6. A Venetian Experiment on Perpetual Copyright

Maurizio Borghi

The recognition that rights pertaining to intellectual creations are of limited duration is one of the 'constitutional moments' in the making of many copyright laws at the end of the eighteenth century. In the English case of *Donaldson v. Becket* (1774) the House of Lords rejected the claim that authors were entitled to perpetual copyright in their published work, and decisively affirmed the pre-eminence of the statutory time-limited protection.[1] In France, the royal *arrêt* of 30 August 1777 on the duration of privileges established a seminal distinction between authors' absolute property right in their creations and the limited duration in the exercise of such right once it has been transferred to a publisher.[2] On the other side of the Atlantic, the principle of limited duration for rights pertaining to creations and inventions has been entrenched in the so-called 'intellectual property clause' of the Constitution of the United States, which came into effect in 1789.[3]

It was in the same period of time that the Prince of Venice approved a ruling on the art of printing.[4] It was just the last of the many attempts to improve the fortunes of a printing industry that found itself increasingly incapable of replicating the performance of its renowned past. The

1 See Ronan Deazley, 'Commentary on *Donaldson v. Becket* (1774)', *Primary Sources*, and the bibliography quoted therein.

2 'French Decree of 30 August 1777 on the Duration of Privileges', *Primary Sources*.

3 The constitutional clause provides that Congress shall have the power: 'To promote the Progress of Science and useful Arts, by securing *for limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries' (Const. U.S. Art. 1, § 8, Cl. 8) (emphasis added). On the backgrounds of the clause, see Oren Bracha, 'Commentary on the Intellectual Property Constitutional Clause 1789', *Primary Sources*.

4 Terminazione degli Eccell. Riformatori, 30 Luglio 1780, '"Pezzana e Consorti" Case: Supporting documents, Venice (1780)', pp. 49-53, *Primary Sources*.

ruling urged 'new efficient measures and useful remedies' in order to stop the 'current disarray' and to relieve the art from the 'present state of decadence'. The root of all troubles being 'the quantity of books lying unsold on the shelves', and this in turn being the effect of 'the excessive amount of books whose privilege has expired', upon which a number of printers 'hurl themselves all at once', so that several editions of the same book flood the market fuelling 'disorder, worse quality of printing, black-market selling by unlicensed and even foreign traders': for all these reasons it was ruled that 'licence to reprint a book whose privilege has expired shall be exclusively granted to the initial owner of the privilege', whether he was the printer or the author, 'and this for as long as he should want'.[5] The ruling introduced a dramatic change in the privilege system that was in force for about three centuries in the *Serenissima* Republic and privileges became, *de facto*, perpetual.

One year later, the ruling was reaffirmed in a case adjudicated before the Senate, whereby a group of booksellers and publishers (*Pezzana e Consorti*) opposed, as claimants, representatives of the Guild as respondents.[6] The claimants' arguments against the perpetuity of privileges were dismissed, although the Senate affirmed the need to 'carefully supervise' the effects of the newly introduced system.

In 1789, less than a decade after, the ruling was eventually revoked and the system abandoned, thus restoring the previous system of twenty year non-renewable privileges. The decree amending the privilege regulation acknowledged 'abuses and harmful consequences of perpetual privileges'.[7] This was the last act of the *Serenissima* Republic on the subject of the printing press.[8]

The Venetian experiment is a remarkable example of the difficulties that lawmakers encounter when trying to accommodate the tension between monopolies in the book trade economy and freedom to use public domain resources. From a more general perspective, this ten year experience can be regarded as a legal experiment aimed at regulating the access to – and

5 Ibid.

6 27 Settembre 1781, reprinted in Horatio F. Brown, *The Venetian Printing Press* (New York: Putnam's Son; London: John C. Nimmo, 1891), pp. 315-6.

7 Terminazione 10 Giugno 1789, reprinted in Brown, pp. 384-8.

8 On the history of the Venetian printing press in the eighteenth century see Mario Infelise, *L'editoria veneziana nel '700* (Milano: Franco Angeli, 1991). Venice's fall occurred only seven years after the mentioned decree, as effect of Napoleon's first Italian campaign. The last doge of Venice, Ludovico Manin, was deposed on 12 May 1797 after the Peace of Leoben between France and Austria.

the extraction of economic value from – the public domain, in a phase of the history where the public domain as such revealed itself as a critical value for both the economy and society, and modes of production, distribution and the reception of books and other 'cultural products' were changing accordingly.[9] Interestingly, this experiment with perpetual protection occurred within the most evolved and experienced privilege system of the modern age, in a time when the emerging principles of the *ius naturalis* increasingly overlapped with the traditional systems of market regulation, thereby shaping most of the legal principles constituting the modern copyright system.[10]

The Legal Nature of the Book Privilege: Exceptions to Law, Regulatory Instrument or (Publishing) Contract?

The Venetian Bill of 1780 is not the one and only experiment with perpetual protection in the five century history of copyright law.[11] It is, however,

9 In the Venetian experiment the notion of 'public domain' tends to have the strict economic meaning of 'books freely reprintable'. However, some of the arguments put forward in the *Pezzana e Consorti* case suggests at the same time a broader understanding, covering aspects such as the free availability of basic knowledge for readers and scholars (see for example Pezzana's counter-petition of 28 March 1871: 'In all possible sciences and arts [...] there has always been a series of classic and original books, consecrated by time and the universal consensus of mankind and all nations. Theology, History, Medicine, all the endless arts and sciences are planted on these *foundations of indispensable books*, that is books which can be rightly called *of first necessity*'. '"Pezzana e Consorti" case: counter-petition and rulings (1781)', trans. by Luis A. Sundkvist, p. 7, *Primary Sources*, (emphasis added)).

10 The above mentioned French decree of 1777 can be seen as an example of this overlap and shaping. The transition of the privilege system into forms of intellectual property, that took place from the end of eighteenth / beginning of nineteenth century, represents the first 'paradigmatic change' of copyright law. For a reading of copyright history based on Kuhn's notion of 'paradigm' see Willem F. Grosheide, 'Paradigms in Copyright Law', in *Of Authors and Origins. Essays on Copyright Law*, ed. by Brad Sherman and Alain Strowel (Oxford: Clarendon Press, 1994), pp. 203-33.

11 Examples of perpetual copyright can be found in statutes of some Latin American countries at the end of the nineteenth century: Guatemala (Literary Property Act 1879, Art. 5); Mexico (Civil Code 1884, Art. 1253 – where, however, the 'right to perform in public' was limited to 30 years *post mortem auctoris*); Venezuela (Civil Code 1880, Art. 2). For details, see Ch. Lyon-Caen and Paul Delalaine, *Lois françaises et étrangères sur la propriété littéraire et artistique*, 2 vols (Paris: Cercle de la Librarie etc.; F. Pichon Éditeur, 1889), II, pp. 117, 132 and 165). Perpetual reproduction and republication rights has also been enacted in the 1927 Portuguese copyright law, before being replaced in 1966 by a life plus 70 system (see C. Trabuco, *O Direito de*

a unique case where such a solution has been effectively used in a pre-'intellectual property' regime, namely in a regulatory regime based on the ancient privilege system. For this reason, the first step of our analysis will be to contextualise the Venetian experiment within its own legal conceptuality, as determined by the very legal nature of the book-privilege.

As a first general characterisation, privilege can be described as a law introducing an *exception* to the law, namely to the benefit of an individual or class of individuals. The *Zedler* lexicon enumerates more than twenty types of *privilegium*, and explains the meaning of the word as *priva lex*: 'a law or a ruling specifically pertaining to single persons (*privus*)'.[12] Privilege is therefore:

> [A] specific right or freedom which the legislator grants to the subject citizen, exempting him from the law. Such *privilegia* can be granted by any legislative authority to any subject who submits a justified claim and who is entitled to draw a legitimate benefit from it.[13]

Accordingly, the book privilege – *privilegium impressionis operum* – bestows the publisher with the exclusive right and freedom to print a work, thereby releasing him from the competition of other publishers. The rationale for awarding such release is analogous to that underlying the granting of privileges for other productive activities, namely, to ensure protection from competitors in order to recoup the initial investment. In a popular eighteenth century business dictionary we can read that the privilege is a useful legislative instrument:

> [O]nly for those industries that require an investment that is so high, the return so uncertain and initially so modest that it is very unlikely that a single individual be willing to take on the burden – but industries whose introduction into the nation is so useful to justify a measure that, with the aim of not immediately destroying their business, temporarily protects it from its competitors.[14]

Reprodução de Obras Literárias e Artísticas no Ambiente Digital (Coimbra: Coimbra Editora, 2006), pp. 121-2). In France, a proposal for perpetual copyright was discussed by the Parliament in 1862 and eventually rejected. On this subject see the pamphlet of P.J. Proudhon, 'Les Majorats littéraires (1868)', *Primary Sources*.

12 J.H. Zedler, *Grosses vollständiges Universal-Lexikon aller Wissenschaften und Künste* (Leipzig und Halle: 1732-50), entry *Privilegien*, 29, p. 589. In Roman law *privilegium* was used sometimes as being synonymous with *ius singulare* (A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia, 1953), entry *Privilegium*, p. 651).

13 Zedler, 29, p. 589.

14 H. Lacombe De Prezel, *Dictionnaire du citoyen, ou abrégé historique, théorique et pratique du commerce* (Paris, 1756), entry: *privilege*.

In this text, which can be taken as exemplary of the mercantilist view of the economy,[15] three requirements are mentioned in order for a privilege to be justified: the industry that the privilege applies to must be *new,* it must require *an initially high investment*, and it must be of particular *utility* to the national economy. When such 'test' is applied to book publishing, it appears that the requirements are potentially fulfilled not only at the initial stage, when the industry as such is 'new' to the nation, but each time a new book is being published. As a matter of fact, publishing a new book is always a risky and uncertain activity, where investments are easily jeopardised by 'free riders'. For this reason, privileges are not exceptional measures for the publishing industry: rather, they represent a necessary infrastructure – at least as far as new editions are concerned.[16] In order to properly operate, such an industry needs privileges just as much as it needs paper and ink.

In this respect, the rationale justifying book privileges is not different from that which is commonly used today by mainstream economists to explain the need for intellectual property protection for 'non-excludable goods', namely: creating artificial exclusion in order to avoid free riding and enable recouping of investments. From this point of view, both the ancient privilege and the modern copyright law can be seen as systems of market regulation for goods that are not 'naturally' excludable.

The first and foremost question arising with such kind of 'exceptions to law' is: *for how long* should the exception be in force? Should the exception last forever, or should it in turn be limited in time? And, if this were the case, what would be a fair and appropriate duration of the given exception?

These questions lie at the very heart of both the ancient and the modern copyright lawmaking, and a number of arguments have been used by scholars and jurisprudence to justify time restrictions in the exercise of author's or publisher's rights.[17]

Limited duration finds its justification also within the so called 'authorship paradigm', where the earliest raison d'être of copyright law lies in the permanent link that the author establishes with his work by virtue of the

15 See Donald J. Harreld, 'An Education in Commerce. Transmitting Business Information in Early Modern Europe', paper presented at the XIV International Economic History Congress, Helsinki, 21-25 August 2006.

16 As we will discuss in the next paragraphs, the requirement that books must be 'new' in order to be eligible for privilege is a cornerstone in the process of codification of the Venetian privilege system (see *infra* notes 35-8 and accompanying text).

17 For an overview see Joseph P. Liu, 'Copyright and Time: A Proposal', *Michigan Law Review*, 101 (2002), 409-81 (pp. 428-52).

act of creation.[18] As an example of how civil law jurisprudence justifies the statutory limits of copyright duration, we can read the following excerpt from a classic Italian treaty on *diritto d'autore*:

> After the author has published his work, thus allowing society at large to share it, his work becomes part of human civilization, and the public appropriates it, so that it can criticise it, use it while creating new works, and so forth and so on; the later the work is published, the more influence the work exerts on civilization, the less it belongs to its author and, so to say, breaks away from him to enter the public domain.[19]

After breaking into the realm of 'human civilization' as part of it, thanks to the creative act of its author, the work takes on a life of its own, and the more it moves out into the world, the fainter becomes the echo of its creation. Although no work can completely break its original liaison with its creator, it is nonetheless true that with the passing of time such a liaison becomes weaker and changes its meaning. Indisputably, works such as Shakespeare's sonnets, Dickens's novels or Joyce's *Ulysses* belong nowadays more to humanity at large than to their respective authors or heirs. But the same principle applies to all kind of works, since, once published, they become part of a 'whole' that gradually incorporates them.[20]

A third, and perhaps more acknowledged, rationale for copyright's limited duration is the argument based on the idea of a 'contract' between the author and the society at large, the former being rewarded by the latter for the benefits he provides by giving his work to the world. Since the benefit is intrinsically limited (no author creates *ex nihilo* – so runs the argument), the reward, in terms of a temporary monopoly over certain uses of the work, must be limited in turn.

An exemplary expression of the 'contract' argument was penned by Proudhon:

> Between the author and society there is a tacit agreement, by virtue of which the author will be paid *à forfait* by means of a temporary privilege of sale. If there is a great demand for the work the author will earn a great deal.

18 For a comprehensive and insightful discussion of the classical 'duality' between 'marketplace norms' (typical of Anglo-Saxon copyright laws) and 'authorship norms' (inspiring continental-European laws), see Paul Geller, 'Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?', in Sherman and Strowel, pp. 159-201.

19 Nicola Stolfi, *La proprietà intellettuale*, vol. II (Turin, 1911), p. 39.

20 The argument that 'the longer a work has been published, the lesser copyright protection does it deserve' inspires the proposal of Joseph Liu of adjusting the scope of copyright protection by considering time as a factor in fair use analysis (see Liu, 'Copyright and Time').

> If the work is refused he will earn nothing. Let's allow him an exclusive right that lasts for 30, 40, or 60 years to cover the costs. I say that this contract is perfectly regular and fair, and that it satisfies all the needs, safeguards the rights, respects the principles, and responds to all objections.[21]

Copyright can be metaphorically described as a contract between the author and society at large. But this is, precisely, a metaphor. Copyright is not a contract that can be revoked on grounds, for example, of non-fulfilment. It is not, legally speaking, an agreement whose terms could be modified according to the quality of the work done. Paradoxically, works that disclose the most spectacular and useful knowledge, and which may have required years of study and labour, benefit from the same 'contractual terms' as the most trivial and frivolous ones.[22] In the course of the nineteenth century, copyright law has progressively entrenched the 'principle of neutrality', namely the rule that copyright arises independently of the 'merit or purpose' of a work.[23] Modern copyright can be described as a content-neutral system, whereby rights are granted unconditionally to anyone who 'authors' anything, irrespective of the worth of the creation. No substantive examination is required. The 'originality' qualification is not an absolute test of quality, but only a minimal requirement that the work actually originated from the author.[24]

By contrast, privilege is a real – not only 'metaphorical' – contract between the State and the publisher. As we will see in the next paragraphs, while detailing the Venetian system, the privilege can be understood as a true publishing contract that the State signs with a publisher on certain conditions. And this contract is not, in principle, 'content-neutral'. The duration of the privilege, as well as its scope,[25] can depend on the quality of the work. The granting and maintenance of the privilege is subject to con-

21 Proudhon, p. 24.

22 This 'paradox' is being incidentally discussed in many cases and treaties of the nineteenth century. For example Antonio Scialoja observed that copyright, by virtue of the idea/expression divide, tends inevitably to promote *more* the works that contribute *less* to the progress of knowledge (Antonio Scialoja, 'Relazione alla Legge 25 giugno 1865 n. 2337 sui diritti spettanti agli autori delle opere dell'ingegno', *Atti del Senato*, (1864), 1136)

23 On this 'trend' towards 'a position of neutrality' towards the content of works see Geller, p. 182.

24 For an in-depth analysis of the concept of originality in copyright law see Abraham Drassinower, 'Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade Mark', *Michigan State Law Review*, I (2008), 199-232.

25 For instance the extent of sanctions and the amount of remedies that were usually provided with the privilege. See examples in Rinaldo Fulin, 'Documenti per servire alla storia della tipografia veneziana', *Archivio veneto*, XXIII (1882).

trols over quality and price. It can be revoked on many grounds, including non-use or delay of use.[26] The counterpart of the privileged publisher is not an abstract notion of 'society', but the State as such, its concrete representations and agencies, its appointed inspectors and superintendents, who permanently watch over the fulfilment of the contract. Privilege is not a title of property. It cannot be assigned or transferred. If the publisher is unable to fulfil the mandate, namely to publish the work for which the privilege was sought *in the form and at the conditions* that are specified in the privilege itself, the latter can be simply revoked. The legal nature of the privilege consists essentially of a publishing contract between the State and the printer.

It is within such a contractual-like framework that the Venetian privilege system evolved over three centuries, from the early variable-term grants to the concluding experiment with perpetual protection.

The Origins of the System in the 'Golden Age' of the Venetian Printing Press (the Fifteenth and Sixteenth Centuries)

The Venetian legislation on the privilege system was administered by the *Riformatori dello Studio di Padova*. After its institution in the early 1500s as a judiciary responsible for the reform of the University of Padua, it was then appointed in charge of all matters concerning the circulation of books and journals, which included, first and foremost, the sensitive task of censorship. Their duties covered a range of subjects, from press censorship to the governance of the book market and production in general, hence including the regulation of the privilege system. Over the years the *Riformatori* became the legal advisory body of the Republic whenever a problem concerning the printing press was on the agenda.

As to the running of the privilege system, several interventions have been recorded over the three centuries of its existence, spanning from substantial law making to dispute resolution, day-by-day administration, and even *ad personam* decisions.[27]

26 See *infra* the Venetian decree of 1533.

27 For a broad overview of the activity of the *Riformatori* see G.B. Salvioni, 'L'arte della stampa nel Veneto: la proprietà letteraria', *Giornale degli Economisti di Padova*, IV (1877), 191-285.

At the time the *Riformatori* took over the regulation of the press, the practice of the Venetian authorities of granting temporary monopolies over the exploitation of books or series of books had already been in place for decades.[28] The average and customary duration of these monopolies was ten years, although there are many cases of both shorter and longer privileges, as well as privileges of unspecified duration.[29] In a few cases privileges were required and granted for up to twenty or even twenty-five years.[30] The rationale justifying such differing durations is not always clear and it may be that this depended more on contingent factors than on advised policy. As a matter of fact, it is not even wholly clear what the criteria were to be applied in the granting or refusal of a privilege. In general, the authorities seemed to be orientated towards maintaining a certain proportion between the value of the book and the duration of the monopoly, and this could have justified a shorter duration – or even the refusal – of a privilege for reprints, whereas a longer privilege was usually granted to books requiring an exceptional investment (such as dictionaries, illustrated books, and editions of classics). The latter could also have been rewarded with a term extension once the privilege was expired.[31] In one particular case, a privilege of only one year was granted: it was for a booklet explaining remedies against pestilence, and it might be the case that reasons of 'public interest' had suggested the granting of such a *short* monopoly.[32]

However, such a case-by-case system soon became unsustainable in a market place that numbered around one hundred and fifty publishers, with more than a hundred new editions being launched every year. Even though privileges were sought only for a minority of highly qualified and commercially valuable books (in a range of about one in ten),[33] the lack of certainty as to the eligibility criteria and the scope of protection encouraged practices that were detrimental to the whole art. Powerful publishers accumulated privileges covering wide ranges of books, which then, by virtue of renewals or further privileges obtained from a different authority after the

28 The first known printing privilege granted by the Venetian authorities dates back to 1469 (see 'Johannes of Speyer's Printing Monopoly, Venice (1469)', *Primary Sources*). A comprehensive collection of requests and grants of privileges from the period 1469 to 1526 is available in Fulin, pp. 84-212.

29 Brown, pp. 236-40.

30 Fulin, n. 41, 150, 188, 189 and 206.

31 Ibid., n. 137.

32 Ibid., n. 178.

33 Between 1470 and 1500 about three thousand editions were published in Venice, while the total number of known privileged editions in the same period is 298 (data drawn from Brown).

expiration of the first grant, became *de facto* perpetual monopolies.[34]

The first known act of the *Riformatori* was a general regulation of the granting of privileges. The decree of 1 August 1517, concerning the printing trade, revoked all existing privileges and introduced a 'novelty' requirement for all works.[35] The only works eligible for a privilege were those that had never been printed before. In addition, 'blanket privileges' covering wide and even indeterminate ranges of works were disallowed. The authority of granting privileges was vested in the Senate only, requiring a two-thirds majority.

This decree was the first of a series of legislative interventions that, in the subsequent two decades, shaped the Venetian privilege system in a thorough anti-monopoly sense. In 1533 a decree introduced a further restrictive provision, whereby any privileges would become void if the book was not printed within one year from the granting of the privilege itself.[36] The one-year term could be extended in the case of voluminous works. Along with this 'use it or lose it' provision, it was affirmed that no privilege could be obtained twice for the same book.

With the *Parte* of 4 June 1537, sanctions and remedies were introduced for counterfeiters and for printers issuing books of bad quality. Most importantly, the 'novelty requirement' was reasserted and more narrowly constructed, requiring that a book should not be considered *new* 'only by virtue of few amendments and corrections'.[37] The *Parte* of 7 February 1544 settled that no book could be printed or sold in the absence of an 'authentic document' providing evidence that the author of the book in question, or his heirs apparent, granted permission to print and sell.[38] The novelty requirement, the 'use it or lose it' clause, limited duration and author's permission became the four pillars of the Venetian privilege system of the sixteenth century.

With the requirement that only previously unpublished books were eligible for privilege, the Senate aimed at two objectives. The first was to avoid double granting, which would have unduly extended the duration of the monopoly. The second, which was perhaps more important, was to

34 Joanna Kostylo, 'Commentary on the Venetian Senate's first Decree on Press Affairs (1517)', *Primary Sources*.

35 '[Grace is conceded] *solum pro libris et operibus novis numquam antea impressis, et non pro aliis* – only for new books and works never printed before, and for none else'. 'Venetian Decree on Press Affairs, Venice (1517)', p. 2, *Primary Sources*.

36 Brown, pp. 208-9.

37 Ibid., pp. 209-10.

38 'Venetian Decree on Author-Printer Relations (1545)', *Primary Sources*.

discourage book reprinting and to provide an incentive for investing in the production of new books. While reprints were mainly sold in the domestic market, new editions represented a true added-value for publishers operating in the international arena.[39] For this reason, in this first series of legislative acts, 'novelty' was to be interpreted as 'absolute novelty', that is, a book was considered to be new if never printed previously, *anywhere*.[40] The meaning of 'novelty' has been subject to reviews over the three centuries of the Venetian printing press. The main problem was the evaluation of books whose 'novelty' consisted merely in the addition of supplements and amendments to previous editions. The issue had been repeatedly addressed in different legislative acts, starting from the above mentioned 1537 decree, but it was not until 1753 that an examination procedure was put in place in order to assess the 'worth of supplements and amendments' in new editions of books.[41]

The purpose of the 'use it or lose it' clause was clearly to disallow the blocking effects of the monopolies. Privileges were intended to promote production, not to be mere 'intangible assets' in a publisher's portfolio. A manuscript lying unprinted on one publisher's shelves could have been successfully exploited by a competitor. The same rationale inspired the limited duration of privileges.

Harmonising Duration, Defining Novelty, Eroding the Public Domain: The Privilege System in the Seventeenth and Eighteenth Centuries

It was not until the beginning of the seventeenth century that the duration of privileges was standardised. The decree of 11 May 1603, which represents the first overall codification of the privilege system in Europe, harmonised the duration of privileges introducing a three-tier system: the duration was standardised at twenty years for books 'never printed before anywhere'; books lacking novelty but which were 'never printed before in Venice' and those 'of great value' which had been out of print for at least twenty years

39 Like Manuzio, Torresani, Giolito (just to mention the major ones). For a thorough history of the Italian publishers operating in the international market during the Renaissance see Angela Nuovo, *Il commercio librario nell'Italia del Rinascimento* (Milano: Franco Angeli, 2003).

40 As we will see below, this criteria has been afterwards re-designed in the seventeenth and eighteenth centuries.

41 See *infra* note 44.

were granted a privilege of ten years; finally, books 'of great value' which had been out of print for at least ten years were granted a privilege of five years. In practice, only reprints of books out of print for less than ten years were not eligible for a privilege.[42]

Table 1. Privilege Term Duration in the 1603 Part

Duration	*Category of books*	*Scope of novelty requirement*
20 years	New books	Absolute novelty
10 years	Reprints – if never printed in Venice *Or*	Territorial novelty
	Books 'of great value' out of print for at least 20 years	Relative novelty *plus* 'special merit' qualification
5 years	Books 'of great value' out of print for at least 10 years	

This three-tier system applied to different categories of books, and the scope of the 'novelty' requirement for eligible books was modulated accordingly. Longer privileges were granted to books meeting an 'absolute novelty' requirement, that is, books never printed before anywhere. A shorter privilege, however, was still available for books previously printed elsewhere, thus meeting a narrower 'territorial novelty' requirement. Finally, also books printed previously in Venice, but no longer in print, were eligible, according to a sort of 'relative novelty' requirement coupled with a 'special merit' qualification.

In spite of the standardisation of the duration, the Venetian privilege system maintained a logic of discrimination, to the extent that the content of the book (its 'value') was still a discriminating factor in deciding whether a book already in the public domain could be re-privileged.

Although the 1603 *Parte* unambiguously settled a 'novelty' requirement in order for a book to be privileged, thus excluding the possibility of granting a further privilege after the expiring of the initial one, it was still not clear what standard of novelty was used with respect to second 'revised' editions of books. On 15 January 1725 the judiciary felt the need to intervene to limit the practice of seeking privileges for further editions of books printed previously 'on the pretext of supplements and amendments'.[43] As a general rule, it was stated that *no privilege can be granted twice for the same*

42 'Venetian Decree on Privileges for New Books and Reprints (1603)', *Primary Sources*.

43 Brown, pp. 724-8.

book, although no guidance was given as to the meaning of the term 'same'. The rule was repeatedly asserted in 1745 and in 1753, when, as mentioned above, an appointed procedure of examination was eventually introduced, in order to assess 'the worth of supplements and amendments' in new editions of books.[44]

Uncertainty about the status of reprinted books was at the origin of most of the disputes between publishers in the eighteenth century. On 27 July 1763 the *Riformatori* issued an *ad hoc* decision declaring that a specific book was in the public domain.[45] In a petition submitted one year later by the Venetian Guild of Booksellers and Printers (30 March 1764) it was affirmed that the price of the book in question dropped from ten pounds to four pounds after the decision. The petition complained about the unfair handling of the privilege system: while some publishers had their privileges unduly extended on the grounds of 'petty supplements and amendments, of little or no importance', others suffered undue losses because the privileges on most of their backlist titles had irretrievably expired.[46] In these years the interventions of the *Riformatori* became more frequent, and were often handled in collaboration with the Venetian Guild of Booksellers and Printers. The complaint of the latter eventually led to the first main amendment of the privilege system: the *Parte* of 6 February 1765 introduced a principle according to which a number of books in the public domain where allocated to 'needy printers', that is, to printers in financial difficulties.[47] A list of one hundred and four titles, including consumer books such as ABCs, dictionaries and classics, was then appointed, and a tortuous procedure of allocation by auction was put in place. This system introduced a sort of regime of 'exceptions' to the public domain: from then on, books whose privilege had expired were in the public domain *except* if the Guild declared that they were to be included in the special list.

As to the duration of privileges, the three-tier system of twenty, ten and five years, established in the 1603 Act, remained unchanged for more than a century and a half. In 1767 the duration for new books was extended to thirty years, and that of reprints to fifteen years irrespective of the length of time they had been out of print.[48] However, only Venetian printers were eligible for these extended privileges: books printed on the *terraferma* (that

44 *Parte* of 26 August 1753, in Salvioni, p. 205.
45 Ibid., p. 206.
46 Ibid., p. 208.
47 Ibid., pp. 209-10.
48 *Parte* of 29 July 1767, in Brown, pp. 298-300

is, on the Venetian Republic mainland) were granted, respectively, only ten or twenty years protection. Secondly, no privilege would be granted to books whose privilege had expired, and no *terraferma* publisher could print a book in the 'public domain' when it had been previously owned by a Venetian printer.

Table 2. Privilege Term Duration in the 1767 Part

Duration	*Category of books*	*Scope of novelty requirement*
30 years (20 if printed on *terraferma*)	New books	Absolute novelty
15 years (10 if printed on *terraferma*)	Reprints, if never printed in Venice	Territorial novelty
No privilege – *terraferma* excluded	Books whose first Venetian privilege is expired	Territorial public domain

The System in the Age of Crisis: The Perpetual Privilege Experiment (the End of the Eighteenth Century)

The term extension of 1767 must be appreciated against the background of the rising conflict between the traditional publishing manufacture, based in Venice, which came under the umbrella of the Guild, and the emerging modern book industry based on the *terraferma*. In spite of the unfavourable legal conditions, compared to those enjoyed by the members of the Guild, *terraferma* publishers were by large the driving force of the Venetian publishing industry by the mid-eighteenth century.

While the traditional Venetian publishing industry was losing its leadership, not only in the international market, but also in the Italian one, a new capitalistic industry was successfully emerging in some areas of the Venetian mainland, thus balancing the increasingly weaker performances of the *matricolati* (members of the Guild).[49] One publisher in particular must be mentioned, namely Remondini of Bassano, one of the biggest publishing companies in Europe at the time. An increasing number of publishers from the city, members of the Guild, were almost exclusively working on orders from Remondini. In this way, Remondini could bypass the restric-

49 Infelise, p. 223.

tions imposed on printers of the *terraferma* and have access to the privilege system *via* its Venetian commissioners. At the same time, Remondini and his associates were able to exploit public domain books more efficiently than other printers. By virtue of modern machinery and an efficient distribution system, Remondini was better suited than his Venetian counterparts to take advantage of mass-production. Not only were classic texts reprinted in cheap high-circulation editions, but also translations, abridgments and compilations on an extensive range of subjects were printed on a low-cost basis, thereby bringing the prices to a very low level.[50]

In 1750 Remondini was finally admitted as a member of the Guild, although he was allowed to maintain his establishment in Bassano. In this way, he was able 'to combine the double benefit of having access to the same privileges as any other publisher in the city, and also to the lower production costs of the *terraferma*'.[51]

In 1780 the head of the Guild Marcantonio Manfré submitted a petition complaining about 'a disorder which destroys all good faith and proper work in the art of printing, and undermines the revenues and business of the printing workshops and bookshops of this *Dominante*'.[52] The source of this 'disorder' was the 'proliferation of print', and this in turn was due to the excessive number of unprivileged books that 'fatten the bookstalls of colporteurs, unlicensed and unregistered sellers, not members of the Guild'. As soon as a book falls into the public domain, many printers 'take possession of it' at the same time, and as a result, a huge number of copies, usually of low quality, flood the market thus reducing the price. The argument was plain: unprivileged books fuelled the 'junk production' of the *terraferma* printers (low price for low quality), provoking a drop in prices and consequently in revenues. In order to reduce this abundance of books in circulation, the prior of the Guild suggested a radical remedy, which would have inspired an even more radical measure, the redefinition of the Venetian privilege system as was in force for almost three centuries: 'to issue a prohibition, whereby books which have been rendered common property upon expiry of their privileges may not be reprinted other than by two matriculated members of the Guild at most, namely by the first one

50 Marino Berengo, 'La crisi dell'arte della stampa veneziana alla fine del XVIII secolo', in *Studi in onore di Armando Sapori* (Milan: Istituto Editoriale Cisalpino, 1957), II, p. 1325.

51 Ibid., p. 1326.

52 'Memoriale Manfré e Compagni, 1780 in Maggio', in '"Pezzana e Consorti" Case: Supporting Documents, Venice (1780)', pp. 46-9, *Primary Sources*.

who undertakes this task and by only one more apart from him'.

The ruling of the *Riformatori* of 30 July 1780 converted this complaint into a Bill.[53] Since the root of the troubles of the Venetian printing press was apparently the number of books available in the public domain, the legal solution was simply to eliminate the public domain as such. More accurately, the temporary privilege was replaced by a system of perpetually renewable privilege: 'Be it enacted that henceforward the first legitimate owner of a privilege, and only him, shall be entitled to seek licence for reprinting the book in question once the privilege is expired, and this for how many reprints he wants'; and the same right 'shall have, before the privilege owner, whoever he is, the author of the work in question, as it has always been done'. The public domain was hence limited to books 'abandoned' by the first privilege owner or by the author. However, any publisher could seek a ten year privilege for up to six 'abandoned' books. Moreover, a list of about a hundred books to be reserved to 'printers in financial difficulties', was maintained.[54]

The duration of privilege, as established in the 1767 Act, was amended as follows:

Table 3. Perpetually Renewable System (1767)

Duration	*Category of books*	*Scope of novelty requirement*
30 years (20 if printed on *terraferma*) – Indefinitely renewable	New books	Absolute novelty
15 years (10 if printed on *terraferma*) – Indefinitely renewable	Reprints, if never printed in Venice	Territorial novelty
10 years – Indefinitely renewable	'abandoned' books (up to 6 per publisher)	

In order for a book to fall into the public domain, it should have been 'abandoned' after the first or a subsequent privilege term *and* not be required by any publishers *or* recorded in the list of books to be used by printers in need. The public domain was, *de facto*, cancelled.

53 Terminazione degli Eccell. Riformatori, 30 Luglio 1780.

54 A tricky system of allocation of books between 'printers in need' was defined in a further ruling of 28 September 1780.

The *Riformatori*'s Bill, as inspired by the Guild's petition, was passed by the Senate on 9 August without any substantial amendments.[55] Such an unprecedented measure, however, was harmful for the most 'capitalistic' part of the Republic's publishing industry which relied heavily on public domain books. This part was represented not only by Remondini – who, although not mentioned in the Guild's complaint, was the real addressee of the grumbles – but also by its main competitors in the new and promising market of cheap editions. Hence, the Bill and its inspiring petition were opposed by a group of twelve publishers lead by Francesco Pezzana who submitted a counter-petition to the Senate on 28 March 1781.[56]

In the *Pezzana e Consorti* petition, many commercial arguments against the perpetual privilege were put forward. The publishing industry, it was argued, is nourished by an 'abundance of genres', while monopoly keeps prices artificially high. Moreover, monopolies discourage the circulation of books, since the owner of an exclusive right to sell has no incentive to circulate his book, and, because of the system of exchange,[57] 'by limiting the circulation of his book he destroys also that of the other'. Furthermore, the complaint stressed the importance of maintaining 'a basis of essential books' (classics and the like) in the public domain, since they represent the necessary 'infrastructure' of the book trade, and 'a monopoly over these books would deprive a business of its very basis, thus striking at the root of its trade, also making it impossible for a printer to venture into new editions'.[58]

The public domain of books, which in the Guild's petition was regarded as the source of all evils, was addressed by *Pezzana e Consorti* as the very basis of the publishing business. Granting a monopoly over this basic infrastructure would have meant depriving the whole industry of its starting material, and reducing the 'abundance of genres' which represented the basic layer which sustained the whole market place for books.

The case was discussed in due form before the Senate, and a counter-argument submitted by the Guild, replying to *Pezzana e Consorti*'s argu-

55 Decreto dell'Eccell. Senato, 9 Agosto 1780, in '"Pezzana e Consorti" Case: Supporting Documents, Venice (1780)', pp. 54-6, *Primary Sources*.

56 '"Pezzana e Consorti" Case: Counter-petition and Rulings (1781)', pp. 1-19, *Primary Sources*.

57 According to this system of distribution each book house (which normally functioned both as publisher and as bookseller) could keep an assorted stock of books by 'exchanging' their own books with other book houses.

58 Ibid.

ments was heard on 20 April 1781.[59] The decision of the Senate issued on 27 September 1781 was in favour of the Guild and of the *Riformatori*'s Bill, and thus for the maintenance of the perpetual-privilege system.[60] However the Senate seemed aware that the Bill represented a major departure from the legislative trail, since it addressed an unconventional recommendation to the *Riformatori* to carefully supervise the effects of the Bill 'upon the advantage of the art of printing and upon the universal benefit of the subjects [of the Republic]'.[61]

During its nine years of life the system was assessed twice as to its effects. In 1784 a detailed report on the state of the publishing industry remarked a slight progress in the number of printing presses in activity: although there was no conclusive evidence that the improvement was due to the new privilege system, the report strongly advocated for its maintenance[62]. Apparently the positive trend was continued in the following years.[63] However, on 1 May 1789, a further review of the whole printing press concluded that the effects of the perpetual privileges were more harmful than beneficial.[64] As a consequence of this, the *Riformatori* eventually took the view of revoking the system of perpetual privileges and re-established the previous terms of thirty and twenty years for new books and reprints respectively. Acknowledging 'abuses and harmful consequences that derived from the perpetual privileges that were granted to booksellers and printers of the Guild upon every category of books', the *Riformatori* terminated all the privileges for 'common place books, such as school, religious, and other small-size books', and restored the previous twenty year system for all new books. The Senate enacted the Bill on 10 June 1789.[65]

Conclusion

The Venetian experience is not only a case concerning the duration of monopolies. It is, above all, an experiment *on* the public domain. It is an attempt at administering this *res nullius* which, unexpectedly, became a

59 Memoriale avversario, 20 Aprile 1781, in '"Pezzana e Consorti" Case: Counter-petition and Rulings (1781)', pp. 20-1, *Primary Sources*.
60 27 Settembre 1781, in Brown, pp. 314-5.
61 Ibid., p. 315.
62 Relazione 15 luglio 1784 (Antonio di Prata), in *Archivio di Stato di Venezia*, Riformatori, filza 47, c. 43-7.
63 Infelise, p. 330.
64 Brown, pp. 320-4.
65 Ibid., p. 324.

valuable resource and perhaps even *the* most sought-after raw-material for a brand new mode of production – namely, the emerging capitalistic publishing industry. In general terms, we can observe that the duration of legal monopolies over creative products becomes a burning issue whenever a technological or cultural shift transforms the public domain into a valuable resource. Or, alternatively, it increases significantly the value and the importance of the stock of creations which are not owned or controlled by anyone. Faced with such a structural changing in the mode of production, the Venetian legislator responded with a parallel changing in the legal system, which in practice extended to the whole public domain the monopoly regime that was traditionally applied only to 'new' works. Insofar as the book privilege can be described, in its legal essence, as a sort of 'publishing contract' between the State and the publisher,[66] the experiment with the perpetual privileges represented an undefined extension of the 'terms' of the contract, whereby both new books and reprints benefited from the same conditions.

The solution eventually revealed itself as either useless or even detrimental to the printing industry, and therefore was abandoned. In this U-turn, the privilege system and its underlying contractual approach revealed an unexpected virtue, namely a certain 'ductility' coupled with a safe pragmatism.[67]

Compared to the ways in which other jurisdictions, in those same years, dealt with the conflicts over the duration of monopolies,[68] the Venetian experiment represents more an ending point than a constitutional moment. It is the end of the privilege system as was in force for three centuries, and of all the world that flourished around it.

66 See *supra* par. 1.

67 Compare this evidence-based approach to term duration with the policy that is being adopted nowadays on the same subject. For a discussion of recent developments on the matter see Christophe Geiger, 'The Extension of the Term of Copyright and Certain Neighbouring Rights – A Never-ending Story?', *IIC* (International Review of Intellectual Property and Competition Law), 40 (2009), 78-82.

68 See *supra* notes 1-3 and accompanying text.