CIRCULATION AND CONTROL

The nineteenth century witnessed a series of revolutions in the production and circulation of images. From lithographs and engraved reproductions of paintings to daguerreotypes, stereoscopic views, and mass-produced sculptures, works of visual art became available in a wider range of media than ever before. But the circulation and reproduction of artworks also raised new questions about the legal rights of painters, sculptors, engravers, photographers, architects, collectors, publishers, and subjects of representation (such as sisters in paintings or photographs). Copyright and patent laws tussled with informal cultural norms and business strategies as individuals and groups attempted to exert some degree of control over these visual creations.

With contributions by art historians, legal scholars, historians of publishing, and specialists of painting, photography, sculpture, and graphic arts, this rich collection of essays explores the relationship between intellectual property laws and the cultural, economic, and technological factors that transformed the pictorial landscape during the nineteenth century.

This book will be valuable reading for historians of art and visual culture; legal scholars who work on the history of copyright and patent law; and literary scholars and historians who work in the field of book history. It will also resonate with anyone interested in current debates about the circulation and control of images in our digital age.

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2. The First Copyright Case under the 1735 Engravings Act
The Germination of Visual Copyright?
Isabella Alexander and Cristina S. Martinez

Introduction

In 1735, the British Parliament passed the world’s first copyright statute in relation to visual works of art: the Engravings Act, commonly known as Hogarth’s Act due to the role played by the famous artist in its enactment. William Hogarth was also involved in the first court case to invoke the Act’s protection, Blackwell v. Harper (1740); however, he played a supporting role in that litigation, as a mere witness. The central character, one of the plaintiffs and the artist whose works were copied, was Elizabeth Blackwell. This legal suit, brought by Elizabeth and her husband, Alexander, in the Court of Chancery against a number of prominent London printsellers was not only the first case to invoke the protection of the Engravings Act 1735 but also the first copyright case with a woman plaintiff involving works created by a female artist. It was also the first case to grapple with the question of whether there was a threshold of creativity that would qualify a work for protection

1 The authors wish to thank Stéphanie Delamaire and Will Slauter for their invitation to participate in this volume. They also wish to thank Tomás Gómez-Arostegui for his feedback as well as invaluable assistance in locating and accessing primary source material, participants at the IP in the Trees Seminar at Lewis & Clark Law School (2019), and Oren Bracha for reading an early draft of this paper and for his helpful suggestions.

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by copyright law, through a consideration of the meaning of the word ‘invention’.

Elizabeth was a highly unusual litigant. Her creative labor gave rise to the property rights in question but, as a married woman, she was in principle unable to own property or bring legal proceedings under the doctrine of coverture. Moreover, as a married woman with scientific aspirations rather than a professional (male) engraver embedded in the artistic community, she was hardly the kind of author to whom the Act’s drafters had foreseen offering protection. Furthermore, the artistic works being litigated were not the imaginative engravings envisioned by the statute’s proponents but botanical illustrations — works ‘copied from nature’. Elizabeth’s works therefore tested the applicability of the very first law for the protection of images, establishing a key precedent for its future application and determining the legal fate of botanical illustrations.

This chapter explores the case of Blackwell v. Harper in detail, drawing on the legal archival record to investigate how the law was interpreted and applied, and uncovering the historical legal and social background against which the case was brought. It focuses in particular on the two unusual aspects of the case noted above. The first of these is its distinct subject matter, which threw into question the kinds of engravings that the Act was intended to protect. For reasons which are explained below, the court was required to interpret the meaning of the word ‘invention’, opening up the potential for conflict between the way the concept was understood in the world of art and the way it would be understood in the world of law. The second remarkable aspect is the plaintiff herself, Elizabeth Blackwell, one of only a handful of women to become involved in copyright litigation in the period. A detailed examination of Elizabeth’s role therefore allows us to reflect on the gendered nature of copyright law, and to trace it back to the very earliest statutes and decided cases. It also requires consideration of how a woman exercised artistic, intellectual, and commercial agency in the male-dominated society and competitive marketplace of eighteenth-century Britain.

We start by briefly setting out the background to the 1735 Act, including its relationship to the Statute of Anne, and its key provisions. We then consider how ‘invention’ was understood by artists and their patrons in the mid-eighteenth century. Next, we narrate how Elizabeth
came to produce *A Curious Herbal*, the volume containing her botanical illustrations, and explore the social and legal contexts in which she was operating, before turning to the litigation itself. Finally, we reflect upon what a case that lies at the intersection of gender, authorship, and art can tell us about the development of copyright law in the visual domain.

The Statutory Background: The Statute of Anne (1710) and the Engravings Act (1735)

The Statute of Anne, which entered into force in April 1710, created a statutory copyright for books, lasting fourteen years from first publication, with a possible second term of fourteen years if the author was still alive at the expiration of the first.² The right was held by the author of the work in question and, if infringed, the infringer would be liable for forfeitures and penalties. These remedies were dependent upon the book being registered before publication in the register book of the Company of Stationers.³ Importantly, it was not necessary to be a member of the Stationers’ Company to register a book, which represented a sharp distinction from prior practice.⁴

Prints published as or within books would probably have been protected by the provisions of the Statute of Anne. Individual prints were sometimes registered at Stationers’ Hall as well.⁵ Yet clearly, there remained a gap in protection for prints. In 1735, William Hogarth

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² Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein mentioned, 8 Anne c. 19 (1710) (hereafter Statute of Anne).
⁴ Malcolm Jones, in a study of the Stationers’ Registers from 1562–1656, states that ‘the number of prints as opposed to books recorded in the Registers is trivial — less than one per cent of all entries — and yet, for all that, there are well over 300 such “prints”’. Malcolm Jones, ‘Engraved Works Recorded in the “Stationers’ Registers”, 1562–1656: A Listing and Commentary’, The Volume of the Walpole Society, 64 (2002), 1–68 (p. 1). A similar study for the eighteenth century has yet to be made, but a few examples indicate that the practice of recording prints was still employed. This is the case of Reverend John Watson who, in 1761, registered two copperplates — *The South East View of the Town of Halifax and A South East Prospect of Halifax Church* — and later published a book, also registered at Stationers’ Hall, which incorporated them.
and six fellow engravers presented a petition to Parliament asking for protection against ‘divers Printsellers and Printers’ who had lately too frequently taken the liberty of copying, printing and publishing ‘great Quantities of base, imperfect, and mean, Copies and Imitations.’ The other six artists (George Lambert, Isaac Ware, John Pine, George Vertue, Joseph Goupy, and Gerard Vandergucht) were also prominent engravers of the time. A bill was introduced and passed through both Houses of Parliament, receiving Royal Assent on 15 May 1735. The new Act gave exclusive printing rights to any person who ‘shall invent and design, engrave, etch or work in Mezzotinto or Chiaro Oscuro […] any historical or other print’ for a term of fourteen years from first publication. It also protected anyone who ‘from his own Works and Invention shall cause to be designed and engraved, etched or worked in Mezzotinto or Chiaro Oscuro, any historical or other Print or Prints’. Anyone who copied and engraved, etched or printed any such print without the consent of the owner, or who knowingly sold or imported such a print would be liable to forfeit the plates, the printed sheets, and the sum of five shillings for every print found in their custody. The plates and prints would be destroyed, while the money would be shared between the King and the person bringing the action. The penalties would not, however, be incurred by a person who had purchased the plates from the original proprietor and sought to print from them. This provision seems designed to clarify that copyright did not pass automatically with the physical copper plates, while allowing those who may have purchased plates intending to print from them to do so without fear of legal action. In other words, that person would receive a copyright license rather than an assignment.

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7 An Act for the encouragement of the Arts of Designing, Engraving and Etching Historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the Time therein mentioned 1735 (8 Geo II c.13) (hereafter Engravings Act 1735).

8 Ibid., s.1.

9 Ibid., s.2.

2. The First Copyright Case under the 1735 Engravings Act

The phrasing of the Act was unclear in several respects. Two of these would require interpretation by the court in *Blackwell v. Harper*. One question related to the information that needed to be included on each print in order to claim the penalties under the Act. The 1735 Act did not replicate the requirement in the Statute of Anne that works be registered at Stationers’ Hall. That requirement represented a point of continuity for the book trade that dated back to the licensing era, but there was no parallel practice for the print trade. Instead, the more common practice was to insert the name of the engraver on each print, and it was this practice that was adapted for inclusion in the Engravings Act. The Act thus set out that the date of protection would ‘commence from the Day of first publishing thereof, which shall be Truly engraved, with the name of the Proprietor on each Plate, and printed on every such Print or Prints’.\(^{11}\)

A second issue was the role to be played by the words ‘invention’ and ‘design’ in limiting the type of engravings to which the Act applied. Timothy Clayton, in his description of Hogarth’s role in the passing of the Act, emphasizes the word ‘design’, stating that ‘[t]he Act protected only designers who published their own prints’.\(^ {12}\) Yet, paying close attention to the phrasing and punctuation of the Act, it would appear to require the proprietor of a print to have invented and either designed, or engraved, or etched or worked the print in *Mezzotinto* or *Chiaro Oscuro*. The Act thus seems to offer protection mainly to ‘inventors’ — but what did this mean and, for our purposes, could it cover botanical illustrations, copied from nature? Was an ‘inventor’ the same as a ‘designer’, as Clayton assumes? The question is difficult because it requires a consideration of whether ‘invention’ and ‘design’ meant the same thing to the engravers whose works were the subject of the Act as it did to the court enforcing it. Before we turn to the court’s approach to this question, it is therefore important to consider how artists, engravers and printsellers would have interpreted the terms ‘invention’ and ‘design’ in the mid-eighteenth century.

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11 Engravings Act 1735, s.1.
The Meaning of Invention and Design

The first point to observe in the 1735 Act is the sheer number of times that the words ‘invention’ and ‘design’ appear as well as their different combinations, including ‘arts of designing’, ‘invented and engraved’, ‘invent and design’, ‘from his own works and invention’, and ‘shall cause to be designed and engraved’. The use of these terms and their Latin abbreviations on prints varied (for example, *invenit* or *invent* for the person who conceived the image, *sculpt* or *sculpsit* for the engraver, and *delint*, *delt* or *delineavit* for the person who created the drawing). It is of interest to note that Hogarth employed some of these Latin forms in early works — *The Lottery* (1724) has ‘Willm. Hogarth Invt. et Sculpt.’ inscribed within the image itself; *Perseus Rescuing Andromeda* is lettered at the lower right ‘WH fecit’ (WH has made); and his series *A Harlot’s Progress* (1732) sees the inscription ‘invt. pinxt. et sculpt.’; but after the passing of the Act, Hogarth’s phrases and formulae are more consistently provided in English, as if moving away from the continental tradition. This can be seen in the series of *A Rake’s Progress* (1735), ‘Invented Painted Engrav’d & Publish’d by Wm. Hogarth’ as well as in Plates I and II of the *Analysis of Beauty* (1753), ‘Designed, Engraved, and Publish’d by Wm. Hogarth’; and in the subscription ticket *Crowns, Mitres, Maces, Etc.* (1754), ‘Design’d, Etch’d & Publish’d by Wm. Hogarth’, amongst others.

Did Hogarth use the words ‘Invented’ and ‘Designed’ interchangeably or with discretion? These examples and the wording of the Act itself reveal the complex underpinnings behind each of these terms from both a legal standpoint and the perspective of art theory. As the art historian Katie Scott has observed, the word ‘invention’ refers to some ‘slippery concepts’.


14 Digital images are available from the Lewis Walpole Library, Yale University: *A Rake’s Progress* (1735), Plate 1, lwlpr22206, https://findit.library.yale.edu/catalog/digcoll:2808268; *Analysis of Beauty* (1753), Plate 1, lwlpr22275, https://findit.library.yale.edu/catalog/digcoll:2808334, and Plate 2, lwlpr22276, https://findit.library.yale.edu/catalog/digcoll:2808335; *Crowns, Mitres, Maces, Etc.* (1754), lwlpr15021, https://findit.library.yale.edu/catalog/digcoll:2782448.

In law, invention could refer to the kind of new mechanical or chemical process that might be the subject of a patent, but in relation to copyright for literary works protection was linked to an act of authorship that was not mechanical. In 1720, counsel for the plaintiff in *Burnett v. Chetwood* argued that a translation was not an infringement under the Statute of Anne because ‘the translator may be said to be an author, in as much as some skill in language is requisite thereto, and not barely a mechanic art, as in the case of reprinting in the same language’.\(^{16}\) The concept of inventiveness was also specifically used by courts making decisions in relation to literary copying.\(^{17}\) For example, in the 1740 decision of *Gyles v. Wilcox*, Lord Hardwicke observed that ‘abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning and judgment of the author is shewn in them’.\(^{18}\)

The debate surrounding the division between mind and hand (or intellectual rather than manual labor) first emerged in the Renaissance, and the use of the word ‘design’ in the Engravings Act 1735 might very well stem from the Renaissance concept of *disegno*. The Italian painter and biographer Giorgio Vasari writes in *The Lives* that *disegno* ‘is none other than a visible expression and declaration of the inner concept and of that which one has imagined and fabricated in the mind’.\(^{19}\) For Vasari, however, the expression of a thought (invention) also necessitated manual ability (execution), and these two principles of *disegno* are what the Act seemed to have wanted, and demanded, for engravings.

Not all prints and drawings could be properly called inventive. Jonathan Richardson, in his discourses on art published in 1719, made the distinction between prints ‘Such as are done by the Masters themselves whose Invention the Work is; and such as are done by Men not pretending to invent, but only to Copy (in Their way) Other men’s Works’.\(^{20}\) Similarly, the architect John Gwynn’s 1749 *Treatise on Drawing*

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16 *Burnet v. Chetwood* (1720) 2 Mer 441, 441.
18 *Gyles v. Wilcox* (1740) 2 Atk 141, 143.
distinguished between the mechanical and the inventive using the notion of design:

Drawing is mechanical, and may therefore be taught, in some Measure, to any Person of moderate Talents, who applieth sufficiently to the Practice of it: But Design is the Child of Genius, and cannot be wholly infused: The Principle of it must exist in the Soul, and can be called forth only by Education, and improv’d by Practice.\footnote{John Gwynn, \textit{An Essay on Design: Including Proposals for Erecting a Public Academy to Be Supported by Voluntary Subscription ... For Educating the British Young in Drawing and the Several Arts depending thereon} (Dublin: George Faulkner, 1749), Preface, p. i.}

However, because the Act’s phrasing sets up ‘invent’ as a cumulative condition alongside the alternatives of ‘design’, ‘engrave’, ‘etch’ or ‘work in Mezzotinto or Chiaro Oscuro’, it appears that the word ‘design’ was employed to convey the mechanical act, while ‘invent’ was used to express the creative act.\footnote{Engravings Act 1735, s.1.} The precise nature of Parliament’s intention cannot be known, but the result was that debates previously confined to the artistic sphere spilled into the legal sphere. Before turning to consider the complex interactions between the theory and practice of art in \textit{Blackwell v. Harper}, it is necessary to provide some background to the parties and the works involved.

Who Was Elizabeth Blackwell?

Elizabeth Blackwell is remembered in history as the author and artist of \textit{A Curious Herbal}.\footnote{A Curious Herbal, \textit{Containing Five Hundred Cuts, of the most useful Plants, which are now used in the Practice of Physick. Engraved on folio Copper Plates, after Drawings, taken from the Life. By Elizabeth Blackwell. To which is added a short Description of ye Plants; and their common Uses in Physick} (London, Printed for John Nourse at the Lamb without Temple Bar), 2 vols., [1737–]1739. Lindley Library, London, 615.3 BLA VOL I and 615.3 BLA VOL II.} Yet, as is the case with the many British women involved in the print and publishing trade of the eighteenth century, we know very little about Elizabeth herself. A short entry on her exists in the \textit{Oxford Dictionary of National Biography} and biographical detail can also be found in John Nichols’s \textit{Literary Anecdotes} and Blanche Henrey’s magnum opus \textit{British Botanical and Horticultural Literature before 1800}.\footnote{See Doreen A. Evenden, ‘Blackwell [née Blachrie], Elizabeth (bap. 1707, d. 1758)’, Oxford Dictionary of National Biography, 27 May 2010, https://doi.org/10.1093/}

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\noindent 21 \hspace{1em} John Gwynn, \textit{An Essay on Design: Including Proposals for Erecting a Public Academy to Be Supported by Voluntary Subscription ... For Educating the British Young in Drawing and the Several Arts depending thereon} (Dublin: George Faulkner, 1749), Preface, p. i.

\noindent 22 \hspace{1em} Engravings Act 1735, s.1.

\noindent 23 \hspace{1em} A Curious Herbal, \textit{Containing Five Hundred Cuts, of the most useful Plants, which are now used in the Practice of Physick. Engraved on folio Copper Plates, after Drawings, taken from the Life. By Elizabeth Blackwell. To which is added a short Description of ye Plants; and their common Uses in Physick} (London, Printed for John Nourse at the Lamb without Temple Bar), 2 vols., [1737–]1739. Lindley Library, London, 615.3 BLA VOL I and 615.3 BLA VOL II.

should be noted, however, that the stories told about Elizabeth appear to be based on two main sources, which are themselves contradictory in places. Moreover, recently discovered records from the legal case cast further doubt on some of the information therein.

The first point of confusion relates to Alexander and Elizabeth’s parentage. Piecing together the evidence, it seems most likely that Alexander’s parents were Thomas Blackwell, a professor of theology and the principal of Marischal College in Aberdeen, and his wife Christian, who was the sister of John Johnstoun, a physician and professor of medicine at the University of Glasgow. Alexander’s brother was the classical scholar, also called Thomas Blackwell. One of the dedications in Elizabeth’s *Curious Herbal* is made to John Johnstoun, identifying herself as his ‘much obliged Niece & humble Servant’. In respect of Elizabeth, new research reveals that previous statements about her parents are incorrect. One of the depositions in the court case is from Alice Simpson, who states under oath that she is Elizabeth’s mother. Who Elizabeth’s father might have been remains unknown. It seems almost impossible to imagine that Elizabeth had no training in either drawing or the craft of

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28 Deposition of Alice Simpson, 14 May 1740, The National Archives (NA), Kew, C24/1547/2.
engraving prior to producing her skillfully executed prints, and it is not known to what extent her family was involved in the print trade.

The second point of confusion is Elizabeth and Alexander’s marriage. Although several sources claim they eloped and lived in Aberdeen, records reveal that an Elizabeth Simpson of St Paul’s Covent Garden married Alexander Blackwell of St Mary le Strand on 1 October 1733 in Lincoln’s Inn Chapel, Holborn, London. Intriguingly, the creditor who initiated the bankruptcy is one Thomas Blackwell. Could this have been Alexander’s own brother? At least one source alleges Alexander assisted in the publication of Thomas Blackwell’s Life of Homer prior to his bankruptcy. According to a sympathetic report in the Bath Journal, after the bankruptcy, one of Alexander’s creditors arrested him and he was sent to prison, where he spent nearly ‘two years, in a very helpless condition’. The report further claims that it was the bankruptcy and imprisonment that spurred Elizabeth into action. She took a house close to the Chelsea Physic Garden and began to collect, draw and engrave botanical illustrations with the object of selling them to provide for herself and secure her husband’s release. This narrative was endorsed

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29 Records of the Honourable Society of Lincoln’s Inn, vol. 2 (Lincoln’s Inn, 1896), p. 595. The marriage allegation (FM I/68) and bond (FM II/70) are held at Lambeth Palace Library, London. Different claims have been made as to children of the marriage. The only child whose birth has been verified by the archival record to date is Alexander Blackwell, baptised 7 September 1742 at St Paul’s Church, Covent Garden: The Registers of St Paul’s Church, Covent Garden (London, 1906), p. 267.

30 The notice of commission of bankruptcy can be found in the National Archives at B8/4. See also London Gazette, 10 September 1734 and 26 November 1734. According to the anonymous letter in the Gentleman’s Magazine, an action was brought against him because he had not served a proper apprenticeship in the trade. We have not been able to locate any records of this action. ‘Abstract of a Letter’, p. 425.

31 Steven, The Life and Work of David Fordyce, p. 86. The book itself has no printer or publisher names on its title page, so these details cannot be verified: Thomas Blackwell, An Enquiry into the Life and Writings of Homer (London, 1735).

32 ‘Abstract of a Letter’, p. 425. The commission of bankruptcy should have protected him against imprisonment, if the creditors assented to the certificate, but we have not been able to locate any material that indicates whether or not all the creditors did so assent, nor have we found any record of Alexander’s imprisonment.

33 Ibid. Henrey has verified that the house at 4 Swan Walk was leased to Alexander Blackwell between 1736 and 1739: Henrey, British Botanical and Horticultural Literature, vol. 2, p. 228 fn. 2.
by the botanical author Richard Pulteney, who wrote in 1790 that ‘It is a singular fact, that physic is indebted for the most complete set of figures of the medicinal plants, to the genius and industry of a lady, exerted on an occasion that redounded highly to her praise’.  

**Making and Selling *A Curious Herbal***

Herbals formed a genre of published literary works which had steadily grown in popularity since the first introduction of the printing press. These books generally contained the names and descriptions of plants and herbs, together with their properties and virtues both for nourishment and medicine. In the period between 1500 and 1600, around nineteen botanical and horticultural books were published in England. Between 1600 and 1700 this number increased fivefold, to around one hundred, and in the following century around 600 individual new titles were published. Such books were a necessary tool of trade for herbalists, botanists, physicians, and apothecaries, but were also indispensable to housewives, who treated minor medical complaints of household members, as well as more serious ones when the costs of a physician lay beyond their means.

Despite this growing market, Elizabeth appears to have identified a gap for a work such as hers. She explains in the introduction that her object was to ‘make this Work more useful to such as are not furnished with other Herbals’. To do this she gave a short description of each plant, including its names in different languages as well as the time of flowering, the place of growth, and common uses in ‘physick’, or what we would today call medicinal botany. Some sources assert that Alexander provided the Latin names, but Elizabeth herself claimed to have used Joseph Miller’s *Botanicum Officinale* as her reference.
Elizabeth’s botanical prints were created by intaglio engraving. The process and technology involved in making such engravings changed very little between the sixteenth and early nineteenth centuries. The process almost always began with a drawing or painting. Copper plates were then prepared with a white wax ground, and the design was then transferred to the ground by pricking or scratching through the wax. The wax was subsequently removed and the design was completed using a burin to engrave the lines. Lettering was added to the plates after the design was finished. Since the letters, like the design, had to be done as a mirror-image, this was a specialist task usually done by letter engravers. The copper plates would then be printed off using a rolling press, and later colored, if desired. It would be normal for each of these activities to be carried out by a different specialist. Elizabeth was, if not unique, certainly unusual in carrying out the drawing, engraving of both design and lettering, and coloring herself.

Once printed and colored, Elizabeth’s prints were issued in weekly parts. Publishing in installments was a new strategy developed by booksellers during the eighteenth century; this allowed them to reach customers who would not have been able to afford large, expensive books, by selling reasonably priced segments. The practice accelerated rapidly after 1732 and was commonly used for the more expensive horticultural and botanical books. Each installment would consist of a small batch of printed sheets and was known as a part, fascicle, or number delivered at weekly, fortnightly, or monthly intervals. The sheets would be folded, collated, and stitched in blue paper. When the set was complete, the blue wrapper would be removed and the full set would be taken to a binder for leather binding.

The creation of such a volume as A Curious Herbal was an enormous undertaking, both in terms of time, labor, and expense. The strategy of selling in weekly installments would have been attractive to Alexander and Elizabeth, given their recent financial difficulties, as it required less

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initial capital and allowed them to recuperate costs as they went along. The weekly *Numbers* contained four prints (available uncolored at 1s. and colored at 2s.), and these were distributed to customers until the set was complete.\(^{42}\) Each print which she titled at the bottom and numbered at the top right (a practice she adopted throughout the series) also included, in the lower left-hand corner, the following inscription: ‘Eliz. Blackwell delin sculp et Pinxt’. This was the common abbreviation for ‘Elizabeth Blackwell delineavit sculpsit et Pinxit’ or, in English, ‘drawn, engraved and painted by Elizabeth Blackwell’.

In 1736 the *London Evening Post* announced that ‘Elizabeth Blackwell, according to the late Act of Parliament, has consented that the said Samuel Harding (only) shall sell these her Prints’.\(^{43}\) The Act to which the advertisement was referring was clearly the Engravings Act 1735. At this stage, the prints had not been collected into a book, so this was the only statute which could have protected them from piracy.\(^{44}\) However, a book was the desired end product and thus, on 28 September 1737, Alexander entered into a contract with the bookseller John Nourse. Nourse was an established London publisher and retail bookseller and, having arranged for their own printing and publishing of the book through Harding, the Blackwells may well have needed his connections to assist with sales.\(^{45}\)

The 1737 contract sold Nourse a one-third share of ‘Elizabeth Blackwell’s Herbal, which is to contain five hundred specimens of Officinal Plants engraved on five hundred Copper-Plates, and also the Third Share of the Explanation Plates, which are to be the Hundred and Twenty Five’.\(^{46}\) Importantly, the Blackwells were not selling him the copyright but rather a one-third share in the plates and in any profits. The price was 150 pounds, and as a security measure a third of the copper plates were delivered into Nourse’s possession. This contract reveals


\(^{43}\) *London Evening Post*, 17 February 1736.

\(^{44}\) As noted above, the Statute of Anne only applied to books, not individual prints produced by engraving.

\(^{45}\) It is possible that the Blackwells knew Nourse more personally through their mutual connection to the Society for the Encouragement of Learning. Nourse was one of the Society’s booksellers between 1735 and 1749 and Alexander unsuccessfully stood for the post of secretary of the Society in 1739. John Feather, ‘John Nourse and his Authors’, *Studies in Bibliography*, 34 (1981), 205–226, p. 206.

\(^{46}\) British Library (BL), MS Add 38729, [31].
that, at this time, 320 of the plant plates had already been engraved, as well as forty-five of the explanation plates. In addition, Nourse was granted the right to a one-third share in any future work by Elizabeth ‘relating to Plants Fruits or Flowers’.47

There are several points of interest to note in relation to this contract. First, as John Feather has remarked, the transaction was more comparable to granting a security against a loan than it was to the usual trading in shares of copies in the book trade.48 Second, the contract referred to the book in terms that recognized Elizabeth’s authorship, but the contracting parties were Nourse and Alexander. Interestingly, five months later, on 22 February 1738, Elizabeth added a statement to the verso side of the contract declaring that the deed of assignment was made with her consent and approbation.49 This highlights the legal challenges posed by the author’s gender. Under the doctrine of *feme covert*, Elizabeth and Alexander were regarded as one person.50 While the basic rule was that married women could own no property of their own, the law in relation to the property rights, both real and personal, of married and unmarried women was in fact both complex and unclear. It could only have been more so in relation to such a new right as that of copyright in engravings.51

In everyday life, the strict rules of coverture were frequently not observed, and many wives carried on businesses and entered into commercial transactions. Indeed, as Tim Stretton and Krista Kesselring point out, ‘If followed to the letter, the legal restrictions of coverture would have made ordinary life all but impossible’.52 Ensuring that the

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47 Ibid.
48 Feather, ‘John Nourse and his Authors’, p. 226.
49 BL MS Add 38729, [31].
50 *A Treatise of Feme Covert or, the Lady’s Law* (London, 1735), p. v.
51 The *Treatise of Feme Covert* stated, somewhat obliquely: ‘Chattels Real, being of mixt Nature, partly in Possession, and partly in Action, which accrue, during the Coverture, the Husband is intitled to by the Marriage, if he survive his Wife, albeit he reduceth them not in to Possession in her Life-time.’ (at 53). Yet, over 150 years later, lawyers were still debating whether copyright was a chose in action or a chose in possession, a categorisation which impacted how they would be treated if owned or assigned to a woman, married or otherwise. See T. Cyprian Williams, ‘Property, Things in Action and Copyright’ (1895) 11 *LQR*, p. 223; Spencer Broadhurst, ‘Is copyright a chose in action?’ (1895) 11 *LQR*, p. 64; Charles Sweet, ‘Choses in action’ (1895) 11 *LQR*, p. 238.
assignment had the consent of both husband and wife — particularly in light of the litigation they were no doubt at that time preparing to launch — was a sensible strategy. A third point of interest to note regarding the initial contract with Nourse is that the money was to be paid in two cheques of seventy-five pounds, both payable to Elizabeth’s mother, Alice Simpson. Was this an attempt to shield the money from Alexander’s creditors? Or were there other, personal, reasons for this? Again, the historical record is frustratingly silent.

In February 1739, the Blackwells clearly needed more money, perhaps to pay for the Chancery proceedings now underway, or perhaps to continue to cover their publication costs; they thus entered into another agreement with Nourse. For £319 6s. 1d., Alexander granted Nourse ‘the copy right and sole privilege of printing reprinting publishing and selling of all that book compiled written or engraved by Elizabeth the wife of the said Alexander Blackwell entitled “A Curious Herbal...,”’ as well as all the copper plates and unsold books in the Blackwells’ possession. However, the indenture went on to specify that the copyright be further divided into thirds, one third of which would be held by Nourse, and two-thirds of which were to be held by Nourse upon trust for Alexander and re-conveyed to him once he had paid Nourse the sum of £169 4s. 1d., as well as any expenses Nourse had incurred in publishing the book. 53

On 2 October 1740, both Alexander and Elizabeth signed an assignment to Nourse of a one-sixth share of the copyright, copper plates and copies of the Curious Herbal in exchange for 75 pounds, stating that this meant Nourse now owned half of the book outright, when combined with the one-third share he had bought in September 1737, and continued to hold the other half on trust for Alexander. 54 In April 1747, Elizabeth sold Nourse the remaining half of her copyright. She entered into this transaction on her own as Alexander was now living in

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53 BL MS Add 38729, [37]. On 29 March 1739, there is an entry in Blackwell’s account with Nourse referring to Alexander having received £11 4s. 2d. from Harding, indicating a possible date when their relationship ended: see Henrey, vol. 2, 234, fn 43b. At this point the title-leaves of both volumes were cancelled, and cancellantes dated 1739 were printed with Nourse’s name replacing Harding’s. There are some mixed sets, including the one held in the British Library: J. Feather, ‘John Nourse and his Authors’, p. 206.

54 BL MS Add 38729, [38].
Sweden and had given her a power of attorney. At this time, Elizabeth still owed Nourse £108 13s., and the remainder of the copyright, the unsold copies of the books and the copper plates were sold for £20 in addition to the cancellation of that debt.

The contracts with Nourse provide a rich source of information on the publication history of the *Curious Herbal*, yet some mysteries remain in addition to those already mentioned. The way that the book was issued and compiled means that all extant copies are slightly different. It is unclear when the second volume was published, although it seems likely to have been in 1739, as it contains a dedication to John Johnstoun dated 17 January 1739. The dedications and the commendation are particularly striking aspects of the book, both in nature and number, and owing to the additional background information they provide.

Most extant copies of the first volume of the *Herbal* contain a commendation from the Royal College of Physicians, dated 1 July 1737, with the names of the College President, Thomas Pellett, and those of the four censors, Henry Plumptre, Richard Tyson, Peirce Dod and William Wasey. It is accompanied by an illustration that one supposes Elizabeth intended to represent the arms of the College, but which contains two modifications: the arm emerges from the left side of the shield and, as underlined by Henrey, the pomegranate is depicted more like a thistle.

Inserted in different versions of the work are a number of additional dedications. These include a dedication to Richard Mead, physician to George II, who Elizabeth states was first to advise her to publish the work; to Sir Hans Sloane, who gave the author permission to draw such foreign plants from his specimens ‘as were not to be found in England’, and to the physician Alexander Stuart, who showed ‘some of the first drawings at a publick herbarizing of the worshipful Company

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55 BL MS Add 38729, [39].
57 Not all editions include the informative and personal dedications. The two volumes held at the Lindley Library (London) seem to be the most complete, 615.3 BLA VOL I and 615.3 BLA VOL II. The British Museum holds editions from 1737, 1739 and 1782, as follows: 1737 (shelfmark 452.f.1,2) — this copy was formerly owned by Sir Joseph Banks; 1739 (shelfmark 34.i.12,13) — formerly owned by King George II, and 1782 (shelfmark 445.h.6,7) — possibly no former owner, the original British Museum Library copy.
of apothecaries’ and who recommended the author to the friendship of Isaac Rand of Chelsea. Isaac Rand, apothecary and director of the Chelsea Physic Garden, was another dedicatee, Elizabeth says that without his assistance and instruction this undertaking ‘wou’d have been very imperfect’ as she claims (perhaps modestly) that she has ‘no skill in botany’. Other dedicatees include the physician and botanist James Douglas, Henry Plumptre, later President of the Royal College of Physicians, Dr. John Johnstoune, as mentioned above, and the apothecary Robert Nicholls, who gave a deposition in the court proceedings (see below). While it was common for botanical and horticultural works to be dedicated to well-known physicians, apothecaries and botanists (Richard Mead being a popular dedicatee), the sheer number included by Elizabeth stands out. Was she emphasizing her scientific credentials and connections to balance out gender bias?

The use of dedications also assisted with sales, and many of those to whom the book was dedicated were also purchasers. Nourse invested in advertising the work, and the accounts reveal he spent £5 8s. for advertisements in the country papers, and £5 6s. 6d. for advertising in the London papers. The advertisements state that the ‘setts are colour’d by Mrs. Eliz. Blackwell’ and engraved ‘from Drawings taken after the Life.’ They also include references to the endorsements by the Royal College of Physicians. The work’s appeal derived from its scientific and systematic approach as well as its entertaining nature. The prints were advertised as ‘curious and useful’ and aimed at an educated public of scientists and taxonomists, botanical enthusiasts.

59 Blackwell, A Curious Herbal, vol. [2], 1739 (Lindley Library, 615.3 BLA VOL II., between Plates 400–401).
61 BL MS Add 38729, Account of Outstanding Debts on Acct of the Herbal [32].
63 London Evening Post, 23–26 May 1747; Country Journal; or, The Craftsman, 27 March 1736.
64 The important endorsement from the Royal College of Physicians is mentioned in newspaper advertisements. See for example London Evening Post, 17–19 June 1736; and Country Journal: Or The Craftsman, 27 March 1736. The Old Whig: Or The Consistent Protestant (7 July 1737) states that ‘Mrs. Blackwell was introduced to the President and Censors of the College of Physicians by Mr. Rand, when she had the Honour to present them with the first Volume of her Plants, colour’d, which they were pleased to accept; and as a Mark of their Approbation, they honoured her with [a] […] publick Recommendation’ endorsed by Thomas Pellet, Henricus Plumptre, Richardus Tyfon, Peircius Dod, and Gulielmus Wafey.
and print collectors. We know that purchasers of the volume also included the Duke of Richmond, the Countess of Aylesford, and the Bishop of St Asaph. 

The Proceedings in Chancery

Elizabeth’s connections in the world of science and botany were not sufficient to protect her from the cut-throat world of the print trade, nor from the unauthorized copying which was endemic to it. Nor was she the first author of a botanical work to complain of piracy. On 18 March 1732 a notice appeared in Fog’s Weekly Journal warning readers against a pirated edition of Robert Furber’s Twelve months of flowers. Elizabeth was, however, the first to take legal action. On 9 March 1738, Elizabeth and Alexander commenced proceedings in the Court of Chancery by bringing a Bill of Complaint against a number of London printsellers whom they accused of copying Elizabeth’s prints. As previously noted, there was only one authorized seller of Elizabeth’s prints. An advertisement in the Country Journal; or, the Crafstman, dated 6 May 1738, states that the ‘first Volume and what is finish’d of the second, is sold by Samuel Harding, Bookseller, in St. Martin’s-Lane; and no where else’; it emphatically warns

of a spurious and base Copy of this Original Work; one Number of which has been lately publish’d and sold by the underwritten Printsellers and Engravers, viz. George Bickham, jun., Philip Overton, John King, Thomas Bakewell, John Tinny, Samuel Simpson, Stephen Lye, Thomas Harper.

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65 See for example, London Evening Post, 23–26 May 1747; General Evening Post, 7–9 April 1748; and London Evening Post, 16–18 May 1749.
66 BL MS Add 38729, Account of Outstanding Debts on Acct of the Herbal [32].
68 It is interesting to note that two years after Elizabeth’s suit was commenced, her own mentor Philip Miller discovered that his extremely popular book Gardener’s Calendar had been pirated; his publisher Rivington sought an injunction in Chancery: Rivington v. Cooper (1740), National Archives (NA), C11/1566/42.
69 NA, C11/1543/7 no. 1.
70 Country Journal; or, the Crafstman, 6 May 1738. The copy of Volume II of the Curious Herbal held in the British Library, which indicates it was published by Harding, also states on the title page a publication date of 1737. Based on this advertisement, as well as evidence from the contracts with Nourse discussed above, this date would appear to be false.
These were the defendants against whom the case was being brought. The inclusion of both Blackwells as plaintiffs is of interest. *A Treatise of Feme Covert* (1735) explained: ‘Where Baron and Feme [sic] sue for personal things, they shall not join unless such things are in Action, and then it is in the Election of the Husband to join his wife or not. But where they have a joint interest they must join’. The question of who owned the property in question was one that the Court had to consider, and will be examined in more detail below.

It is also important to note that although the advertisement quoted earlier refers to a complete ‘Volume’ and ‘a spurious and base copy’, the suit in question was brought not in respect of the *Curious Herbal* as a book, but in respect of four of the engraved prints. The Bill of Complaint stated that Elizabeth had with ‘Labour and Expence […] invented Designed Etched and Engraved […] Three hundred and sixty prints being the representations of Sundry Official plant or plants’; but, of these, the prints at the subject of the suit were the Dandelion (which she labelled ‘Plate 1’), the Garden Cucumber ‘Plate 4’, the Red Poppy ‘Plate 2’ and the Pansy, or Heart’s Ease ‘Plate 44’ (see Figs 1–4). Resting the case on the copying of the prints rather than the book meant that it clearly engaged the brand-new Engravings Act.

Certainly, the Blackwells seemed aware that they were the first to make use of the new statute, because their Bill commenced by providing some background to it. They explained to the court that the 1735 Act had been passed as a response to the unauthorized copying of historical and other prints, ‘to the very great prejudice and Detriment of the Inventors Designers and proprietors thereof’ and its object was to provide a remedy and prevent such practices in the future. They went on to complain that although Elizabeth had made the engravings after the Act was passed

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71 *A Treatise of Feme Covert*, p. 88. The uncertainty over whether copyright was a chose in action or a chose in possession is referred to above in note 50.
72 NA, C11/1543/7 no. 1. The reason for this particular selection amongst Blackwell’s prints is unknown, but this is the order in which they are listed in the Bill of Complaint (where the dandelion print is given a different number).
73 It does not appear that either the Blackwells, Harding or Nourse ever registered the book at Stationers’ Hall. This would have precluded them from obtaining the penalties under the Statute of Anne (s.2) but not from bringing an action for ordinary damages, or indeed common law copyright. For some discussion of this, see Arostegui, ‘Untold Story’, pp. 1306–1307.
74 NA, C11/1543/7 no. 1.
Figs. 1–4 Elizabeth Blackwell, *A Curious Herbal*, vol. 1, John Nourse (1739), Medical Historical Library, Harvey Cushing/John Hay Whitney Medical Library, Yale University. Dandelion ‘Plate 1’; Red Poppy ‘Plate 2’; Garden Cucumber ‘Plate 4’ and Pansy, or Heart’s Ease ‘Plate 44’.
and had published them on 1 July 1737, several printers and printsellers had nevertheless engraved and sold copies of Elizabeth’s four works without her permission.

The chief argument of seven of the defendants was that they had been supplied by George Bickham the younger, and that as soon as they had discovered that the Blackwells had asserted their title in the prints they returned all the prints to Bickham. Bickham was a talented political satirist who, according to his biographer Timothy Clayton ‘often sailed close to the wind in matters of piracy, obscenity and political acceptability’. The court had to issue a number of additional orders in an attempt to get Bickham to appear and answer the complaint, and he eventually submitted his Answer on 18 December 1738.

In May 1740 a number of depositions were taken. The deponents included the apothecary Robert Nicholls, who testified to Elizabeth’s creation of the engravings from specimens of plants he had supplied, and Elizabeth’s own mother, Alice Simpson, who testified she had witnessed Elizabeth making the engravings. The most famous of the deponents was William Hogarth himself. Hogarth was appearing as an ‘expert witness’ on the fact of copying, deposing on 16 May 1740 that the prints sold by Bickham were copies of those made by Elizabeth. It is unfortunate that the short deposition, which includes the letters and numbers identifying each of the four prints and respective copies, is addressed only to the factual question of copying. It does not provide a rationale upon which Hogarth based his evaluation, and rather un informatively states that ‘the time when or by whom’ Elizabeth’s works were ‘reprinted or Copyed this deponent cannot set forth’.

The case was eventually heard by Lord Chancellor Hardwicke on 8 December 1740. By this stage, the defense had been reduced to two key issues: first, whether prints copied from nature fell within the ambit of the statute; and second, whether Elizabeth Blackwell had complied with the terms of the statute so as to bring her engravings within its protection. We now turn to consider each of these issues in more detail.

75 NA, C11/1543/7 no. 2; C11/1543/11.
77 NA, C11/1546/6 no. 2.
78 NA, C24/1547/2.
(a) The Meaning of Invention

From the outset, Alexander and Elizabeth anticipated that a chief objection to their claim would focus on whether the prints were ‘invented and designed’ by Elizabeth. The initial Bill of Complaint emphasized Elizabeth’s ‘great Labour and Expense’ in inventing, designing, etching and engraving the prints and went on to state that the defendants ‘pretend that if your Oratrix did design the said prints yet that they being taken from nature are not to be considered as historical or other prints invented by your Oratrix within the meaning of the aforesaid Statute’.  

They sought to forestall this claim with their evidence by deposition. The apothecary Robert Nicholls deposed that he had provided some of the botanical specimens to Elizabeth as her models, and also stated she had employed others to color some of the completed engravings, copying from ‘original prints of her own painting’, because she did not have time to paint them all. The assertion is of interest in view of inconsistencies in the treatment of line and color within and between volumes. Such is the case, for example, in Peas ‘Plate 83’, where the patchy coloring of the legume pods in the first volume of the *Curious Herbal* from the Medical Historical Library at Yale University (see Figure 8) contrasts with the more detailed lines and richer tonal variations of the images in both the Lindley Library and the British Library’s volumes. Whether Elizabeth hired or received help from others remains unknown, yet, importantly, Elizabeth’s mother deposed that Elizabeth was the ‘Inventor and Author’, noting that she was best able to assert this as her daughter carried out the engravings in her presence.

George Bickham had several lines of defense. He argued that ‘the Engraving or Etching of the Representation of any plant flower or vegetable’ is not such an ‘Invention or Design’ intended by Parliament to fall within the Act, because it is ‘only the effect of Labour and not of Genius or Invention’. He also alleged that he had made the engravings

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80 NA, C11/1543/7 no. 1
81 NA, C24/1547/2. When Nicholls says ‘paint’ he is referring to the coloring of the black and white engravings.
82 Blackwell, *A Curious Herbal*, vol. 1, Medical Historical Library, Harvey Cushing/John Hay Whitney Medical Library, Yale University; Lindley Library (615.3 BLA VOL I) and British Library (shelfmark 452.f.1).
83 NA, C24/1547/2.
84 NA, C11/1546/6 no. 2.
without copying Elizabeth’s. Here he seems unable to avoid a small dig at Alexander’s failure to have been properly apprenticed in the trade, noting that ‘having served a regular apprenticeship to an Engraver and having set up and followed that Business,’\textsuperscript{85} he (Bickham) had decided it would be profitable to engrave some prints of herbs, flowers and vegetables, and that he did so not by copying from the Complainant but by etching from drawings or the plants themselves. Thus, any likeness between his prints and those of Blackwell ‘cannot be avoided they being Representations of the same plants and vegetables’.\textsuperscript{86} He went on to argue that his prints were ‘original Designs […] taken from Nature and the Similitude of those prints owing to this Defendants own Genius and Invention and done in a manner as he apprehends much better than the Complainants plates’.\textsuperscript{87}

It is of particular import to note the inherent contradiction of Bickham’s first and third claims. Both assert the centrality of ‘genius’ and ‘invention’ to the protection offered by the Act, but the former denies such characteristics to botanical prints, while the latter emphasizes them. This demonstrates the very real uncertainty as to the scope and operation of this new statute, and the interpretation that the court would take of the words ‘design’ and ‘invent’.

There are several sources of the argument and decision before Lord Hardwicke. There are two printed reports: one in Barnardiston’s Chancery Reports, and another in Atkyns’ Reports.\textsuperscript{88} There are also two manuscript reports held by the British Library which appear to be identical as well as Lord Hardwicke’s own notes on the case and notes from the collection of shorthand documents by Sir Dudley Ryder.\textsuperscript{89} Both Atkyns and the manuscript reports in the British Library include information about the arguments; both state that the Attorney-General’s first objection on behalf of the defendant was that Elizabeth could not be considered as falling within the intent of the Act because she was not

\begin{footnotes}
\item[85] Ibid.
\item[86] Ibid.
\item[87] Ibid.
\item[89] BL Add MS 36,015; BL Hargrave MS 412; BL Add MS 36,050; Blackwell v. Harper (1740), printed in Sir Dudley Ryder, Ryder Shorthand Documents (1973), p. 7 (Transcription of legal notes held at Georgetown University Law Library, original manuscripts held in Lincoln’s Inn Library. The authors are grateful to Tomás Gómez-Arostegui for sharing his copy with them).
\end{footnotes}
an ‘inventor’. According to Atkyns, ‘engraving is not properly inventing, and therefore is not within the act, unless it had been something within the mind, and not already in nature, as all these plants certainly are’.\(^{90}\) Likewise, the MS report recorded the argument as ‘she is not within the Intent of the Stat. for these are only Copys from Nature & no Inventions & the Stat: designd this benefit only to persons who form’d designs out of their own Fancy — as Historical — Allegorical Prints &c’.\(^{91}\)

Lord Hardwicke declined to take such a narrow interpretation of the word ‘invention’. The precise words he used vary between the different reports, but all agree he stated something along the following lines: ‘I do not think the act confines it merely to invention; as for instance, an allegorical or fabulous representation’.\(^{92}\) Moreover, the reports agree he went on to explain that the Act could cover a print of something already in nature, and mentioned that prints of a garden, a building and the city of London could all be covered by the Act. The only way that Bickham and the printsellers would be able to escape liability under the Act would be to show that Elizabeth had copied the prints from ones already in existence.\(^{93}\)

Lord Hardwicke’s judgment assisted in interpreting the scope of the Act in one respect — namely that ‘design and invent’ did not require a depiction of an imagined image. In other words, it extended beyond the fabulous and allegorical prints of William Hogarth to cover many other types of prints that made up the popular print market. Yet it left two gaps: first, the question of whether prints copied from drawings or paintings could be considered the product of ‘design and invention’. Indeed, Lord Hardwicke opened this up as an issue in his discussion of the particular provision in the 1735 Act in relation to John Pine’s tapestries contained in Section 5 of the Act:

> And whereas John Pine of London, engraver, doth propose to engrave and publish a set of prints copied from several pieces of tapestry in the house of lords, and his Majesty’s wardrobe, and other drawings relating to the Spanish invasion, in the year of our Lord one thousand five hundred and eighty eight; be it further enacted by the authority aforesaid, That the said John Pine shall be intitled to the benefit of this act, to all intents and purposes whatsoever, in the same manner as if the said John Pine had been the inventor and designer of the said prints.\(^{94}\)

\(^{90}\) Blackwell, 2 Atk. 93, 93.

\(^{91}\) BL Hargrave MS 412, fol. 131r.

\(^{92}\) Blackwell, 2 Atk 93, 94.

\(^{93}\) Blackwell, 2 Atk 93, 94–5; Barn C 209, 212; BL Add MS 36,015.

\(^{94}\) Engravings Act 1735, s5.
Lord Hardwicke explained that the existence of this clause was not an argument in favor of the defendants, as it dealt with a different situation. According to Atkyns, he stated: ‘If it had not been for the clause thrown in for Mr Pine’s benefit, any body might have copied the prints of the hangings in the House of Lords, for what is tapestry but copies taken from drawings’.95 This was explained a little more fully in the Barnardiston report, which stated ‘that Print cannot be an Invention, it being only a mere Copy from the Tapestry. All Tapestry is made from Drawings; the Drawing is the Invention, the Tapestry is a Copy from the Drawings, and consequently Mr Pine’s Prints are only Copies from Copies’.96 He went on to say that ‘The present Prints are of quite another Nature, and clearly Inventions within the Meaning of the Act’.97 The explanation, however, requires one to overlook the reality of making any engraving. It would be very rare for the design to be applied directly to the copper plates without the prior creation of preliminary design drawings. The Lord Chancellor’s reasoning therefore creates a distinction between drawings made solely for the purpose of being copied onto plates, and drawings (or paintings) with an independent aesthetic value, but this distinction goes entirely unobserved.

Second, Lord Hardwicke markedly failed to provide a legal definition or standard of ‘invention’. It is in fact noteworthy that every participant in the case also characterized Elizabeth’s prints as factual, precise and objective depictions of plants in actual existence. Yet, this is exactly what they were not and could never be. As Kärin Nickelsen explains, botanical illustration in the eighteenth century was not intended to produce what we could today call ‘photographically exact’ copies of nature. Rather, draughtsmen ‘consciously applied specific strategies (such as simplifying, schematizing and exaggerating details as well as unrealistically combining several stages of development in the life-cycle of a plant) that sometimes rendered their illustrations quite unlike real-life specimens of the depicted species’.98 Thus, much of the skill and labor expended by Elizabeth was devoted to ensuring that she depicted all of the elements needed to demonstrate the plant’s qualities and

95 Blackwell, 2 Atk 93, 95.
96 Blackwell, Barn C 210, 211.
97 Ibid.
features for its scientifically-minded audience, while at the same time creating the illusion of facticity which gave her work its very authority.

As noted above, Elizabeth was unusual in combining in one person the skills that were more commonly distributed amongst a group of skilled craftsmen: namely, the draughting of the initial design, the engraving (itself a task sometimes divided between those with specific expertise) and the coloring of the completed images. Carl Linnaeus himself wrote in his *Philosophia Botanica* (1751) ‘A draughtsman, an engraver and a botanist are equally necessary to produce a praiseworthy image; if one of these is at fault, the image turns out to be flawed’.99 Yet, Elizabeth appears to have mastered all of these skills, even if she did have the assistance she refers to in her various dedications.

Detail and accuracy of illustrations were a primary concern in botanical works, enabling comparative analyses, identifications, and classifications. In the words of the seventeenth-century English botanist John Ray, many ‘looked upon a history of plants without figures as a book of geography without maps’.100 As with the latter, the choice of what is included or excluded is key and, in fact, as Nickelsen explains ‘using the results of successful predecessors was the best way to avoid mistakes and allowed the players to start their work at a comparatively high level’.101 Elizabeth was not exempt from this practice, but what made hers unusual was that she was careful to acknowledge others when she did copy from them. She in fact copied some of her drawings from Henricum van Rheede, van Draakestein’s *Hortus indicus malabaricus*, published in Amsterdam in twelve volumes between 1678–1703; yet acknowledgement is contained in the descriptive text accompanying each plant.102 In her description of the Indian Berry Tree ‘Plate 389’ she concedes: ‘This Specimen I had from the Malabar Garden. Vol. 7. Tab. 1 & the separate Fruit from Mr. Joseph Millar’.103 Elizabeth also admits to have copied elements from Mr. Nicholls ‘Plate 395’ but in the case of the

99 Ibid., p. 68.
100 John Ray, *Correspondence*, 1848, p. 155.
Embrick Myrobalan ‘Plate 400’, also copied from the Malabar Garden, she specifies: ‘the Fruit that is open and divided I did from the Life’.104 Elizabeth drew from ‘life’, employing the carefully curated specimens from the Chelsea Physic Garden, and it should be noted that her bright and lively colors distinguish her representations from van Draakestein’s uncolored works.

Botanical illustrations were the product of direct observation, yet this did not supplant artistic and technical merit. Elizabeth’s creative impulse is evinced in the curious juxtaposition of elements (Water Lilly Roots ‘Plate 499’, see Figure 5) and her rich and vibrant compositions (Asch Colour’d Lichen ‘Plate 336’). Also, it is revealed in her playful yet balanced representations, as seen in a Hart’s Tongue ‘Plate 138’ and Wake Robin ‘Plate 228’ (as seen in Figures 6–7) which bring to mind the sensual nature of Georgia O’Keeffe’s modern works, three centuries later.

Fig. 5 Water Lilly Roots ‘Plate 499’ from Elizabeth Blackwell, A Curious Herbal, vol. 2, John Nourse (1737), Medical Historical Library, Harvey Cushing/John Hay Whitney Medical Library, Yale University.

104 Ibid.
A combination of aesthetic, scientific, and technical mastery of the art of engraving were all necessary in rendering an image of high quality. Elizabeth’s reputation resided precisely in the inclusive treatment of all three aspects. Indeed, her work was so respected that it was itself copied. A German edition, *Herbarium Blackwellianum Emendatum*, was published in Nuremberg in five volumes in the 1750s, with a supplementary volume in 1773 of a large number of extra prints. The volumes were edited by Christoph Jacob Trew and the images redrawn and engraved by Nicholaus Friedrich Eisenberger. The title page states that it is an amended and improved version of Elizabeth’s work, and although it clearly gives attribution to her authorship, Elizabeth did not receive any monetary compensation.\(^\text{105}\) Of course, in the absence of international copyright law there was no legal entitlement for her to seek.

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\(^{105}\) *Herbarium Blackwellianum Emendatum*, ed. by Christoph Iacobi Trew, 6 vols. (Nuremberg, [1752] 1757–1773), Lindley Library, 615.3 BLA VOL I–VI.
Eisenberger closely reproduced Blackwell’s prints adding the title and other descriptive terms in German at the bottom of the works, as well as providing other details. For example, his version of the Peas, also numbered ‘Plate 83’, includes various blossoms of the flowering cycle.\footnote{See the \textit{Herbarium Blackwellianum Emendatum} in the Lindley Library (615.3 BLA VOL I–VI) and the Toronto Public Library (Baillie Special Collections 581.6 V. 1–6).} Eisenberger’s prints seem to have continued to circulate, gaining new information and details in an effort to provide greater knowledge. Figure 9 shows a separate print of the Peas with a French title and the more specific Latin name \textit{Pisum Sativum L.} now inscribed, but whether these additions were made by its owner, a collector, or a seller pursuing the French market remains unknown. A comparison between Blackwell’s Peas ‘Plate 83’ (Figure 8) and the version with the French caption (Figure 9) shows how closely her image was copied. Following the convention of botanical illustrations, each specimen is rendered against a blank background. The image is almost identical except for the appearance
of an unopened legume and a detailed flower stem (both on the left) as well as the addition of another split pea and the repositioning of the open pod to the right. The size and appearance of the leaves, stems, and curly tendrils of her artistic composition have all been retained. The similarity with Elizabeth’s works is also unmistakable in other images, such as the Citrul or Water melon ‘Plate 157’, where the arrangement is virtually the same, and where only a few details and dissected parts have been added.

(b) Property and Formalities

Alongside claims about lack of invention, the second main line of defense was that Elizabeth had failed to comply with the requirements of the Engravings Act because she had not included the correct information on each print. The Act stated, somewhat opaquely, that:

Every person who shall invent and design, engrave, etch, or work in Mezzotinto or Chiaro Oscuro, or from his own works and invention, shall have the sole Right and Liberty of printing and reprinting the same for the Term of Fourteen years to commence from the Day of first publishing thereof, which shall be Truly engraved, with the name of the Proprietor on each Plate, and printed on every such Print or Prints.\(^{107}\)

The Attorney-General argued that this provision meant that the name of the proprietor of the copyright must be included on every print, for ‘Mrs Blackwell might both delineate and engrave them, and yet not be the proprietor of them’.\(^{108}\) Further, the day of the first printing ought also to be included ‘that all mankind might know when it commences, and when it expires’.\(^{109}\) As noted above, on each of the prints in question, Elizabeth had included the phrase ‘Eliz. Blackwell delin sculp et Pinx’, but she had not specifically named herself as proprietor, nor included the day of publication. The question of whether Elizabeth could own property under the doctrine of feme covert has been discussed above. The evidence provided by the contracts with Nourse indicates that her husband, Alexander, was the appropriate contracting party, although the inclusion of Elizabeth’s endorsement suggests that there may have

\(^{107}\) Engravings Act 1735, s.1.

\(^{108}\) Blackwell, 2 Atk 93, 93.

\(^{109}\) Ibid.
been some uncertainty about this. There was, however, no uncertainty in the court. According to Atkyns, Lord Hardwicke stated:

The second objection is, as to the directions of the act, that Mrs Blackwell has not complied with the terms of it so as to vest the sole property in herself. *Elizabeth Blackwell sculpsit et delineavit* is sufficient, and are the very words of the act of parliament to shew the person to be proprietor.\(^{110}\)

There is no suggestion here that gender was a consideration for the Lord Chancellor. Indeed, by the time the case was reported, the existence of Alexander seems to have been deemed irrelevant. He is not mentioned at all in the Atkyns report and the Barnardiston report refers to him simply as a long dash (‘Wife of — Blackwell’).\(^{111}\)

The Lord Chancellor held that the day of first publishing did need to be included. He drew an analogy here with the Statute of Anne and the case of *Baller v. Watson*, in which the question had arisen as to whether the book needed to be registered at Stationers’ Hall. He concluded that the day of publishing needed only to be included if the owner wished to take advantage of the penalties in the Act.\(^{112}\) Since Elizabeth had not included this information on the prints, she could be awarded a perpetual injunction, but not the penalties in the Act (5 shillings per print) nor the costs of suit. Moreover, the Lord Chancellor also considered that this was not a case in which it was appropriate to award an account of profits, because the profits involved were so small and it would be unjust to the defendants who had no notice of the date on which the prints were first published.

The litigation was therefore only a partial victory for Elizabeth and does not seem to have solved her financial woes. Before the decree was even handed down, she and Alexander had sold Nourse a further one-sixth share, as noted above. Alexander took up a position as superintendent of works for the Duke of Chandos, but did not entirely

\(^{110}\) *Blackwell*, 2 Atk 93, 95.

\(^{111}\) *Blackwell*, Barn C. 209, 209.

\(^{112}\) *Baller v. Watson* (1737) 2 Swans 431. Lord Hardwicke’s reasoning on this point is not clear to modern eyes. According to Atkyns’ Report, he states that the words of the statute are ‘only directory and not descriptive of the day, and that they are only necessary to make the penalty incur.’ *Blackwell*, 2 Atk 93, 95. The words ‘directory’ and ‘not descriptive’ are also referred to in the Barnardiston report, while the MS report refers to the words being ‘directory’. He appears to be stating that the requirement is not necessary to enliven the property right itself but only to give access to the statutory remedies. Barn C. 209, 213.
abandon the world of books, publishing *A New Method of Improving Cold, Wet and Clayey Grounds: Particularly Clayey-Grounds ... as practiced in North Britain* in 1741. The work is dedicated to Cockin Sole, Esq. and contains only a few technical illustrations. A year later, in 1742, Alexander traveled to Sweden, where he became involved in political intrigues and was executed for treason on 9 August 1747. Elizabeth apparently remained in London but vanishes from the records to live on only in her *Curious Herbal*. The famous biologists Carl Linnaeus and Albrecht von Haller both mentioned her work. A century later, in 1806, Richard Weston, a well-known writer on agriculture and gardening wrote: ‘This work still continues in such esteem as to keep up its original price of six or seven guineas, and 10 on large paper, in the modern sale catalogues’.

**Conclusion**

The case of *Blackwell v. Harper* is both significant and fascinating in the history of visual copyright, lying as it does at the intersection of questions about gender, authorship, and contemporary understandings — both cultural and legal — of what makes a work protectable by copyright law. Today, we might examine this latter question in terms of whether the work can be said to be ‘original’ and whether that, in turn, means of aesthetic value, demonstrating creativity, an investment of labor and money, or some combination thereof. In 1740, however, the question was couched in terms of what it meant to ‘design and invent’ under the terms of the Engravings Act of 1735. While the arguments of the parties, and the circumstances in which the prints were created, may have offered Lord Hardwicke the opportunity to provide guidance on what factors might be relevant to establishing the meaning of these words as


114 In a letter, dated 11 January 1739, Albrecht von Haller wrote to Carl Linnaeus: ‘In England Elizabeth Blackwell has published a herbarium consisting of 500 copper plates, with new illustrations for common plants.’ The letter is available online at the Alvin — Platform for digital collections and digitized cultural heritage: www.alvin-portal.org/alvin/view.jsf?pid=alvin-record%3A223184&dswid=5940. In another letter that appears to be between Linnaeus and Jacob Jonas Björnstahl, Den Haag, 28 February 1774, Elizabeth’s name and her *Herbal* are listed in a group of ‘artists’ who ‘in recent years [...] have ‘produced pictures of plants in color’. See www.alvin-portal.org/alvin/view.jsf?pid=alvin-record%3A233558&dswid=-1718.

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a matter of law, he did not do so. Instead, he simply stated what was not required: that is, fabulous or allegorical representation. Further, by treating images of plants, alongside those of other objects such as buildings and gardens, as simply ‘copied from nature’ or the real world, and failing to recognize the artistic skill and aesthetic choices inherent to making such images, he was able to sidestep the question of whether ‘invention’ required a particular level of creativity, or its relationship to the connotations the word held within the artistic community.

By simply stating that Elizabeth was the proprietor of the copyright in the prints, Lord Hardwicke also sidestepped the question of gender. However, even though gender was not addressed in the court does not mean it was irrelevant. Elizabeth had worked hard to establish her claim to both authorship and authority. Moreover, she had done so in terms that seem to have been carefully calibrated not to upset the paradigm of male authorship. Her numerous dedications to her scientific mentors and champions sought to establish the scientific repute of her work, but she also played down her own contributions with an expected level of feminine modesty. As noted, she insisted that without Rand’s assistance her work ‘wou’d have been very imperfect’ due to her lack of ‘skill in botany’, and recognized Miller for descriptions and information ‘extracted […] with his consent’ and furnishing her with rare specimens.\(^{116}\)

Even the narrative around Elizabeth’s impetus for creation is gendered, with close-contemporary and later accounts all emphasizing her noble motivation to support her family, rescue her husband and pay off his debts. Recently, attention has been paid to the masculine nature of the Romantic author;\(^{117}\) Mark Rose, for example, has drawn attention to the difficulties caused by ‘the [romantic] notion of the author as a creative man who by virtue of imposing the imprint of his unique


personality on his original work makes them his own’. Shelley Wright has also commented upon the impact of possessive individualism in copyright law, explaining:

The existing definition of copyright [...] presupposes that individuals live in isolation from one another, that the individual is an autonomous unit who creates artistic works and sells them, or permits their sale by others, while ignoring the individual’s relationship with others within her community, family, ethnic group, religion — the very social relations out of which and for the benefit of whom the individual’s limited monopoly rights are supposed to exist.

Printing in the eighteenth century was still a trade that was carried out mostly in the home; this facilitated participation by women, an aspect that has only begun to be explored. Elizabeth’s authorship and its assertion were intrinsically situated in the domestic sphere and in her community: they involved her mother (who witnessed her labors), her husband (whose troubles impelled her), and her relationships with apothecaries, gardeners, physicians, and even the leading painter and engraver of the day, William Hogarth. While the collaborative nature of her work is emphasized in the publication itself through the various dedications, and emerges through the legal documents, the decision of the Lord Chancellor saw only one authorial proprietor — Elizabeth.

Furthermore, legal and other sources tell us almost nothing about the reality of Elizabeth’s internal life or motivations. Was she a victim of her husband’s improvidence? Was he exploiting her labor for his own gain? Or was she a willing and supportive economic agent in her own right? Did she consider herself an artist expressing her creative and authorial ambitions, or a natural philosopher engaged in furthering knowledge for the public benefit? Certainly, she was far from passive in the story of her life. A treatise published in 1735 entitled The hardships of the English laws

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The contributions of women to the print trade is the subject of Female Printmakers, Printmakers, Publishers in the Eighteenth Century: The Imprint of Women 1735–1830, ed. by Cristina S. Martinez and Cynthia Roman (Cambridge: Cambridge University Press, forthcoming).
in relation to wives attacked coverture and asserted that married women were ‘Dead in Law’. But Elizabeth was not dead. She created property rights through her skill and labor, she entered into contracts in relation to these rights, and she brought a legal action enforcing them in which the court clearly recognized her as a proprietor. The case that Elizabeth brought before the courts is significant in terms of copyright’s history and the development of copyright doctrine, particularly in relation to how courts approach cases involving artistic works. In addition, attending to gender enriches the story by stimulating insights in relation to the history of women as legal and economic actors more generally. 

Examining Elizabeth’s story and her involvement in the birth of artistic copyright law also raises questions about the kinds of authors copyright protects and rewards. It reminds us that much of the rhetoric in copyright law and policy is directed at those who create for individual fulfilment and public benefit, rather than those who might create to benefit their family or community, and might prompt us to question whether one set of motivations is inherently more worthy of encouragement or reward. It is hoped that an examination of the case of Blackwell v. Harper which initiates this volume not only offers the first glimpses into the complexities surrounding the role played by creativity in copyright law — whether addressed in terms of invention or originality — but also serves to give proper recognition to the key role that a woman played in copyright history. In fact, Elizabeth Blackwell’s inventive and laborious work planted the seeds for the germination of visual copyright law.

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