


Jousting at Windmills: Cervantes and the Quixotic Fight for Authorial Control

H. Parkman Biggs

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JOUSTING AT WINDMILLS:
CERVANTES AND THE QUIXOTIC FIGHT FOR
AUTHORIAL CONTROL

H. PARKMAN BIGGS

“ . . . for among the untutored poets of our day, the custom is for each to write however he wishes and steal from whomever he wishes regardless of whether or not it suits his intention, and there is no foolishness, either sung or written, that is not attributed to poetic license.”¹

Miguel de Cervantes, *Don Quixote* (Part II)

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INTRODUCTION

Achieving the appropriate balance between the right of first authors to control the later use of their work and freedom for follow-on authors to further develop from that text has long been challenging. Currently, under United States law in particular, fair use stands as a nebulous buffer between the two creative camps, granting a significantly limited right to the second author to work from the first author’s text.² While that tension excites its own debate, a less considered aspect of this tension involves the degree to which the first author might be creatively and productively affected by the follow-on author,

1. MIGUEL DE CERVANTES, DON QUIXOTE 917 (Edith Grossman trans., HarperCollins ed., 2003).

2. 17 U.S.C §§ 107(1), (4) (1992).

particularly in a context where absolutely no such mediating protection exists. If that lack of protection substantially improves and increases the original author's output, by extension it puts the foundational reasoning for U.S. Copyright's limited monopoly in question.

Don Miguel de Cervantes wrote *Don Quixote* in such a copyright-less landscape. Cervantes' bitter interplay with a follow-on author, Alonso Fernández de Avellaneda—which substantially affected both the plot and general content of Cervantes' original *Don Quixote*—provides a striking insight to what such an uncontrolled universe might produce creatively.

Our focus here will first be to consider the interplay of these two authors through a close reading of their rival texts. Having provided the introduction to our topic in Part I, in Part II we will take a broader look more generally at the historical relationship of the author to his text. In Part III we will focus on Cervantes specifically, addressing his misattributions and non-attributions, which highlight the lack of authorial control for artists in his time. In Part IV we will consider Cervantes' follow-on author, Avellaneda, and his work, often termed the “false *Don Quixote*.” We will conclude by considering what this bitter rivalry may suggest in terms of creative production, the core goal of the U.S. Copyright Clause.

I. UNDERSTANDING THE AUTHOR'S RELATIONSHIP TO HIS WORK

The attribution and close association of authors to their texts has not always been convention for western literature, let alone the idea of exclusive authorial control. While we understand the modern author generally as fulfilling, as Foucault has stated, “a certain functional principle by which, in our culture, one limits, excludes and chooses,”³ Foucault also observed that historically the author did not always enjoy this control:

There was a time when texts that we today call “literary” (narratives, stories, epics, tragedies, comedies) were accepted, put into circulation and valorized *without any question about the identity of the author* . . . [t]heir ancientness, whether real or imagined, was regarded as a sufficient guarantee of their status.⁴

3. FOUCAULT, WHAT IS AN AUTHOR? (1977), *reprinted in* AESTHETICS, METHOD AND EPISTEMOLOGY 221 (Robert Hurley and others trans., James D. Faubion ed., 1998).

4. *Id.* at 212; *see also* Robert J. Griffin, *Anonymity and Authorship*, 30 NEW LITERARY HISTORY 877 (1999) (emphasis added).

This idea of authorship harkens for some back to Greek and Roman precedents,⁵ but Foucault's claim of author-text disassociation has particular support in the medieval period of western literature, between the 8th and 14th centuries. *The Song of Roland* for example, an epic poem recounting the heroic death of Charlemagne's nephew in battle in 778, was largely codified in the 12th century.⁶ Many scholars have argued compellingly, however, that new characters were added over a period of several prior centuries—characters such as Ganelon—introduced in the 9th century—or Oliver, introduced in the 10th.⁷ While the poem has been attributed to Tuold, this seems primarily based on the mention of his name in the very last lines of the work—his name was not originally listed under the work's title.

The Romance of the Rose offers another example of group authorship over time. While most agree that the first four thousand lines of the work were written between 1225 and 1230 by Guillaume de Lorris,⁸ the work was expanded in scope and given a decidedly more sexual tone under Jean de Meun's period of writing (1269-1278).⁹ Under de Meun's hand, the lover gets the rose to open her bud so he can then spill "a little seed just in the center,"¹⁰ providing an explicitness which would have been a surprise to its original author. Furthermore, a third contributor, Guy de Mori is credited with weaving the two texts to a better whole, reportedly adding, editing, and deleting portions of text.¹¹ If true, these three authors, if not more, all co-authored the version we recognize today—a final version quite different from its original author's vision.

5. For Greek precedent, there is a contingent of classical scholars who believe the *Iliad* and *Odyssey* were composed by many unnamed authors, most likely oral composers, and only collected and committed later to writing; see BARBARA GRAZIOSI, *INVENTING HOMER: THE EARLY RECEPTION OF EPIC* 41 (2002). For consideration of the oral nature of these works and the notion of ring or chiasmic structures in Homer, see ALBERT LORD, *SINGER OF TALES* 45 (1960); FREDERICK AHL & HANNA ROISMAN, *THE ODYSSEY RE-FORMED* 191 (1996). For evidence of loose authorial attribution in Roman times, see Harold C. Streibich, *Moral Right of Ownership to Intellectual Property - Part I: From the Beginning to the Age of Printing*, 6 MEM. ST. U. L. REV. 1, 6 (1975-1976) (quoting Martial, *Epigrams*, L. i., 30, stating: "It is said, Fidentinus, that in reciting my verses you always speak of them as your own. If you are willing to credit them to me, I will send them to you gratis. If, however, you wish to have them called your verses, you had better buy them, when they will no longer belong to me," Marshal's comments in his *Epigrams* are instructive.)

6. GERARD BRAULT, *THE SONG OF ROLAND: AN ANALYTICAL EDITION* 1 (1978).

7. EUGENE VANCE, *READING THE SONG OF ROLAND* 9 (1970).

8. FRANCES HORGAN, *INTRODUCTION TO ROMANCE OF THE ROSE* ix (Oxford University Press, 1999).

9. *Id.* at xv.

10. BARBARA W. TUCHMAN, *A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY* 212 (1987) quoting JEAN DE MEUN, *ROMAN DE LA ROSE*.

11. SYLVIA HUOT, *THE ROMANCE OF THE ROSE AND ITS MEDIEVAL READERS* 85-7 (1993).

Examples of a lack of authorial control persisted through the tail end of the Middle Ages as well, albeit with a closer association of author to text. Matteo Boiardo revisited the medieval Roland, giving him a considerably more romantic turn in his *Orlando Innamorato* (1483, 1495).¹² Boiardo's Orlando was taken and further developed under Ludovico Ariosto in his well-received *Orlando Furioso* (1532).¹³ In the Renaissance period, Lope de Vega, a highly renowned poet of Cervantes' period,¹⁴ wrote what many consider a further sequel to this work with his *La Hermosura de Angélica*.¹⁵ Although the authors here are clearly more attributed to their text, their sequels—freely taking from prior authors—illustrate the lack of exclusive rights for prior authors.

All of these examples provide essential context for understanding the later intense interplay between Cervantes and Avellaneda that is our focus, particularly in terms of clarifying the then understood authorial rules of the game. Avellaneda, author of “the false *Don Quixote*”, actually makes this point himself in his *Don Quixote* prologue:

*I only say that nobody need be startled that this second part comes from a different author, for there is nothing new about a different person pursuing the same story. How many have spoken to the love affairs of Angélica and what happened to her? Various Arcadias have been written and Diana is not all by one hand.*¹⁶

While Avellaneda's point is worth taking, it is also noteworthy that he felt the need to make the point. If these were truly the authorial rules of the game, it would hardly seem to require comment. Avellaneda, however, clearly knew his work would excite a virulent response, and he would not be disappointed. In the next section, we turn to Miguel de Cervantes and take a closer look at his life and *Don Quixote*, his masterpiece.

12. ENCYCLOPEDIA OF ITALIAN LITERARY STUDIES 267 (Gaetana Marrone, Paolo Puppa, & Luca Somigli et al. eds., 2006).

13. ELIZABETH HORODOWICH & LIA MARKEY, THE NEW WORLD IN EARLY MODERN ITALY, 1492-1750 271 (2017).

14. Lope de Vega has been conjectured by many as to be Avellaneda, the author of *The False Don Quixote*.

15. LOPE DE VEGA, POEMA DE LA HERMOSURA DE ANGELICA (1602).

16. ALONSO FERNANDEZ DE AVELLANEDA, DON QUIXOTE DE LA MANCHA 4 (John E. Keller & Alberta Wilson Server ed., 1980) (emphasis added).

II. CERVANTES AND THE 16TH CENTURY COPYRIGHT LANDSCAPE

A. Cervantes' Early Years

Miguel de Cervantes Saavedra was born in 1547 and initially chose a life of adventure—a choice that proved decidedly unrewarding. At twenty-four, he lost his hand fighting at the Battle of Lepanto in 1571 and a few years later suffered the further indignity of both being captured by Barbary pirates and forced into slavery in Algiers, serving a significant amount of time in prison.¹⁷ Ransomed and returned to Spain in 1580, he turned to writing and enjoyed little success, writing at least twenty plays, all rather coolly received. His early works of fiction and poetry also found only tepid approval, and so the extraordinary success of *Don Quixote* in 1605 was rather unexpected.¹⁸

Fully titled *El Ingenioso Hidalgo Don Quixote de la Mancha* (“*The Ingenious Nobleman Don Quixote of la Mancha*”) the work followed the wanderings of its eponymous subject’s knight-errant quests, coupled with the credulous and corpulent Sancho Panza, all to win the heart of his idolized Dulcinea, who we come to learn falls decidedly short of Don Quixote’s panegyrics. Don Quixote’s often deluded actions, for all of their entertainment value, doubled as scathing criticisms of earlier knight-errantry works of absurdly exaggerated exploits, most notably *Amadis of Gaul*¹⁹ and the *Song of Roland*.²⁰

For all of the book’s bite, it was nonetheless enthusiastically hailed by the public, immediately bringing urgent calls for a second part. Cervantes, however, had sold the rights to a printer, Franciso de Robles, who secured a ten-year license from the king banning any other works using Don Quixote.²¹

17. Indeed, Cervantes would seem to obliquely make reference to his experiences in prison in *Don Quixote*, when he notes through one of his characters that imprisonment could be welcome in providing the necessary free time to write books: “I’ll have time to finish my book, for . . . on the galleys of Spain there’s more leisure than I’ll need, though I don’t need much for what I have to write.” MIGUEL DE CERVANTES, *DON QUIXOTE* 169 (Edith Grossman trans., 2003). Cervantes also seems to cull from his imprisonment generally later when “the captive” relates another extended imprisonment, 34380 (*passim*).

18. With the absence of any cognizable authorial rights, Cervantes would sadly not reap the financial rewards of his success with *Don Quixote* he richly deserved. Indeed, it is likely Cervantes would have died penniless and unable to complete the second part of his most famous work if not for the sponsorship of Pedro Fernández de Castro y Andrade, who recognized the author’s thorny, but undeniable genius.

19. See generally GARCI RODRIGUEZ DE MONTALVO, *AMADIS OF GAUL* (1304).

20. See generally UNKNOWN, *SONG OF ROLAND* (c. 1100). Scholars speculate that the author was possibly the poet named Turolde. See Brault, *supra* note 6.

21. Francisco de Robles, *Personajes relacionados con la Historia del Libro*, *TODO LIBRO ANTIGUO* (2013), <http://www.todolibroantiguo.es/personajes-historicos/francisco-de-robles.html> [<https://perma.cc/4XZ3-VL2Q>];

It would seem that Cervantes himself took this to heart, or perhaps found himself actively forbidden by his printer, and so turned his attention to other projects over that decade.

Cervantes furthermore *seemed* to suggest in *Don Quixote* that he was done with the character, when at the end he wrote the following: “[P]erhaps a better pen will take up the cause.”²² Might a follow-on author then reasonably assume such a call was an invitation to continue?²³ Cervantes’ tongue-in-cheek criticisms of the era’s general lack of authorial control might also suggest a follow-on author might have at least his grudging license to further develop the character. In the next section, we take a more specific look at those tongue-in-cheek references, particularly as they relate to aspects of copyright law, and most notably, attribution.

Pero si por algo es recordado es por el Quijote. Como dice la portada: “Vendese en casa de Francisco de robles, librero del Rey nuestro señor.” Los derechos para la primera parte de la obra los había comprado por 1.500 reales en 1604.

La cédula real o privilegio de Felipe III del 26 de septiembre de 1604 autoriza su publicación, concediendo a Miguel de Cervantes licencia y facultad «por tiempo y espacio de diez años, que corran y se cuenten desde el dicho día de la desta nuestra cédula. So pena que la persona o personas que sin tener nuestro poder lo imprimiere o vendiere, o hiciera imprimir o vender, por el mesmo caso pierda la impresión que hiciere, con sus moldes y aparejos della, y más incurra en pena de cincuenta mil maravedises, cada vez que lo contrario hiciera» . El por qué Cervantes eligió a Francisco de Robles puede deberse a la amistad que ambos mantenían, ya que como hemos dicho su padre editó la Galatea o bien, la fama que como editor tenía, [. . .]

Translation: (Jennifer Rengachary) *But if he is remembered for anything it’s for Quixote. As it says on the cover: “Sold at the House of Francisco de Robles, bookseller of our Lord the King.” The rights for the first part of the work were purchased for 1500 reales in 1604.*

The royal stamp of Felipe III on September 26, 1604 authorized its publication, giving Miguel de Cervantes a license “for a space and time of 10 years, from this stamped date. If any unauthorized person prints or sells this work or causes this work to be printed or sold, the printed materials will be seized, as well as the printing apparatus used, and a fine of 500,000 maravedises will be imposed.” Whether Cervantes choose Francisco de Robles due to their friendship as his father had edited La Galatea or because of his own fame as an editor [. . .]; see also ROGER CHARTIER, THE AUTHORS HAND AND THE PRINTERS MIND: TRANSFORMATIONS OF THE WRITTEN WORD IN EARLY MODERN EUROPE 140 (2013).

22. Tom Lathrop, “*Don Quixote*” and Its Errant Author, *NEW ENGLAND REVIEW* (1990-), VOL. 31, NO. 4, 16 (2010). Original: “*forse major plecta.*”

23. While one could reasonably cite to this as a license to borrow, we should perhaps not overly read into such exhortations, as they were part of the standard ending of works, such as *Orlando Furioso*. See MATTEO MARIA BOIARDO, *ORLANDO INNAMORATO*, the first two parts published 1483, the last part, posthumously in 1495; see also LUDIVOCO ARIOSTO, *ORLANDO FURIOSO* (Guido Waldman trans., 1532).

B. Don Quixote, Part I: Cervantes and Copyright

It is perhaps helpful first to situate not only the copyright landscape of Cervantes' past, but also the timing of the laws that followed. *Don Quixote* fell just under a century before the Statute of Anne in England (1710)²⁴ and slightly over two centuries before Spain's Copyright Act of 1847.²⁵ As for the writing itself, it is perhaps Cervantes' criticisms with regard to authorial attribution that are most striking relative to basic modern copyright principles.²⁶

From the very beginning we learn that Cervantes plans to embrace a loose sense of authorship. In the prologue, Cervantes wrote that others have advised him "[to] write [the poems] yourself, and then . . . baptize them with any name you want . . ."²⁷ That is to say, rather than actually take the time to wait on the praise of authors and also lose control of that content, greater efficiency and control can be achieved writing the content yourself and attributing that work to those whom you admire.

As something of an aside, it is worth mentioning that Avellaneda later gave this statement a more cynical coloring, claiming that the actual reason Cervantes had to make up verses and attribute them to other poets was because he was incapable of "finding a titled person in Spain who would not be offended if his name were mentioned [in connection with Cervantes], so many having permitted their names to appear at the beginning of books by the authors he backbites."²⁸ We will have more to say on this later.

Cervantes' efforts at misattribution, however, do not end there. He attributes a quote to Cato that is actually from Ovid and compounds the error (intentionally?) by misquoting the reference.²⁹ Cervantes then states at the

24. ISABELLA ALEXANDER & H. TOMÁS GÓMEZ-AROSTEGUI, RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW 17 (2016).

25. *Id.* at 423.

26. Cervantes was critical of many other areas of authorship as well, directing his wrath towards the obtuseness of publishers among many other targets. He might end a chapter randomly with a semi-colon for example: Cervantes, *supra* note 1, at 94. At other times, he began chapters with humorously bland and contentless titles, such as "Chapter LXX, which follows chapter LXIX," or Chapter 59 (LIX), which begins as: "[W]hich recounts the extraordinary incident that befell Don Quixote and can be considered an adventure." *Id.* at 842, 912.

27. *Id.* at 5.

28. Avellaneda, *supra* note 16, at 4.

29. Cervantes, *supra* note 1, at 6. For example, in his preface notes Cervantes stated: "[i]f it's the fickleness of friends, Cato's there, ready with his couplet:

*Done eris felix, multos
numerabis amicos,
Tempora si fuerint
nubila, solus eris*"

outset that the text of *Don Quixote* is actually not his, but a translation from an old Arabic text, written by a sort of omnipresent wizard-like chronicler named Cide Hamete Benengali. Cervantes, however, took this literary conceit still one step further, noting that he was not even the translator, but instead paid another to translate it.³⁰

From misattribution, Cervantes moved seamlessly into non-attribution. Within the body of his work, songs were sung as if original to Cervantes' *Don Quixote*.³¹ Sancho Panza cited pontifically to all sorts of famous works, sometimes also misquoting them and frequently mistaking their application.³² Don Quixote and others also hold forth, without always revealing that wisdom proffered is not their own.³³ Given this accumulation of factors—Cervantes' non-authorship conceit, his misattribution and non-attribution, his final

This phrase is misattributed, it actually came from Ovid's *Tristia* 1.9.5-6.

"*To a Steadfast Friend*," but there should be two lines rather than four for the elegiac couplet form. In addition, there are actual textual errors. The Oxford English Edition reads as follows:

Donec eris sospes, multos numerabis amicos
Tempora si fuerint nubila, solus eris
 "When you are happy, you will have many friends
 If times become gray, you will be alone" (translation by author)

[‘Felix’ instead of ‘sospes’ has been accepted in other textual versions however.] Original text: <http://www.thelatinlibrary.com/ovid/ovid.tristia1.shtml> [<https://perma.cc/J4KD-DPYG>].

30. Cervantes wrote specifically "*to facilitate the arrangement and not allow such a wonderful find out of my hands, I brought him to my house, where, in a little more than a month and a half, he translated the entire history, just as it is recounted here.*" Cervantes, *supra* note 1, at 68. Furthermore, in Cervantes' Second Part he again alludes to the *Don Quixote* text being found in an old hermitage, "some parchments on which, in Gothic script, Castilian verses celebrated many of the knight's exploits and described the beauty of Dulcinea of Toboso, the figure of Rocinante, the fidelity of Sancho Panza, and the tomb of Don Quixote . . ." *Id.* at 445.

31. For example:

And when my soul, freed of its mortal shell,
 is led across the dark infernal Styx,
 it will celebrate you still,
 and with that song it will halt the waters of oblivion.

The verse is not attributed but is from the second stanza of Lope de Vega's third eclogue. Cervantes, *supra* note 1, at 909. Cervantes even has counsel for those trying to lengthen their work, to give it an amplitude and weight it might not otherwise have. Cervantes' opening, furthermore, is filled tributes to the major characters of *Don Quixote*, misattributed to famous authors. *Id.* at 11–18.

32. *Cf.*, e.g., "you are the messenger, my friend, and do not deserve the blame." *Id.* at 515. Which are actually lines from a ballad referring to Bernardo del Carpio as noted in footnote 3 of the chapter.

33. For example, Don Quixote sings a long song that is actually a translation from an Italian madrigal by Pietro Bembo. *Id.* at 905.

invitation for another to continue the writing of Don Quixote's adventures, and the fact that copyright as we know it did not exist at the time—one might think Cervantes would allow another author to borrow his character. As will become clear, this is not the case, and his anger substantially affected his own creative production of the final hundred pages of his literary masterpiece.

III. THE BATTLE FOR AUTHORIAL CONTROL

A. Cervantes' Don Quixote, Part II

While copyright as we know it did not exist at the time, as noted above, isolated exclusive licenses could be obtained from the king, and it appears Cervantes' publisher, Francisco de Robles, actively protected his ten-year grant from the king for *Don Quixote*. As it turns out, one author was watching closely, waiting for Francisco de Robles' license to expire. Writing under the pseudonym Alonso Fernández de Avellaneda, this author printed his version of the second part of *Don Quixote* almost immediately upon Francisco de Robles' license expiration in 1614. While Cervantes had also been waiting, he was clearly beaten to the punch, his version appearing a full year later. Reading Avellaneda's version, Cervantes was so incensed he wove insults to Avellaneda's person, writing ability, and plot choice in the final pages of his version, often to the exclusion of other character or plot development.³⁴ Avellaneda's follow-on work—understood in terms of its effect on first author output and creativity—in short dramatically affected Cervantes' subsequent creative work, changing content choice and perhaps even increasing Cervantes' creative output.

At this point it makes sense to consider this curious interplay and output in light of the functioning of modern U.S. copyright. For Cervantes' heightened productivity here offers us a compelling, perhaps repellent, example of an author whose productivity was potentially significantly enhanced through the desperation of a lack of copyright protection.

For, where the purpose of U.S. Copyright's is to "promote the Progress of the Science and the useful Arts,"³⁵ in this example many have rightly questioned whether Cervantes would have finished this work under a modern Copyright regime, free from the anxiety of a creative interloper. If the

34. Cervantes apparently learned of the other Don Quixote around Chapter 59 (LIX) of the second part after which allusions to the false Don Quixote increase considerably. *Id.* at 842; *see also id.* at 453, note 2. For a look at a similar fight for authorial control through Charles Dickens in a 19th century British copyright landscape, *see* H. Parkman Biggs, *Mocking their Muses: 'Fan Fiction' in the Age Dickens and Cervantes*, MÉLANGES EN L'HONNEUR DU PROFESSEUR JOËL MONÉGER, 615–17 (2017).

35. U.S. CONST. art. I § 8, cl. 8.

Copyright Clause speaks in part to a utilitarian function of productivity, where the function is solely to promote quantity, Cervantes' accelerated output suggests an uncomfortable counterpoint to the argument of increased utility. Would Cervantes have had the material, the inspiration, the spurring without Avellaneda threatening his legacy? Anyone who has read the last half of *Don Quixote Part II* will be hard-pressed to argue that Avellaneda's work did not dramatically influence Cervantes' version. And yet, it is that very lack of protection that is in part responsible for a text many consider the greatest literary fiction of *all time*. To make Avellaneda's influence more explicit, it is useful to document just how riddled the final part of Cervantes' *Don Quixote* is with allusions to Avellaneda.

Cervantes first references Avellaneda fairly gently in his prologue, sympathizing with his readers, who he imagines as longing for his angry response to Avellaneda's work:

[H]ow impatiently you must be waiting for this prologue, illustrious . . . reader, believing you will find in it reprisals, quarrels and vituperations hurled at the author of the *second Don Quixote* . . . [b]ut the truth is [that] I will not give you that pleasure . . . you would like me to call him an ass, a fool, an insolent dolt . . . let his sin be his punishment, let him eat it with his bread, and let that be an end to it.³⁶

Notice also that Cervantes refused to refer to Avellaneda by name, a discipline he stuck closely to. Cervantes then mentions a "loathing and disgust caused by another Don Quixote who has traveled the world in the disguise of a second part,"³⁷ Cervantes fairly pointing out that this second author would seem to implicitly recognize his inappropriateness by not revealing his identity.³⁸

Still in the Prologue, Cervantes speaks to the money lost to him by Avellaneda's work, which again speaks to our modern notions of copyright, but he insists the money is not his concern:

36. Cervantes, *supra* note 1, at 455 (Cervantes continues with what does upset him, however: "[w]hat I do mind . . . is that he accuses me of being old and one-handed, as if it had been in my power to stop time and halt its passage, or if I had been wounded in some tavern and not at the greatest event ever seen in past or present times . . .").

37. *Id.* at 453.

38. Cervantes writes that [this other author] "hides his name and conceals his birthplace, as if he had committed some terrible act of treason against the crown." *See id.* at 456. This is indeed, the case, as the true identity of Avellaneda has never been established. *See also* Avellaneda, *supra* note 16, at vi.

[H]is threat to deprive me of profits with his book is something I do not care about at all . . . [thanks to] the great Count of Lemnos, whose . . . liberality keeps me standing in spite of all the blows struck by my bad fortune³⁹

Cervantes finishes his second prologue by explaining he decided to kill Don Quixote at the end of this second part to prevent further use of his character. Cervantes is in effect asserting authorial control through the only means available to him without copyright, but that textual decision, if we find it sublime, is linked to the copyright-less space Cervantes created in.⁴⁰

The negative to outright scathing references to Avellaneda's work and person do not end with the prologue. They become almost the very rhythm of the final hundred pages of the work, a point at which we might reasonably guess Cervantes first became aware of his rival's publication.⁴¹

In the first reference within the work, Cervantes' Don Quixote hears through a thin hotel wall a person proposing to his friend "to read another chapter of *the second part of Don Quixote of La Mancha*" to which the person responds "why does your grace want us to read this nonsense? Whoever has read *the first part of the history of Don Quixote of La Mancha* cannot possibly derive any pleasure from reading this second part."⁴² Not limiting the criticism to content, Cervantes' character also takes exception to Don Quixote "having fallen out of love with Dulcinea of Toboso"⁴³ in Avellaneda's version.

As the final hundred pages continue, Cervantes' obsession with Avellaneda's intrusive contribution becomes increasingly the focus, although Cervantes takes great pains to never mention Avellaneda by name. For example, Sancho, discovering the existence of both his and Don Quixote's counterparts, feels compelled to mark the difference:

Believe me . . . the Sancho and the Don Quixote in that history are not the ones who appear in the history composed by Cide Hamete

39. Cervantes, *supra* note 1, at 457; see Avellaneda, *supra* note 16, at 3 (stating in the prologue that "[b]ut let him complain about my work because of the profits I take away from his second part.")

40. Cervantes, *supra* note 1, at 458 (stating that "I give you a somewhat expanded Don Quixote who is, at the end, dead and buried, so that no one will dare tell more tales about him")

41. See *id.* at 540 (when Don Quixote speaks of the possibility of an enchanter that appears as Don Quixote and "allowed himself to be vanquished in order to cheat [the real] Don Quixote of the fame that his high chivalric deeds have earned . . . for him throughout the known world.")

42. *Id.* at 845.

43. *Id.*

Benengeli, the ones who are us: my master is valiant, intelligent and in love, and I'm simple, amusing, and not a glutton or a drunkard.⁴⁴

Cervantes' reworkings do not end there as he also alters the actual plot of his work, *Don Quixote* stating he will no longer go to Zaragoza as Avellaneda's character had, but instead has Don Quixote travel to Barcelona, simply to further underscore "the lies of this modern historian to the world, and . . . that I am not the Don Quixote he says I am."⁴⁵

Later, in the hopes of helping Don Quixote better understand who the other Don Quixote is, Cervantes' Don Quixote is then urged to read passages from Avellaneda's *Don Quixote*. He demurs, however, not wanting to give Avellaneda—again not mentioned by name—the satisfaction:

[Don Quixote] considered that he had read it . . . that all of it was foolish, and if it happened to come to the attention of the author that he had held it in his hands, he did not want him to celebrate the idea that Don Quixote had read it, for one's thoughts must eschew obscene and indecent things, as must one's eyes.⁴⁶

At a meta-textual level, it is worth noting that characters here are not only speaking across books, but across authors, indeed across their purported translators. Cervantes creates a further opportunity for insult by having Don Quixote spot a printing shop in his wanderings, where he finds Avellaneda's *Don Quixote* headed to press:

He moved on and saw that they were also correcting another book, and when he asked its title, they responded that it was called the *Second Part of the Ingenious Gentleman Don Quixote of La Mancha*, written by somebody from Tordesillas.

"I have already heard of this book," said Don Quixote, "and by my conscience, ***the truth is I thought it had already been burned and turned to ashes for its insolence; but its day of reckoning will come, as it does to every pig***, for feigned histories are good and enjoyable the closer they are to the truth . . . and as for true ones, the truer they are, the better."⁴⁷

44. *Id.* at 848.

45. *Id.* at 849.

46. *Id.* at 848.

47. *Id.* at 874–75 (emphasis added).

And the drumbeat would only intensify. Subsequently, Don Quixote's unrequited (although in actuality feigned) suitor Altisidora, describes her near-death experience to Don Quixote:

To tell the truth . . . I probably didn't die completely because I didn't enter hell . . . I reached the gate, where about a dozen devils were playing *pelota* . . . in tights and doublets . . . and what amazed me most was that instead of balls they were using books . . . [o]ne of them, brand new and nicely bound, was hit so hard that its innards spilled out.

[When it was discovered to be the "fake" second part of the history of *Don Quixote of La Mancha*, the devil says] 'Take it away from here . . . and throw it into the pit of hell so that my eyes never see it again . . . [For it is] [s]o bad . . . that if I myself set out to make it worse, I would fail.⁴⁸

Don Quixote soon after then relates the incompetence of certain artists who paint:

[w]hatever comes out. And if . . . painting a rooster, he would write . . . 'This is a rooster,' so that no one would think it was a fox And that . . . is how the . . . writer . . . must be . . . of this new Don Quixote: he painted or wrote whatever came out.⁴⁹

Cervantes then took the extraordinary additional step of weaving Avellaneda's *characters* into Cervantes' text, setting up a lengthy passage between Avellaneda's Don Alvaro Tarfe, a close associate of Avellaneda's Don Quixote, and Cervantes' Don Quixote.⁵⁰ Don Quixote convinces Tarfe that the characters Tarfe consorted with were impostors and that the author who created him was substandard. Tarfe agrees. Not finished there, Cervantes went so far as to have Don Alvaro Tarfe sign a document with the local magistrate officially declaring it so.⁵¹

48. *Id.* at 915–16.

49. *Id.* at 923 (noting that he may also have been "like a poet who was at court some years ago, whose name was Mauleón; when asked a question, he would say the first thing that came into his head, and once when asked the meaning of *Deum de Deo*, he responded 'Dim down the drummer.'")

50. Avellaneda, *supra* note 16, at 14, footnote 17.

51. Cervantes, *supra* note 1, at 924–27.

The cataloguing of this degree of reference and animosity is important again when we are considering purely the extent of the influence that Avellaneda's work had on Cervantes' productivity and content choice. For the work that we now consider one of the great literary masterpieces of all time owes unfortunately a massive debt in its final pages to Avellaneda—an by extension to the lack of copyright.⁵²

The finale of *Don Quixote* further makes the point. On his deathbed, Cervantes' Don Quixote reads his last will and testament and begs his executors, should they meet the author who wrote the other *Don Quixote Part II* to ask his forgiveness for having given this false author the opportunity to write "such great absurdities . . ." ⁵³ Don Quixote dies three days later, and Cervantes relates that the priest drew up a document testifying to his death "to remove the possibility that any author other than Cide Hamete Benengeli would falsely resurrect him . . ." ⁵⁴

Finally, to further assure that no other would take up the quixotic mantle, Cervantes ends this second part with the fictional Arab writer, Cide Hamete Benengeli, speaking to his pen as follows:

Here you will remain, hanging from this rack on a copper wire . . . [I]et no one lay a hand on [this pen]; for this enterprise . . . is reserved only for me. For me alone was Don Quixote born, and I for him; he knew how to act, and I to write; the two of us alone are one, despite and regardless of the false Tordesillan who dared . . . to write . . . about the exploits of my valorous knight . . . ⁵⁵

The final words of Cervantes' *Don Quixote* are a warning to leave his "true Don Quixote" alone.⁵⁶ It is interesting to consider again, however, the role Avellaneda's work played on the creative production of Cervantes. As we have noted, Cervantes' final hundred pages referenced Avellaneda relentlessly and seemed to give Cervantes new creative inspiration—perhaps even a solution as to how he might end his second part. What might that final text have looked like without Avellaneda's work? Might the work have been finished at all? If Avellaneda helped Cervantes finish his work, Western literature owes Avellaneda an enormous debt of gratitude, for not only did his text contribute

52. Angelique Chrisafis, *Don Quixote is the World's Best Book say the World's Top Authors*, THE GUARDIAN May 8, 2002, <https://www.theguardian.com/world/2002/may/08/humanities.books> [<https://perma.cc/74WJ-7LG6>].

53. Cervantes, *supra* note 1, at 938.

54. *Id.*

55. *Id.* at 939.

56. *Id.* at 940.

significantly to Cervantes final pages, Avellaneda's spurring on of Cervantes at that particular moment in time was crucial as Cervantes died only one year later.

An analysis of only Cervantes' text of *Don Quixote* is incomplete, however. Understanding more closely what may have caused such upset to Cervantes and affected him so deeply is warranted. Was Avellaneda's work truly so wanting that it deserved the "loathing and disgust" of Cervantes?⁵⁷ In the next section, we will take a closer look at Avellaneda's text, particularly focusing on the author's references to Cervantes and Cervantes' *Don Quixote*.

B. Avellaneda's *Don Quixote de La Mancha Part II*

For all of Cervantes' mockery, it is fair to question whether Avellaneda's work was indeed as substandard as Cervantes found it to be. Although not every generation agrees—indeed in the seventeenth and eighteenth centuries the French actually found Avellaneda's version superior to Cervantes'—current consensus generally finds Avellaneda's version capable but not quite to Cervantes' level of mastery.⁵⁸ We will try here to document in some measure how the difference in quality between the two works might reveal itself.

Cervantes' greater discipline reveals itself first in the maintaining of conceits; Cervantes notes that his work is from a mysterious Arab writer, Cidi Hamete Benengeli, a conceit he sustains throughout the book, mentioning the Arab author forty-two times.⁵⁹ Cervantes further improves on the conceit, as earlier noted, by stating that he also did not translate the work. In contrast, Avellaneda cites to an Arab writer, Alisolán, so seems ready to honor the tradition, but then never specifically mentions him again.

Avellaneda also seems less able to fully render the complexity to Cervantes' characters. Under Avellaneda's version, *Don Quixote* is mad without any moments of lucidity or redemptive behavior, also proving more quick to violence. Sancho Panza is not a wise-fool as under the hand of Cervantes but is instead an unremitting fool.⁶⁰ At the end, while Avellaneda

57. *Id.* at 453.

58. See Avellaneda, *supra* note 16, at Translator's Introduction ix–xi.

59. The figure of 42 times established through text search by author.

60. Addressing Sancho Panza a character of Cervantes' notes of Avellaneda's work: "this new author does not handle you with the decency that displays itself in your person; he makes you out a heavy feeder and a fool, and not in the least droll, and a very different being from the Sancho described in the First Part of your master's history." DON QUIXOTE, PART II, MIGUEL DE CERVANTES Chapter 59, 167 (Amazon Kindle, 2011). Compare Avellaneda, *supra* note 16, at 269 where Sancho behaves simply like a fool, with Cervantes, *supra* note 1, at 895 where Cervantes' Sancho, who is allowed to render judgment, and does so fairly wisely, even at the behest of *Don Quixote* himself who towards the end of the work says, "[you] are welcome to respond . . . Sancho, my friend; I would not be competent to do so, my judgment is so shaken and confused."

has his Don Quixote involuntarily committed to an insane asylum because there is simply no hope for him, Cervantes' Don Quixote comes to a more baleful realization of his errors, induced into a sort of anagnoresis after an inglorious confrontation at the hands of herders whose animals trample him into his changed worldview. Don Quixote, in his despondency, seems to understand what his life has been, lamenting to Sancho:

Eat, Sancho my friend . . . sustain life, which matters to you more than to me, and let me die at the hands of my thoughts and by means of my misfortunes. I, Sancho, was born to live by dying, and you to die by eating; so you can see that I am telling you the truth in this regard, consider me, printed in histories, famous in the practice of arms, courteous in my actions, respected by princes, wooed by maidens; and *when I expected the palms, triumphs, and crowns that were earned and deserved by my valorous deeds, I have seen myself this morning trampled and kicked and bruised by the feet of filthy and unclean animals.* This thought dulls my teeth, blunts my molars, numbs my hands, and completely takes away my desire for food, and so I think I shall let myself die of hunger, the cruelest of all deaths.⁶¹

Cervantes' Don Quixote takes control of his life at the end and understands fully the absurdity of his position. That fuller complexity is not part of Avellaneda's Don Quixote who is simply deposited, still delusional, in an insane asylum.

Avellaneda's moralism is furthermore rather heavy-handed, and so for him Don Quixote deserves his misery and misfortune for after all he is committing sins against God.⁶² Cervantes' lessons are less heavy-handed, more equivocal. We see a bit of ourselves in him and even find ourselves rooting for him. Not so for Avellaneda's Don Quixote.

The only area where Avellaneda and Cervantes seem to agree is on the corrupting influence of chivalric books, something Avellaneda would rail against more stridently and unsubtly than Cervantes: "we both have one aim, which is to banish the harmful lesson of the inane books of chivalry so commonplace among rustics and idle people."⁶³ Avellaneda echoes this sentiment again late in his story when another describes Don Quixote as "half-

61. *Id.* at 842 (emphasis added).

62. *See* Avellaneda, *supra* note 16, at 77, 153, 165, 189–91.

63. *Id.* at 3.

crazy . . . because of having taken to reading too many of the deceitful books of chivalry which are being printed, and believing them to be true”⁶⁴

Even here, however, the complexity of the moral lessons of these two authors diverges. In the end of Avellaneda’s version, in a rather heavy-handed moral fashion, Don Quixote is sent to a mad house because of these books, and he is instructed he must no longer read them:

I trust . . . that you will return to your senses and forget the readings and wild fancies in the insane books of chivalry that have reduced you to such a state. Take care of your soul and realize God’s mercy in not permitting you to die on those roads in the disastrous situations in which your madness placed you so many times.⁶⁵

At the end of his version, Avellaneda took an approach to the continuation of the Don Quixote legacy far more consistent with his times than Cervantes, inviting others to take up the challenge and write further adventures of Don Quixote, stating on his final page that “a better pen will surely not be lacking.”⁶⁶ Avellaneda had indeed earlier even invited others to consider writing a separate work focusing on Sancho Panza.⁶⁷ One might argue that this was relatively easy for him to do as he was playing with house money, offering up characters that had never been his own. Regardless, as loud as Avellaneda may have invited follow-on authorship, history has for the most part favored Cervantes’ plea that no one else take up their pen in Don Quixote’s name.

CONCLUSION

Understanding exactly the nature and degree of interplay between Cervantes’ and Avellaneda’s version of Don Quixote is essential to understanding how things operated in a long forgotten literary landscape without copyright. A perhaps uncomfortable conclusion suggests itself in terms of creative production, a constitutional predicate of U.S. Copyright. As shown, the lack of any copyright protections provided in this particular case for an open market that motivated excellent additional original authorship from both the original and follow-on author. As noted earlier, Avellaneda’s work, though

64. *Id.* at 275.

65. *Id.* at 344.

66. *Id.* at 346.

67. *Id.* at 334.

today not as widely hailed as Cervantes', at one time was held to actually be the superior version.⁶⁸

Avellaneda's work also seems to have contributed greatly to Cervantes' Second Part and perhaps even to its completion. The references to Avellaneda and his work sprinkled through Cervantes' version can be seen on the one hand as a muddying a masterpiece, compromising its purity, but the opposite conclusion can also be reached. The text as written has been judged by many to be the greatest fictional work of all time,⁶⁹ perhaps that sort of muddying is an essential part of the patina that makes it so exceptional.

We would be remiss, however, not to note that a contrary conclusion is also possible. Cervantes did kill off Don Quixote in the hopes this would make him unavailable to others, and most have respected that plea. This plea to end all follow-on authorship for perpetuity diminished follow-on authorship far more than the short-term increase in productivity added. More speculatively, was Cervantes' death independent of his productive output or did his outrage have consequences for his health and so did his untimely death end the productivity of a great author?

It is also worth noting that if we are sympathetic to Cervantes' authorial challenges and protest, our reactions spring in part more from a sense of fairness than from a desire for optimal creative output. Certainly, it is a fairer world that allows authors to benefit from their creations and to have the right to control the use of that creation. Fairness, however nice, is not part of the U.S. Copyright mandate, so has no place as a constitutional argument. All in all, the case of Cervantes and Avellaneda is therefore intriguing from a copyright production standpoint, as this extraordinary creative battle made possible by its attendant, uncontrolled copyright landscape can reasonably be seen to have resulted in greater productivity for the authors than its copyright-controlled counterpart—and resulted in no less than the greatest piece of western literary fiction of all time. This serves as a somewhat unwelcome truth—and frankly not one that this author or most creatives will particularly welcome, but a truth nonetheless—that from a utilitarian perspective a lack of limited monopolies can actually lead to truly exceptional creative productivity.

68. Avellaneda, *supra* note 16, at xi. As Server and Keller note specifically: “[w]hen Alain-René Lesage’s translation into French of the spurious novel appeared in 1704, a century after the first publication of Cervantes’ Part I, he printed a prologue in which he extolled Avellaneda highly and led Spaniards themselves to consider it as great or even greater than Cervantes’ work . . . [e]ven as late as 1882 in France the translator A. Germond de Lavigne was still hailing Avellaneda as Cervantes’ superior in the area of novel writing.”

69. Chrisafis, *supra* note 52.