestiges of the world a couple of centuries ago are, there is so little interest in them (attendees at this conference are naturally excepted from that generalisation). For it was perfectly clear as I opened the fraying ribbons around the legal records in the National Archives that they had lain unopened for many, many decades.

Like any historical document, one cannot understand the surviving records divorced from their context. Let me say something of that.

First, the dispute between Hawkesworth and Parkinson was decided by perhaps the weakest chancellor in the 18<sup>th</sup> century, Henry Bathurst,<sup>7</sup> 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”.<sup>8</sup>

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 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 uncontroverted 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.<sup>9</sup> 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 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

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<sup>7</sup> No relation to the current Chief Justice of New South Wales.

<sup>8</sup> W Holdsworth, *A History of English Law* (Sweet & Maxwell 1938), Vol XII, p 314.

<sup>9</sup> For a summary of the debate whether the numerous botanical sketches were undertaken by Parkinson or his assistants, see H Parsons, “Collaborative Drawing on Captain Cook’s Endeavour Voyage, 1768-1771: An Intellectual History of Artistic Practice”, Ph D thesis submitted to University of Melbourne, December 2018, ch 2.

Hawkesworth for the authorship of the official account of £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,<sup>10</sup> who later played a role in the decision to despatch the First Fleet)<sup>11</sup> 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”.<sup>12</sup>

Unquestionably Banks had ownership of Parkinson's diary, but he also let the grieving brother have access to it to read his 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.<sup>13</sup> Another was whether Banks merely had ownership of the physical diary, but not the copyright in the unpublished text.<sup>14</sup> The following point is quite interesting to a lawyer (you have been warned). In the late 18<sup>th</sup> 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”.<sup>15</sup> 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

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10 See A Frost, *The Precocious Life of James Mario Matra* (Miegunyah Press, 195), p 6.

11 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, above, at pp 110-122.

12 Bentinck to Cook, 10 October 1771, quote in J Beaglehole, *The Life of Captain James Cook* (Stanford University Press, 1974), p 290.

13 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, PRO C31/187 f 80). Stanfield disputed this in his answer.

14 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.

15 Walpole to Rev Mason, 15 May 1773, *Correspondence* (Yale edition), vol 28, 85.

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 in the South Seas. The entertaining matters would not fill half a volume ...".<sup>16</sup> I shall return to those words in a moment. 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".<sup>17</sup>

Hawkesworth died of an opium overdose later that year. Stanfield also died later that year. 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, 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".<sup>18</sup> (I do not suggest that it would be safe to regard that decision as a guide to the law today.)

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 St 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.

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<sup>16</sup> Walpole to Rev Mason, *Correspondence* (Yale edition), vol 28, 96.

<sup>17</sup> See J Beaglehole, *The Life of Captain James Cook* (Adam and Charles Black, 1974), p 439.

<sup>18</sup> (1774) Lofft 775; 98 ER 913.