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America's First Unprofessional Songwriter: Stephen Foster and the Ritual Economy of Copyright in Early American Popular Music

Jason Lee Guthrie
Clayton State University

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Abstract

This article explores Stephen Foster's understanding and use of copyright. It examines what his copyright strategy can reveal about his professionalism as a songwriter and about his worldview as an important influencer of early American popular culture. It adapts the anthropological theory of ritual economy to theorize how Foster's economic decision making, as revealed in copyright and related business records, can offer material evidence of his worldview. Foster's failure to secure copyrights for his early work, to establish himself as the author of his most popular songs to the music buying public, and to capitalize upon favorable songwriting contracts are considered. These sources may also illuminate how the precedent Foster set has shaped the discourse on professionalism in American popular music.

Keywords: copyright law, early America, music business, music history, Music Modernization Act, music piracy

The recent passage of the Music Modernization Act (MMA) is intended to "modernize copyright law" by providing specific, enforceable guidelines for royalty payments to songwriters by music streaming services.¹ This legislation was necessary to address inadequacies in the Digital Millennium Copyright Act of 1998 and the Copyright Act of 1976.² These acts are part of a continuous cycle of problematic legislation that extends

back to the origins of recorded music with the Copyright Act of 1909's mechanical licensing response to *White-Smith Music Publishing Co. v. Apollo Co.* (1908) and beyond.³

The balance of power between copyright's three constituencies—content creators, distributors and publishers, and the public—has always been difficult to strike.⁴ Keith Negus emphasized how digital technologies have decidedly tipped that balance toward publishing and distribution interests, a shift that has changed the perception of music as “product” to music as “data” and has increasingly disassociated composer from composition.⁵ If the MMA does hold meaningful potential for songwriters to regain some of the power and agency eroded by digitization, a historical understanding of how popular musicians have understood and used copyright can provide important context for their efforts. The history of American popular music offers a clear place to begin such an inquiry.

Stephen Foster was born in 1826 on the Fourth of July while cannon fire and patriotic music heralded the fiftieth anniversary of America's founding. During his short thirty-seven years of life Foster composed many of the most popular songs in antebellum America, including a few such as “Oh! Susanna,” “Camptown Races,” “Swanee River,” and “My Old Kentucky Home” that have enduring appeal today. Foster is often remembered as “America's first professional songwriter.”⁶ Yet, he was only able to support himself and his family with his songwriting income for a brief span in the mid-nineteenth century, and the ways in which he conducted his business affairs were far from professional.

This article explores Foster's understanding and use of copyright. It examines what his copyright strategy can reveal about his professionalism as a songwriter and about his worldview as an important influencer of early American popular culture. It adapts the anthropological theory of ritual economy to theorize how Foster's economic decision making, as revealed in copyright and related business records, can offer material evidence of his personal worldview. Copyright records related to his work have been considered previously and have helped to fill in the gaps from a relative lack of personal correspondence that has confounded Foster scholarship for decades.⁷ Yet, Foster's failure to secure copyrights for his early work, to establish himself as the author of his most popular songs to the music buying public, and to capitalize upon favorable songwriting contracts have not been considered as evidential of his worldview. These sources may

also illuminate how the precedent Foster set has shaped the discourse on professionalism in American popular music.

Copyright and Culture

An 1867 *Atlantic Monthly* article that memorialized Foster three years after his death noted how remarkable the popularity of his first hit songs were, considering that “Although limited to the one slow process of communication,—from mouth to ear,—their fame spread far and wide...”⁸ At a time when the transportation and communication technologies that could enable a shared popular culture were only just emerging, Foster’s winsome lyrics and catchy melodies spread with remarkable speed across America and around the globe.⁹ He was also among the first to encounter some of the economic difficulties peculiar to songwriting.¹⁰

Foster’s copyright strategy is potentially illustrative of the ways that American popular musicians have understood and used copyright, but he was far from the first to seek protection from infringement. A petition was filed in Massachusetts for the sole right to print the *New-England Psalm-Singer* as early as 1770, and in 1781 the Connecticut General Assembly granted relief to the author of the *Singing Master’s Assistant* by issuing an exclusive patent.¹¹ British copyright law applied to America in the colonial era, though enforcement often proved difficult.¹² During the Revolutionary Era, all of the original thirteen colonies except Delaware enacted their own copyright statutes.¹³ The Copyright and Patent Clause of the U.S. Constitution established the initial authority for federal protection, and the first Copyright Act followed soon after in 1790.¹⁴

Revolution liberated America from British rule, but not from British culture. American demand for British literature was sizable, and piracy of British works was vital to the economic model of early American print industries.¹⁵ America would not provide copyright protection for international works until 1891, and throughout the nineteenth century popular British works could be obtained for little more than the cost of printing.¹⁶ The founders’ emphasis on a robust public domain in American copyright policy has often been framed as ideologically driven, but it was also pragmatic because it legitimated the piracy of British literature and ensured that piracy would not be stunted by imposing royalty payments on American publishers.¹⁷

Thus, in addition to articulating a cultural voice for the new nation, early American authors had to compete with works by their more estab-

lished British counterparts sold at a price that made it difficult to recoup costs.¹⁸ Noah Webster recognized the harm this arrangement would do to the development of American culture and he advocated for copyright laws that favored authors' interests as early as 1782.¹⁹ While Webster's dictionary and spelling books helped to spread mass culture by standardizing American English, he also directly influenced the passage of copyright reform with a speech before Congress in January 1831.²⁰ The resulting copyright amendment significantly extended the length of time that works could be protected, and explicitly included "musical compositions" as a protectable category for the first time.²¹

The sheet music trade was inextricably bound up with the wider print culture in early America. Books and music were printed by the same firms, and both mediums catered to those with the requisite literacy and leisure time to enjoy them.²² Published in 1852, Harriett Beecher Stowe's *Uncle Tom's Cabin* demonstrated that American literature could generate substantial demand, both at home and abroad.²³ The following year Stowe brought suit in a precedent setting copyright case against an unauthorized German version of her work. While she was ultimately denied royalties from the translation, the nature of the case pointed to the book's cross-cultural popularity.²⁴ Yet, it was a genre of popular music that took primacy as America's first cultural form to enjoy widespread domestic and international success.

Blackface minstrelsy was a form of entertainment popular in America throughout the nineteenth-century. In its early, antebellum form white men donned burnt cork makeup and derisive costumes to caricature African American music and culture. Also known as Ethiopian songs or plantation melodies, minstrelsy's use of the banjo, primitive percussion instruments, and exaggerated black dialect generated considerable appeal among white audiences from Cincinnati to Continental Europe.²⁵ The genre grew in tandem with the increased popularity of piano parlors in the home that functioned as "material proof of middle-class standing in America."²⁶ The leisure time and entertainment budget of the emerging middle class helped create a viable market for minstrel shows, and public minstrel performances in turn drove demand of sheet music for private use.

The 1867 *Atlantic Monthly* article that memorialized Foster began with a familiar origin myth about W. D. "Daddy" Rice as the first white man to "Jump Jim Crow" in Foster's hometown of Pittsburgh in 1830. Although the article claimed to be "authentic in every particular," the true

origins of blackface minstrelsy have been as obscured in myth and memory as Foster's own story.²⁷ Foster biographer Ken Emerson described minstrelsy as an expression of "an urban nostalgia for the agricultural economy, for a preindustrial, pastoral state of affairs, at the same time that it drew parallels between bondage on the Southern farm and in the Northern factory."²⁸ The complex and contradictory meanings of this cultural phenomenon have been examined in previous literature.²⁹

Notably, Lawrence Levine's conceptualization of highbrow and low-brow American culture was informed by his previous work on minstrelsy.³⁰ Levine articulated his ideas on the sacralization of culture in part by noting how incorporation into the symphonies of Charles Ives reified Foster's minstrel melodies into the American musical canon.³¹ Foster came of age in the antebellum milieu that birthed minstrelsy, and more than any other composer of the time his work had crossover appeal between high and low cultural forms. Yet, by wedding minstrelsy's demeaning racial tropes with a more sophisticated style of music he sentimentalized its content, making it more palatable to a wider audience and increasing its circulation.³²

The paradox between Foster's musical style and lyrical content has left him in a contested space in the literature. Scholars have rightly emphasized his importance in American music but have struggled to communicate that importance while critically analyzing his faults. Jennie Lightweis-Goff, borrowing a term from Jonathan Arac, identified a problem of "hypercanonization" in Foster scholarship in which "the critic who offers insufficient praise risks becoming an aesthetic terrorist."³³ One way this problem has manifested is through a "conversion narrative" which imposes "a fundamental cultural myth—the American exceptionalist conception of racial progress and progressive revelation—onto [Foster's] personal story."³⁴ In other words, the broad strokes of Foster's life have come to personify American racial progress despite the deeply problematic lyrics of his most popular songs. Theorizing copyright and related business records as material evidence of Foster's worldview may help to address the hypercanonization of Foster's work and to explain how his worldview has influenced the American popular music industry he helped create.

Ritual Economy

Previous theoretical frameworks used to inform historical work on copyright have encountered difficulties in legitimating individual creativity while contextualizing its relationship with the socio-cultural and politi-

cal economic aspects of creative labor.³⁵ Adapted from economic anthropology, the theory of ritual economy provides an alternative framework capable of legitimating individual contribution through a twin emphasis on worldview and process. Ritual economy opens new vistas of historical exploration that suggest a return to the primary evidence left by creative individuals of how they understood and used copyright in practice.

E. Christian Wells and Karla L. Davis-Salazar wrote “ritual and economy are not often integrated by those who wish to understand the ways in which nonmaterial motives are embedded in material transfers.”³⁶ To escape this tendency, Wells, along with Patricia A. McAnany, codified a theoretical definition of ritual economy as the “process of provisioning and consuming that materializes and substantiates worldview for managing meaning and shaping interpretation.”³⁷ Informing McAnany and Wells’s conceptualization of worldview was Roy Rappaport’s distinction between an “operational model” of the physical world built on empirical data and a “cognized model” of the “environment conceived by the people who act in it.”³⁸ Rappaport explained: “The operational model...has a purpose only for the anthropologist. The cognized model...has a function for the actors; it guides their actions...*it elicits behavior that is appropriate to the material situation...*”³⁹ Also influential was Pierre Bourdieu’s concept of an “economic habitus” comprised of the various economic, social, and historical conditions in which worldview materializes, a concept that Bourdieu intentionally contrasted with “the so-called ‘rational’ economic agent” idealized in the logic of traditional economics.⁴⁰

Conceiving of ritual and economy as “linked” but “not reducible to one another,” and making worldview of central importance, allows for a historical understanding of copyright that considers the perspective of individuals who create popular media.⁴¹ Ritual economy’s emphasis on process allows for a theorization of copyright and creativity that can retain the important effects of political economy upon the creative industries without minimizing the contribution of creative individuals. Foster’s case shows that the complex interactions between individual worldview, symbolic social rituals, and the constraining forces of political economy are all crucial to understanding cultural production.

The efficacy of ritual economy in theorizing copyright can also be seen in its compatibility with recent feminist, critical race, and post-colonial critiques. Melissa Homestead’s study of nineteenth-century American women authors detailed similarities in the language of copyright and

coverture laws, similarities that make sense when one realizes that many of the same wealthy white men authored both.⁴² Stephen Best drew a similar comparison between copyright's notion of "fugitive property" and the legal justification articulated by the Fugitive Slave Law of 1850.⁴³ Neil Netanel noted that "copyright unduly chills minority voices" by formalizing the ways that protection and power are obtained, and he joined other recent work in demonstrating how copyright can be used as an overt instrument of cultural colonialism.⁴⁴ These perspectives highlight issues essential to understanding the antebellum American context that shaped Foster's worldview.

Foster's Worldview

A lack of sources in Foster's own hand has contributed to the proliferation of historical myths about his life.⁴⁵ After Foster's death his brother Morrison actively burned any correspondence that might portray the family in a negative light.⁴⁶ Apart from Foster's songs, only a few dozen letters, an account ledger, and a sketchbook of musical ideas survived the fire. These, along with relevant family letters, journalism, realia, and business records, comprise the Foster Hall Collection held in the Center for American Music at The University of Pittsburgh.⁴⁷

From the surviving evidence, Foster's early aptitude for music is clear. In 1832, his mother wrote to William Foster Jr., known in the family as Brother William, of a five-year-old Stephen who had "a drum and marche[d] about after the old way with a feather in his hat...whistling old [sic] lang syne."⁴⁸ At nine, Stephen performed "'Zip Coon,' 'Long-tailed Blue,' 'Coal-Black Rose' and 'Jim Crow'" which "were the only Ethiopian songs then known," and "his performance of these was so inimitable and true to nature that, child as he was, he was greeted with uproarious applause."⁴⁹ At ten while away at school, Foster wrote to his father requesting a "commic [sic] songster" from which he would have learned more of the popular minstrel tunes of the day.⁵⁰ In his early teens Foster had to promise Brother William "not to pay any attention to my music untill [sic] after eight O'clock [sic] in the evening" as it was interfering with his formal studies.⁵¹ This tendency was echoed by Foster's father to Brother William in 1841 who noted that the boy's "leisure hours are all devoted to musick, for which he possesses a strange talent."⁵²

Like his serendipitously patriotic birthdate, these surviving sources have contributed to the mythic quality of Foster's musical origins. De-

spite his sonic preoccupations, Foster was able to pick up some accounting skills as well.⁵³ He worked for his brother Dunning's shipping firm in that capacity until his songwriting income was sufficient to support his family.⁵⁴ Previous biographers have characterized Foster's approach to songwriting as professional and businesslike, citing his accounting background as evidence for this.⁵⁵ Yet, the only real success he enjoyed lasted for less than a decade, and he spent the end of his life in poverty estranged from his family and selling his songs for a pittance.

A note on the political affiliations of his family is also necessary to understand Foster's worldview, at least as it characterized his upbringing. William Foster Sr. was among the first settlers of Pittsburgh, and held several government positions including the administration of military supplies through the settlement during the War of 1812.⁵⁶ The family's financial stability was irreparably damaged when their patriarch personally guaranteed an emergency shipment of food, clothing, and ammunition that helped General Andrew Jackson defeat the British at the Battle of New Orleans.⁵⁷ The American government never repaid Foster Sr. for his material display of patriotism, but despite the lack of remuneration the Fosters stayed politically loyal to Jackson's Democratic Party, especially to the future President James Buchanan to whom they were related by marriage.⁵⁸ Their motivation was partly economic, as they hoped to benefit from lucrative political appointments.⁵⁹ However, it was also ideological including the pro-slavery aspect of the Democratic Party platform. If Stephen Foster did, as previous work has claimed, evolve beyond the racial worldview exhibited in his early songs such an evolution would have represented a significant break from the views of his family.

What can be surmised of Foster's worldview through personal correspondence alone is limited. The lyrical content of his songs is also potentially evidential of his worldview, a theoretical assertion explored most recently by JoAnne O'Connell.⁶⁰ Ritual economy suggests that one way to triangulate worldview is by examining how it materialized in actual economic practices such as his early copyright struggles, his complicated attribution relationship with minstrel performer E. P. Christy, and the royalty contracts he negotiated with music publishers.

Early Struggles

Stephen Foster's first original composition was written around the age of fifteen, and the only surviving copy of it was put to paper from his

brother Morrison's memory some fifty years later.⁶¹ Foster's first copyrighted song was "Open Thy Lattice Love" in 1844, although it was inaccurately attributed to "L. C. Foster" and it is likely that he had to pay for the privilege of having it printed.⁶² In just a short time, though, Foster would negotiate lucrative contracts with eager music publishers under unprecedentedly favorable terms. The 1867 *Atlantic Monthly* article that noted Foster's rapid rise to fame referred to a trio of songs that were most responsible for his change in fortunes: "Lou'siana Belle," "Uncle Ned," and "Oh! Susanna."⁶³

These three songs were all copyrighted between 1847 and 1848.⁶⁴ Foster left a record of the publishing arrangement he had at this time in a letter dated May 25, 1849: "I gave manuscript copies of each of the songs...to several persons before I gave them to Mr. Peters for publication, but in neither instance with any permission nor restriction in regard to publishing them."⁶⁵ This letter was addressed to William E. Millet, a New York publisher who had claimed a copyright in "Oh! Susanna" the previous year although no record of formal registration has survived.⁶⁶ Millet had written to Foster, rather than the authorized copyright holder Mr. Peters, enquiring about the copyright status of the song, and Foster's reply revealed valuable insider information that undercut his own interests.

Kevin Parks noted that Foster's decisions regarding "Oh! Susanna" "served as an object lesson against the practice of distributing too many manuscripts before publication."⁶⁷ The exact amount Foster received for the song is not known, but it was a trifle compared to overall sales.⁶⁸ If Foster's actions seem naïve, it must be noted that he had no notion of the success he would soon enjoy. Not only was Foster's reputation unknown before "Oh! Susanna," the song's popularity would have been extraordinary even for an established composer. Because Foster proliferated manuscript copies to performers the song was widely pirated. Yet, despite its multiple editions the song sold in amounts that made many music publishers, including Millet and Peters, hefty sums.⁶⁹

If Foster was naïve in the early part of his career, the popularity of his songs gave him ample opportunity to learn their true value. The exposure he received from the success of "Oh! Susanna" led to a contract in 1849 with Firth, Pond, & Company, one of the largest publishing houses in America at the time.⁷⁰ Foster did make some attempt to professionalize his business practices in the wake of this windfall. He had given the song "Nelly was a Lady" to an acquaintance in New York with a charge to cir-

culate it to minstrel performers for use in their acts. After contracting with Firth & Pond, Foster took a deprecatory tone about the “miserable song” and suggested that if the acquaintance had “not already burned the copyright (as [Foster] certainly should have done) he may give it to Mess Firth & Pond any time.”⁷¹ There was a certain calculus in this self-effacing attempt to recover the document, as the acquaintance might have registered the copyright in his own name had he been aware of its economic potential. Morrison Foster later noted that the song “sold in immense numbers and to a profit of several thousands of dollars.”⁷²

The balance between maximizing exposure by circulating song manuscripts to popular minstrel performers and maximizing capitalization by limiting piracy was difficult to strike. The more widely a song was performed publicly the more manuscripts were available for unauthorized copying. Yet, public performance was the primary motivator for the purchase of authorized copies by antebellum Americans seeking to bring a piece of popular culture into their piano parlors at home. Foster’s quick rise to fame meant that he was the first American to sell his work in numbers that allowed him to compose music full-time, and he had to try and strike the balance between performance and piracy with little guidance. Firth & Pond gave this recommendation early in its relationship with Foster:

From your acquaintance with...bands of ‘minstrels,’ & from your known reputation, you can undoubtedly arrange with them to sing [your songs] & thus introduce them to the public in that way, but in order to secure the copyright exclusively for our house, it is safe to hand such persons printed copies only...for if manuscript copies are issued particularly by the author, the market will be flooded in a short time.⁷³

John Tasker Howard saw a redemptive element in Foster’s early copyright failures, writing “Even though Foster made little or nothing from his earliest success, he learned two things: that he could write songs people liked to sing, and that these songs would bring money to the man who published them.”⁷⁴ However, whatever lessons Foster may have learned early on in his career, he was never able to translate them into a

sustainable business model that would support himself and his family over the long term.

Copyright Complications

Perhaps influenced by the sage advice he received from Firth & Pond, beginning in 1850 Foster amended his strategy of passing song manuscripts out to any interested minstrel performer and instead attempted to partner with one in particular, Edwin Pearce Christy. Several factors contributed to the stand-out success of The Christy Minstrels. Minstrel music in general was more a caricature than a copy of African music, but Christy's troupe paid close attention to the musicality of African-Americans, lending an air of authenticity to their sound.⁷⁵ Christy was also a particularly adept manager of the group's business affairs, and he recognized early on that Foster's sentimentalization of minstrel content would help the genre make the transition from a novelty act to the mass market.⁷⁶ Emerson observed, "Commercial calculation probably played as great a role as politics in softening the minstrel shows E.P. Christy and other impresarios produced" and added that "E.P. Christy was above all else a businessman."⁷⁷

Foster's partnership with Christy included sending advance copies of new songs so that by performance the public would be primed for the published versions when they became available, but it also went further. They had an arrangement where Christy's name would be emblazoned upon the sheet music's title page as a kind of celebrity endorsement. The partnership was strained from the beginning though as Foster ran afoul of Christy's endorsement policies by also including the names of other popular minstrel acts on the title pages of "Gwine to run all night" (better known today as "Camptown Races") and "Dolly Day." Foster was apologetic in a letter dated February 23, 1850, claiming the page was "cut before I was informed of your desire that your name should not be used in connection with other bands." He promised to insist his publisher recut the title page and reiterated his "wish to unite with [Christy] in every effort to encourage a taste for this style of music so cried down by opera mongers."⁷⁸ In addition to evidencing an overt attempt to raise the cultural status of minstrelsy, this letter shows that Foster was making a sincere effort to professionalize his business dealings.

The following year, Foster attempted to strengthen his partnership with Christy by proposing an exclusive arrangement in which The Christy Minstrels would receive Foster's latest compositions in advance of publi-

cation for a fee of ten dollars per song. Foster began the proposal by claiming to have “received a letter from Mess. Firth, Pond & Co. stating that they have copy-righted a new song of mine (“Oh! boys, carry me ’long”) but will not be able to issue it for some little time yet, owing to other engagements,” which was a polite cover insinuating an intentional delay of publication so that demand for the song could be generated by Christy’s performance. Foster confidently wrote that the “song is certain to become popular, as I have taken great pains with it” and emphasized the benefit his proposed arrangement would bring to Christy as “it will become notorious that your band brings out all the new songs.”⁷⁹

At this point in his career, Foster had cause for confidence in the popularity of his work, but the note of ostentation in Foster’s tone likely did not set well with “the tough-minded minstrel man” Christy.⁸⁰ Still, Christy did agree to the arrangement and sent the requested sum for an advance copy. In a letter acknowledging receipt of the payment, Foster urged Christy to “Remember [the song] should be sung in a pathetic, not a comic style,” again indicating the sentimental turn in minstrel music that occurred in the early 1850s. Unfortunately for their working relationship, Foster again had to inform Christy of an attribution misstep and express his “regret that it is too late to have the name of your band on the title page,” adding “but I will endeavor to place it (alone) on future songs, and will cheerfully do anything else in my humble way to advance your interest.”⁸¹

Christy could hardly be blamed if he grew tired of Foster’s equivocation about song attribution and continued requests for money. Whether to assuage Christy’s ire over past missteps, or as an attempt on Foster’s part to distance his public persona from the lowbrow connotation of minstrelsy, a decision was made around this time to publicly give full attribution for one of Foster’s sentimental minstrel songs to Christy. The printed version of “The Old Folks at Home” (better known today as “Swanee River”) issued by Firth, Pond, & Company attributed the song as “Written and Composed by E. P. Christy.”⁸² As Foster’s reputation grew his options for creative control over his work likewise increased. There is some evidence that he desired to move beyond the racially-charged minstrel content he had relished as a child and rode to fame as a young man. “The Old Folks at Home” and “Ring de Banjo” were both copyrighted in 1851 and both featured lyrics written in exaggerated black dialect, but several other Foster songs copyrighted that year were written in a more genteel style and in-

tended for the piano parlors of the middle class.⁸³ Yet, the overwhelmingly positive public reception of “The Old Folks at Home” after its release caused Foster to again renege on his agreement with Christy. Foster’s explanation for doing so merits quoting at some length:

As I once intimated to you, I had the intention of omitting my name on my Ethiopian songs, owing to the prejudice against them by some, which might injure my reputation as a writer of another style of music, but I find that by my efforts I have done a great deal to build up a taste for the Ethiopian songs among refined people by making the words suitable to their taste, instead of the trashy and really offensive words which belong to some of that order.⁸⁴

Steven Saunders’s discussion of this letter identified it as the “canonical text” of the Foster conversion narrative.⁸⁵ Previous work in that vein has focused on Foster’s misgivings about his past use of “trashy and really offensive” racial language in his song lyrics. Importantly though, it was concern over his reputation, rather than a progressive conversion of racial worldview, that motivated him. Foster went on to request from Christy that he be allowed to “reinstate” his name on the song and he declared his intention to “pursue the Ethiopian business without fear or shame.” Foster’s pride was evident in the statement “I am not encouraged in undertaking this so long as ‘The Old Folks At Home’ stares me in the face with another’s name on it.” After promising to refund the money Christy had paid for the privilege of purchasing the song’s attribution rights, Foster revealed something of what truly motivated him as an artist, confessing “I find I cannot write at all unless I write for public approbation and get credit for what I write.”⁸⁶ The copy of this letter held in the Foster Hall Collection bears the following revelation of Christy’s thoughts on this request written on the verso: “S.C. Foster - A mean & contemptible – vascillating [sic] skunk & plagiarist.”⁸⁷

Foster hoped the reputation he had built upon blackface minstrel songs would allow him to transition into more respectable parlor music, but he had no moral qualms about continuing to produce whatever content the public was interested in buying. To avoid a negative association with the racialized language of “The Old Folks at Home,” Foster accepted some amount of compensation to attribute its lyrics and music to Christy. After it

became clear the song and its sentimental depiction of the “ol’ plantation” would be a tipping point in minstrelsy’s cultural reception, Foster vacillated and attempted to recover his lost social currency. Regarding Foster’s racial worldview, the series of correspondence with Christy does not reveal a conversion, but rather Foster’s investment in the “values of the middle class” and that while he was “palpably uncomfortable with some of the low, vulgar, and low-class associations of minstrelsy,” he understood the financial imperative of composing such work.⁸⁸ Regarding Foster’s understanding and use of copyright, his initial attribution decision regarding “The Old Folks at Home” was an attempt to divorce legal ownership from public perception that ultimately backfired. From the beginning, Firth & Pond registered the copyright in the song on Foster’s behalf and paid the royalties to him, but by not initially taking ownership in the court of public opinion Foster’s long-term interests in the song suffered.⁸⁹

Copyright and Contracts

The dysfunction in Foster’s work life was mirrored at home. Foster married Jane McDowell on July 26, 1850, and their relationship was strained by periods of long separation throughout his thirteen remaining years.⁹⁰ Their daughter Marion, born nine months into the marriage, would be their only child.⁹¹ With proper management the income Foster earned from songwriting at this time could have comfortably supported his young family, but Foster struggled to stay within his means.⁹² After his father’s financial troubles the family depended on Brother William for support, and Foster transferred that co-dependent patronage relationship to Morrison in his own adult years.

A letter to Morrison dated July 8, 1853 illustrated the arrangement. Foster repaid a loan from his brother with a check from Firth & Pond, found he had “rather stinted” himself by paying the loan back early, and requested the money be returned for the time being. Foster boasted about his impending song earnings, promising to “take the first occasion to pay” Morrison back in full. While Foster claimed he was “not living expensively,” his letter also mentioned attending races at the Hippodrome, spending time at a new saloon, plans to take in an opera performance, and a visit to the Crystal Palace in the coming weeks.⁹³ When Foster’s financial reality did not match with his worldview of how an artist of his stature should live, he chose to keep up appearances rather than amend his economic behavior.

Foster's financial situation was not the result of unfair treatment from his publishers. On the contrary, it took more than a decade of squandering the opportunities he was given for Foster to be dropped by publishers that went out of their way to accommodate him due to his significant talent. When he wrote to Morrison requesting his loan repayment back, he was only two months into a new contract with Firth & Pond that was more favorable than his first in 1849. His 1854 contract, still extant in the Foster Hall Collection, was more favorable still offering Foster as much as a ten percent royalty on his best-selling compositions.⁹⁴ Howard examined the contract and related copyright records in depth, and noted the fact it was written in Foster's own hand "prompts one to speculate whether the composer, with the aid of an able lawyer, dictated his own terms," adding "by this time he was no doubt in a powerful enough position to do so."⁹⁵ This speculation could well be true, but bargaining acumen did not equate to fiscal responsibility in Foster's case.

In the mid-1850s, money was coming in from Foster's songs, but he continued to live beyond his means by drawing advances on his future interests from Firth & Pond. The account book Foster kept provides detailed evidence of this practice.⁹⁶ Worse still, Foster's compositional output lagged as he only copyrighted one song a year in 1856 and 1857, despite having the strongest contractual incentive of his career to produce new music.⁹⁷ Matters must have been dire, because it was at this time that Foster made an irrevocable decision regarding his future interests that displayed a fundamental misunderstanding and misuse of the copyrights he held in his songs.

The contract Foster inked with Firth & Pond in 1858 had similar terms as its predecessor, including up to ten percent royalties on future compositions. However, in this contract Foster agreed to relinquish all future interests in his previous work.⁹⁸ A document exists in which Foster tallied what he had earned for each of the songs published by Firth, Pond, & Company with an estimate of future earnings in an adjoining column. The list began with best sellers such as "The Old Folks at Home" and "My Old Kentucky Home" but also included Foster's lesser known titles. All told, Foster reckoned the thirty-six songs on the list had earned him \$9,436.96 in just over six years, and he estimated his future earnings in the amount of \$2,786.77.⁹⁹ He ultimately accepted a one-time payment of just \$1,872.28 for the entire repertoire on March 14, 1857.¹⁰⁰

By the time their final contract expired in August of 1860, Foster's consistent requests for advances on future earnings had left him in debt to Firth & Pond to the tune of \$1,396.64 and they refused to send any more money.¹⁰¹ Foster acknowledged this in a letter to Morrison that began straight to the point by asking to borrow twelve dollars, but then downplayed the seriousness of the Firth & Pond situation as a minor dispute. Foster tried to save face by saying he was inclined to sign with another publishing house once his current agreement expired.¹⁰² Yet, a month later Foster requested of his brother another fifty dollars.¹⁰³ Both letters mention that he hoped to soon be on his way to New York.

Foster, along with his wife and daughter, arrived in New York before the election of President Abraham Lincoln in late 1860.¹⁰⁴ The following year, Jane would take Marion back to the more stable environs of Pennsylvania, but Foster would remain until his death on January 13, 1864.¹⁰⁵ Accounts from acquaintances, some written down decades later, offer what little is known about the end of Foster's life.¹⁰⁶ Ironically, while he had less financial incentive than ever to compose new music, the copyright record shows that this period was one of the most musically productive of Foster's career.¹⁰⁷ A particularly fruitful partnership was formed with Union veteran George Cooper after Cooper returned to New York from fighting in the Battle of Gettysburg. O'Connell noted that the two men, "produc[ed] eighteen songs in six months," and that "When Cooper penned the words to Foster's songs, they had just the right amount of sentimentality to make them moving, but not tragic."¹⁰⁸

George Birdseye, a contemporary and sometime collaborator of Foster's during this period, characterized Foster as an alcoholic and wrote "it was not seldom, in consequence, that a publisher would take advantage of his miserable condition, paying him a paltry sum for what other composers would demand and receive a fair remuneration."¹⁰⁹ Birdseye gets several details demonstrably wrong in his account, but it seems clear that Foster did struggle with alcoholism. In his later years, Foster could no longer command royalty agreements, much less advances, and instead had to sell his work outright for whatever he could get.

In some ways, Foster was a casualty of the sharp decline in music sales during the American Civil War. The public was no longer interested in his signature sentimental renderings of Southern life, and even the market for pro-Union patriotic songs was as divided as the nation itself.¹¹⁰ But Foster was also a victim of his own addictions and poor business decisions

that left him destitute. Had he lived even a few years longer, he would have seen public interest in his songs revive after the end of the war. He was at least spared the sting of realizing just how foolish his decision to sell out his royalty interests in them was.

Conclusion

Stephen Foster was not America's first professional songwriter. It is a pithy, convenient phrase for emphasizing his importance, but such platitudes ring hollow when considering how unprofessionally Foster handled copyright and contractual obligations during his career. Foster was among the first to skillfully forge elements of high and low culture into a distinctly American brand of popular song, but he also empowered a discourse that excuses and exploits the unprofessional behavior of musicians and other creative individuals.¹¹¹ These faults have been as much obscured by hypercanonization as his racial worldview, and precisely because of his importance it is vital that historical work on Foster not shy away from the objectionable aspects of his influence. The popularity of his songs rightly deserves a place of primacy in American music, but the precedent that he helped set for inequality in American popular culture and for popular musicians being more focused on fame than financial fairness are also undeniable parts of his legacy. The fact that Foster's songs are today in the public domain means that popular mediums such as films, television, and cartoons have a vested interest in using them, which, in turn, perpetuates his legacy to successive generations.¹¹²

The application of ritual economy to Foster's copyright use reveals that he had a fundamental misunderstanding about its purpose. Foster's obsession with reputation, coupled with his personal demons, resulted in a copyright strategy that favored short-term expediency over long-term investment. His reluctance to establish himself as the author of his best-selling works had disastrous consequences for his career. Registering for copyright was certainly part of establishing authorship in a legal sense, and it helped to satisfy obligations to the political economy of the creative industries. Yet, the public reception of authorship, or what can be considered part of the ritual economy of copyright, was just as important to both Foster's sense of satisfaction with his career and to his bottom line. During the 1850s, enthusiastic public reception provided him leverage to negotiate favorable contracts, but he failed to capitalize on those opportunities for a complex set of personal, social, and political reasons. His music also

failed to keep up with changing tastes during the Civil War. His career, and ultimately his life, were cut short as a result.

Foster's cognized model of the world elicited economic behaviors that were contradictory to his personal interests, a phenomenon especially evident in his handling of attribution for "The Old Folks At Home." He conceived of himself as a member of upper-class American society, but also labored under an economic imperative to produce work for the lowbrow cultural form of blackface minstrelsy. His melding of these two worlds resulted in a version of minstrel music primed for a mass audience, but it also produced a cognitive dissonance within Foster that he was unable to resolve. His economic habitus consisted of the emerging mass market for minstrelsy, pressure to support the value systems of his family and social class, and a personal desire to make a living off of his tremendous talent for melody. The interaction of these forces resulted in some of the most memorable melodies, the most ideologically fraught lyrics, and one of the most tragic personal stories in the history of American music.

The relevance of Foster's understanding and use of copyright extends beyond his personal story though. His brother Morrison expended significant effort after his death to secure some royalties in his work for the wife and daughter he left behind.¹¹³ Morrison had some success in this endeavor, but the Foster family never received what they could have had Foster conducted himself more professionally as an artist. Foster wrongly believed in copyright's claimed ability to secure economic compensation, a belief that cost him a great deal. While copyright protection may be part of a larger strategy that ultimately results in profitability for some, it cannot, in and of itself, secure compensation for creative individuals. This fiction about copyright still reverberates in modern narratives, both in the language of copyright laws and in the discourse of policy makers.¹¹⁴ Modern creative industries are built upon arrangements in which production and distribution interests manage the legal affairs of most artists, with the success of a few superstars pointed to as justification for a system in which musicians regularly enter inequitable contracts.¹¹⁵ Moreover, copyright's emphasis on original work is highly dissonant with the ways popular musicians learn their craft, identify with established genres, build audiences, and push artistic boundaries.¹¹⁶

Music's inherent ephemerality relative to work based on text or images is especially instructive of the limits of copyright law.¹¹⁷ Jacques Attali went so far as to theorize the economics of music as "*prophetic*" of

coming economic, political, and legal trends in other sectors.¹¹⁸ Attali drew a direct line between the patronage economic model and classical style of eighteenth-century European music and the logic of modern capitalism, and this model is instructive for how Foster's influence can still be felt in American popular culture today. Content creators still believe in copyright's ability to protect their interests. That belief often drives them to depend on representatives of the creative industries to manage their careers for them without applying themselves or those they contract with to industry standards of professionalism. In the past, copyright has worked for publishers, distributors, and the most successful content creators. Yet, as other aspects of popular music production such as recording, marketing, and touring are increasingly managed by artists themselves it is time to rethink copyright and other legal matters as a sufficient reason for blind dependence upon record labels. Perhaps emphasizing the lack of professionalism Stephen Foster displayed in managing his musical career may inspire modern musicians to educate themselves and make more informed choices about the ownership of their work.

Endnotes

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2. See Callie P. Borgmann, "The Future of Streaming Music: The Music Modernization Act and New Copyright Royalties Regulations," *University of Denver Sports & Entertainment Law Journal* 21 (Spring 2018): 19-24. See also Jennifer M. Urban and Laura Quilter, "Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act," *Santa Clara Computer & High Technology Law Journal* 22 (2006): 621-693, Lydia Pallas Loren, "Untangling the Web of Music Copyrights," *Case Western Reserve Law Review* 53 (2003): 673-722, Wendy M. Pollack, "Tuning in: The Future of Copyright Protection for Online Music in the Digital Millennium," *Fordham Law Review* 68 (2000): 2445-2488, David Nimmer, "Riff on Fair Use in the Digital Millennium Copyright Act," *University of Pennsylvania Law Review* 148, no. 3 (January 2000): 673-742, David Balaban, "Music in the Digital Millennium: The Effects of the Digital Millennium Copyright Act of 1998," *UCLA Entertainment Law Review* 7, no. 2 (2000): 311-323, and Rochelle Cooper Dreyfuss, "The Creative Employee and the Copyright Act of 1976," *The University of Chicago Law Review* 54, no. 2 (Spring 1987): 590-647.
3. See *An Act To amend and consolidate the Acts respecting copyright*, Chapter 320, *U.S. Statutes at Large* 35, Part 1 (March 4, 1909): 1075-1088 and *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1908). See also Jason Lee Guthrie, "Authors and Inventors: The Ritual Economy of Copyright in Early America" (PhD diss., The University of Georgia, 2018), 123-126.
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6. JoAnne O'Connell, *The Life and Songs of Stephen Foster: A Revealing Portrait of the Forgotten Man Behind "Swanee River," "Beautiful Dreamer," and "My Old Kentucky Home"* (Lanham,

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7. See, for example, John Tasker Howard, "Stephen Foster and His Publishers," *The Musical Quarterly* 20, no. 1 (January 1934): 77-95.
 8. R. P. Nevin, "Stephen C. Foster and Negro Minstrelsy," *Atlantic Monthly* 20, no. 121 (November 1867): 613-614.
 9. Emerson, *Doo-Dah!*, 9-16.
 10. See Kevin Parks, *Music & Copyright in America: Toward the Celestial Jukebox* (Chicago, IL: American Bar Association, Section of Intellectual Property Law, 2012), 13-20.
 11. William Lichtenwanger, "Music and Copyright Law in the United States," in *Music Publishing and Collecting: Essays in Honor of Donald W. Krummel*, ed. David Hunter (Urbana, IL: Graduate School of Library and Information Science, University of Illinois at Urbana-Champaign, 1994), 70-71.
 12. See Meredith L. McGill, "Copyright," in *A History of the Book in America, Volume 2 An Extensive Republic: Print, Culture, and Society in the New Nation, 1790-1840*, eds. Robert A. Gross and Mary Kelley (Chapel Hill, NC: The University of North Carolina Press, 2010), 198-211.
 13. Thorvald Solberg, ed., *Copyright Enactments of the United States, 1783-1906* (Washington, DC: Government Printing Office, 1906), 11-31.
 14. See U.S. Constitution, art. 1, sec. 8, cl. 8 and *An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned*, Chapter 15, *U.S. Statutes at Large* 1 (May 31, 1790): 124-126.
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 16. Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton, NJ: Princeton University Press, 2014), 82-122.

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20. *Ibid.*, 351-357.
21. *An Act to amend the several Acts respecting Copyright*, Chapter 16, *U.S. Statutes at Large* 4 (February 3, 1831): 436-439.
22. See Russell Sanjek, *American Popular Music and its Business: The First Four Hundred Years, Volume 2 From 1790 to 1909* (New York, NY: Oxford University Press, 1988), 3-32.
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28. Emerson, *Doo-Dah!*, 65.
29. See, for example, Douglas A. Jones Jr., "Black Politics but Not Black People: Rethinking the Social and 'Racial' History of Early

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 32. See Susan Key, “Forever in Our Ears”: Nature, Voice, and Sentiment in Stephen Foster’s Parlor Style,” *American Music* 30, no. 3 (Fall 2012): 290-307; Lee Glazer and Susan Key, “Carry Me Back: Nostalgia for the Old South in Nineteenth-Century Popular Culture,” *Journal of American Studies* 30, no. 1 (April 1996): 1-24; Susan Key, “Sound and Sentimentality: Nostalgia in the Songs of Stephen Foster,” *American Music* 13, no. 2 (Summer 1995): 145-166; and Nicholas Tawa, *A Music for the Millions: Antebellum Democratic Attitudes and the Birth of American Popular Music* (New York, NY: Pendragon Press, 1984), 37-47.
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 35. See Jason Lee Guthrie, “Taking the Liberty: Toward a Theory of Copyright and Creativity,” *Journal of the Music and Entertainment Industry Educators Association* 16, no. 1 (2016): 97-123.
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 55. See, for example, Howard, *America’s Troubadour*, 132-138; Emerson, *Doo-Dah!*, 118-138; and O’Connell, *A Revealing Portrait*, 83-101. In contrast, William W. Austin, “*Susanna*,” “*Jeanine*,” and “*The Old Folks at Home*”: *The Songs of Stephen Foster from His Time to Ours*, 2nd ed. (Urbana, IL: University of Illinois Press, 1987), 13-26 considered the risks Foster undertook by pursuing songwriting full-time and Austin’s analysis provides a helpful counterpoint to the dominant narrative.
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 59. See, for example, Stephen C. Foster to Ann Eliza Foster, September 15, 1845, FHC where Foster mentions his interest in taking over a clerkship in Washington, D.C. that was held by his brother Henry.
 60. See O’Connell, *A Revealing Portrait*, xxv-xxxii for a theoretical and methodological argument that positions Foster’s song lyrics as evidential of his worldview.

61. Foster, *Biography, Songs, and Musical Compositions*, 13.
62. Parks, *Music & Copyright*, 14.
63. Nevin, "Negro Minstrelsy," 613-614.
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65. Stephen C. Foster to William E. Millet, May 25, 1849, FHC.
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67. Parks, *Music & Copyright*, 15.
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69. Howard, "Foster and His Publishers," 78-79.
70. Though no copy of the 1849 contract has survived, details can be surmised from references to it in extant contracts from 1854 and 1858.
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76. Cockrell, *Demons of Disorder*, 154.
77. Emerson, *Doo-Dah!*, 95.
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79. From Stephen C. Foster to E. P. Christy, June 12, 1851, FHC. Note that this copy is a photocopy. The original is held by the Henry E. Huntington Library, San Marino, California.
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81. From Stephen C. Foster to E. P. Christy, June 20, 1851, reprinted in Elliker, *Guide to Research*, 96. The original is held by the Henry E. Huntington Library, San Marino, California.
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88. Saunders, "Social Agenda," 281.
89. See O'Connell, *A Revealing Portrait*, 134-141.
90. From Stephen C. Foster to Ann Eliza Buchanan, July 16, 1850, FHC.
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96. Stephen Foster's Account Book, 1837-1863, FHC.
97. Elliker, *Guide to Research*, 5-6.
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 117. See Ronald S. Rosen, *Music and Copyright* (Oxford, UK: Oxford University Press, 2008), 2-7.
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JASON LEE GUTHRIE is an Assistant Professor of Communication and Media Studies at Clayton State University in Morrow, Georgia. Guthrie is a media historian interested in the intersections of creativity and economics, with specific interests in the creative industries and intellectual property law.



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