Chapter II: Copyright English and Colonial Origins

This chapter traces the development of various administrative, political and legal means employed in sixteenth century England as part of the regulation of the book trade, into the late eighteenth century general copyright regimes of both England and the American states. Since it is easy to lose sight of the forest in the multitude of trees consisting of doctrinal and ideological details, one should keep in mind the overarching argument of this account. As in the previous chapter the underlying argument about the early history of Anglo-American copyright is twofold. First, it is designed to show that the early practices and the conceptual scheme embedded in them were fundamentally different from the modern framework of copyright that eventually emerged out of them. Second, while tracking the gradual yet profound changes undergone by copyright law and practice over a period of two centuries, the chapter demonstrates that by the end of the eighteenth century some of the transformations that led to the modern framework did not yet occur while others were still in an embryonic stage. On the eve of the Constitution the practices that Americans were familiar with as "copyright" were already much different from their sixteenth century English origins. At the same time, however, they were just as different from the doctrinal and conceptual framework of copyright at the beginning of the twentieth century.

In general terms modern Anglo-American copyright is a regime of general rights of authors in their creative works. Taking this abstract definition apart, one can detect several components constituting it. First, modern copyright is a general right in the sense used in the previous chapter to describe modern patents. It is a set of standard entitlements enjoyed as a matter of right by any subject of the legal regime that meets a predefined set of general criteria.

Second, copyright is usually thought of and referred to as a property right or as ownership. This is a somewhat complex and elusive concept. Ownership is sometimes referred to or assumed to be total control of something. Yet in actual legal doctrine property rights in general and copyright in particular never constitute in any meaningful sense total control. More importantly, ownership is hardly ever conceptualized by modern jurisprudence as absolute control. Instead the dominant image of ownership is that of a bundle of various entitlements enjoyed by the owner vis-à-vis the object of ownership. Modern copyright doctrine fits well within this image. It confers upon the owner a set of various entitlements regarding different aspects and possible uses of the protected object of the right- the "work."

This set, as well as the scope of each entitlement within it, is far from constituting absolute control, but it is fairly comprehensive and diverse.

Third, the object of the property right created by copyright- the intellectual "work"- is conceptualized as an abstract or intangible entity to which the various entitlements apply. Different legal doctrines define the work and govern its protected boundaries. While debates rage regarding the optimal scope of the work and while such scope may change or remain vague in some respects, an overarching theme of the modern conceptual scheme of copyright is the depiction of its object as such an intangible entity in which the entitlements or the control allowed to the owner subsist.

Finally, just as the inventor is the conceptual correlative of the invention in patent law, in copyright it is the author that occupies this position in relation to the work. The modern concept of copyright is founded on the general principle of individual original authorship. The author is the creator of the work and the person to which the original entitlements are awarded by law. The exact doctrinal details that define authorship may differ or be disputed. The relation between the ideal concept of authorship and the actual doctrinal arrangements may be complex and sometimes even fictional. Nevertheless, modern copyright protection is founded on a generalized form of the principle of authorship, on the assumption that the guiding light of protection is individuals who create original new works.

The early origins of copyright in England were different from the conceptual and doctrinal scheme described above on every count. The protection of exclusive printing and publishing rights in books was based not on a regime of a general right but on particularistic privileges awarded by the sovereign as a matter of specific discretion either to certain individuals or to a specified group of individuals as part of the regulation of the book trade. Although the language of "property" can be found in connection to such privileges as early as the middle of the seventeenth century, it was not until much later that a concept of ownership similar to the modern one started to appear. Copyright or similar devices were not thought of as general control of or as a bundle of entitlements in some intangible object. Instead it was conceptualized and practiced as an exclusive privilege to exercise a certain economic activity, to engage in the printing or publishing of a certain book. Finally, neither the work nor the author played any significant part in the early days of copyright. Early copyright discourse simply had no concept of an intangible object- the "work"- in which the rights consist. Similarly, copyright did not originally single out the writer of a text as the obvious or even as the most common subject of the relevant rights. Nor was there a developed concept of authorship as the basis of rights in books, much less a

generalized principle of protecting original authorship in the context of other subject matter.

The transformation of these various elements was slow, gradual and complex. The seeds of the later developments can often be discerned in an embryonic form in the older practices. But the process leading from one to the other was neither linear nor inevitable. Moreover, by the end of the eighteenth century copyright was still in several important respects quite different from its modern form. On this most abstract level the historical story of Anglo-American copyright appears to be identical to that of patents. However, once one plunges into the specific details of this process important differences appear. Instead of a perfect match between the two stories one ends up with a complex pattern of similarities and dissimilarities-convergence and divergence. Moreover, the historical actors themselves often exhibit an awareness of this complex pattern, resulting in attempts to rationalize it, shape it or harness it to their purposes.

I. English Copyright

A. Early Copyright

Like patents the practices that eventually gave rise to what we call today copyright first appeared in the Italian republics, from where they were probably imported to other European countries and to England.[1] Usually these were specific privileges granted by the government to a printer or a publisher which included an exclusive right to print or sell certain books. In some places there appeared also independent arrangements of different degrees of formality between printers and publishers to recognize each other's exclusive rights to publish certain books. Such arrangements were usually connected to a guild apparatus, which in turn, received some sanction

[1] About the early origins of copyright in Venice and other Italian republics see BRUCE W. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 43-48 (1967); LEONARDAS VYTAUTAS GERULAITIS, PRINTING AND PUBLISHING IN FIFTEENTH-CENTURY VENICE (1976); Victor Scholderer, *Printing at Venice to the End of 1481*, 25 The Library 130 (4th Ser. 1924). For an argument about a possible personal connection between one of the earliest English printing patents (possibly the earliest) and Venice see JOSEPH LOEWENSEIN, THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT 69, 75 (2002).

or recognition from the government. A final common characteristic was that while the interest of the printers and publishers in such arrangements was mainly commercial the governments involved had an additional substantial motive: censorship.

The early development of copyright in England which started in the first part of the sixteenth century shared these general characteristics. Copyright developed in England in two parallel tracks that interacted with each other until they finally converged in the eighteenth century. The first channel was the printing patent. This was a discretionary privilege patent granted by the crown on the basis of its prerogative power. Like invention patents the early printing patents constituted yet another undistinguishable category of royal patent grants. Hence, during the seventeenth century the printing patent was caught up in the struggle and discourse of monopolies. Nevertheless the specific characteristics of the book industry and the issues intertwined with it gradually gave rise to an emerging practical recognition of the printing patents as a unique class of grants with its own distinctive practices.

The second track of development was the stationers' copyright. This was a set of practices and regulations internal to the book trade guild - the Stationers' Company.[2] These practices involved the allocation of exclusive publishing or printing rights among the members of the guild. In time this arrangement received increasing governmental sanction and backup.

Just like invention patents these early practices, that regulated the entitlement of specific persons regarding the publishing of books, were a thoroughly different creature than what we call today copyright. This was true even when familiar terms like "property" or "rights" were used. The

[2] About the Stationer's Company see CYPRIAN BLAGDEN, THE STATIONERS' COMPANY A HISTORY 1403-1959 (1977). A transcript of the Registers of the Stationers' Company (with some gaps) as well as a wealth of related documents can be found in the following sources: EDWARD ARBER, A TRANSCRIPT OF THE REGISTER OF THE COMPANY OF STATIONERS, 1554-1640 A.D. (1876); EYRE & RIVINGTON, A TRANSCRIPT OF THE REGISTER OF THE WORSHIPFUL COMPANY OF STATIONERS, 1640-1708 A.D. (1914); W.W. GREG, A COMPANION TO ARBER (1967). The records of the governing body of the Company- the Court of Assistants- are available in: W.W. GREG & E. BOSWELL, RECORDS OF THE COURT OF THE STATIONERS' COMPANY, 1576-1602 (1930); WILLIAM JACKSON, RECORDS OF THE COURT OF THE STATIONERS' COMPANY, 1602-1640 (1957).

unique character of early copyright, however, and the subsequent transformation of the practices and concepts involved is somewhat different from the story of patents for invention. English copyright developed along a trajectory which in some respects is very similar to that of patents and in others diverges quite significantly. Two significant factors of the many involved in this pattern of convergence and divergence are the unique two-track early development of copyright and the complex interaction between state power and guild apparatus it entailed.

1. Printing Patents

a. The Emergence and Rise of Printing Patents

Like elsewhere, the arrival of the printing press to England was the engine that supplied the first drive for both the transformation of the book trade and for its emerging regulation by government and the guild apparatus. After William Caxton brought the first press to England in 1477 printing was dominantly treated as a new trade to be encouraged. Much like other new industries at the time this mainly meant the enticement of foreign craftsmen to come to England and practice their trade within it. Governmental encouragement of this sort consisted mainly in general exemptions to foreign printers and booksellers[3] from restrictions and conditions that limited the ability of foreigners to exercise their trade in England.[4] Within a few decades, however, the gradual growth of the new trade in England turned the tide.

[3] Booksellers were roughly the equivalent of what we would call today publishers. The three main professions within the guild in the age of print were printers, booksellers and bookbinders. In the early years of the trade professional specialization was minimal with many combining a few of these functions. The later years, beginning in the late sixteenth century, were characterized by two developments in this respect. First, professional specialization in the trade was gradually sharpened with many craftsmen focusing on one of the professions. Second, booksellers slowly replaced printers as the dominant and most wealthy class- a process that reduced many of those who were exclusively printers or bookbinders to the level of hired-craftsmen, rather than entrepreneurs or partners in the enterprise of publishing a book. See MARJORIE PLANT, THE ENGLISH BOOK TRADE 59-68 (3rd ed. 1974).

[4] See *Id.* at 24-25; LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 21-22 (1968);

Agitation of native printers eventually brought about the repeal of all measures designed to encourage foreign craftsmen in the field.[5]

The emergence of the new trade had its implications at the home front as well. Members of the book trade who felt the growing pinch of competition, especially in the wake of changing market and of production conditions,[6] started looking for means for protecting their investments and their commercial interests. In the sixteenth century one of the most common means of this sort in various economic fields were privileges of exclusivity bestowed by royal patent grants. This was exactly the form that early protection of specific members of the book trade took. For a century royal printing patents were the most important form of protection in the trade, at least in terms of covering the most profitable and lucrative books in the market.

Though the distinction is somewhat obscure, and was not explicitly employed by contemporaries, one can distinguish three main brands of printing patents. The brand of printing privileges that appeared first was that of the king's printer.[7] This privilege was probably first granted in 1504 when

[5] *Id.* at 22-23; Blagden, *supra* note 2, at 25-26.

[6] The new need for protection is often described as a direct outcome of the new mass reproduction technology which significantly lowered the cost of copying and brought the book closer to the status of a public good. This argument is flawed because it is not clear how the changing cost of reproduction by itself changed the producer's need for protection. Any reduction in the reproduction cost was equally enjoyed by the first to print as by subsequent "copiers." Even the main component of cost possibly separating the first printer from others- the cost of obtaining the manuscript- was often less significant than what one may assume. Payment to authors was not high at the early period of the new system and in many cases the printed texts had no relevant authors that had to be compensated. Thus the, main reason for the increased pressure for protection was probably not merely the decreasing cost of reproduction but rather the more complex and general changing patterns of production and sale. In the age of print the production of books gradually became a capital intensive initiative involving mass production and gradual returns on investment. The drive for protection was rooted mainly in the need to reduce the risk on a substantial investment that could be recouped only on the basis of large scale sales. See *infra* text accompanying note 35.

[7] The office was created in 1485. Peter Actor who was the first King's printer was granted a right to import books and manuscripts with an exemption from

Henry VII backed up the nomination of William Facques to the position of the king's printer by granting him the exclusive right to print various documents issued by the crown such as statutes and royal proclamations.[8] Though there was no official law or decree of any kind limiting the printing privileges bestowed upon the king's printer to "state documents," the general practice seems to have been for such grants to cover mainly materials to which a relatively direct state origin or interest could be traced. This category, however, was understood in wider terms than we are accustomed to today. Bibles and service books for example came to be one of the common items included in the king's printer privileges. Accordingly, these privileges that persisted throughout the seventeenth century, rather than covering a relatively esoteric segment of the trade, were among the most commercially valuable and coveted ones.

Patents of a second kind were bestowed on individual members of the book trade independently of the king's printer office and covered whole classes of books. At first some of these patents followed, at least in rhetoric, the form of an official office that carried with it the exclusive right to print certain books. Thus for example in 1547 Reginald Wolff was appointed to the office of printer and seller of books in Latin, Greek and Hebrew.[9] Most of these patents, however, simply allocated the exclusive right to print certain classes of works to particular persons, without taking the form of appointment to an official position. Primers and books of private prayer[10] as well as almanacs and prognostications[11] were among the classes covered by printing patents. Soon classes of works that originally had been allocated to the king's printer, or could have been so allocated if any strict logic had been

customs and levies, but not a privilege to exclusively print specific texts. Loewenstein, *supra* note 1, at 67.

[8] See John Feather, THE HISTORY OF BRITISH PUBLISHING 17 (1988). Loewenstein argues that it is uncertain whether Faques had such formal privileges. Loewenstein, *supra* note 1, at 286 n. 64.

[9] Plan, *supra* note 3, at 101. This title and the related monopoly were later granted to Francis Flower In 1573. See II Arber, *supra* note 2, at 16; Leo Kirschbaum, *Author's Copyright in England Before 1640*, 40 Papers of the Bibliographical Society of America 43, 79 (1946).

[10] See Letters Patents to William Seres, 3 June, 1559, in II Arber, *supra* note 2, at 60.

[11] See the 1588 patent to R. Watkins and James Roberts, II Arber, *supra* note 2, at 16.

followed, were included in separate printing privileges. Richard Grafton received the sole right to print the statute books.[12] Richard Tottell obtained a patent covering common law books,[13] and John Cawood's privilege included the Acts of Parliament and Proclamations.[14]

Finally, a third category of patents granted to certain persons the exclusive right to print specific books. One of the earliest known patents of this sort was the 1518 Richard Pynson's patent for printing the *Oritario Richardi Pacei, &c* (a sermon by Richard Pace).[15] William Seres obtained in 1553 what possibly was the most lucrative of those patents. It covered the *ABC* (the period's elementary reading textbook).[16] Anthony Morlar received in 1542 a four year patent for the printing of the bible in English.[17] Many other specific texts came to be covered by such printing privileges.[18]

By the last quarter of the sixteenth century there were privileges in primers, prayer books, school-books, service books, almanacs and prognostications, all bibles, music books, catechisms, statutes, law books, dictionaries as well as in a host of specific important texts such as the *ABC* and commonly used scholarly works.[19] The importance of the printing patent

[12] Plant, *supra* note 3, at 101.

[13] II Arber, *supra* note 2, at 16; Kirschbaum *supra* note 9, at 45.

[14] Plant, *supra* note 3, at 102.

[15] JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 11 (1994). Loewenstein refers to an earlier patent granted in 1517 for the printing of Thomas Linacre's *Progymnasmata* (the two years patent was probably granted to the printer of the text and not to the author but the colophon is ambiguous regarding this issue). Loewenstein, *supra* note 1, at 69.

[16] Plant, *supra* note 3, at 102.

[17] *Id.* at 101.

[18] See, for example: 1574 patent to Thomas Vautrollier to print certain Latin texts. II Arber, *supra* note 2, at 746; Wynkyn de Worde's 1533 patent for the printing of Robert Winston's Treatise of Grammar, Plant, *supra* note 3, at 101; Richard Field's 1592 patent for the printing of Sir John Harington's translation of Ariosto's *Orlando Furioso*, Feather, *supra* note 15, at 13.

[19] Plant, *supra* note 3, at 103; Feather, *supra* note 15, at 12.

is further highlighted by the fact that most of these privileges were concentrated in the hands of a few prominent members of the book trade.[20]

b. Printing Patents as Particularistic Policy Decisions

Despite their importance, by the end of the sixteenth century printing patents were not regulated by a body of law or even by a rigid set of administrative practices. They were based on the royal prerogative power, which at the time, like in the case of other patent grants, was used in an ad-hoc, discretionary and flexible manner and was subject to little formal limitations. Still, a few common characteristics of printing patents can be discerned.

To begin with, the flexibility and particularism were themselves important traits of the printing patent. Following the general framework of patents at the time, printing patents were specific royal policy decisions. No person had a right to receive a printing patent and there were no standard requirements whose fulfillment could assure a grant. Instead each grant involved a specific royal discretion, weighing the relevant policies and interests and determining whether to grant a patent and what its particular terms should be. Thus, though many texts, among which were some of the most commercially valuable ones, were covered by patents, the majority of printed works were not the object of such grants.

Moreover, the particularistic nature of the grants was evident in their wide variety of coverage and terms. Some granted protection to a specific printer for an entire class of works, while others protected a single specified text. While most early printing patents were limited in time, some, especially (but not always or exclusively) those covering general classes, lasted for the entire lifetime of the grantee.[21] Others expired after various specified terms. One can find diverse patent terms such as four and twenty one years.[22] Since there was no formal restriction on re-granting printing patents whose terms

[20] Feather, *supra* note 15, at 12.

[21] Some examples of life-time patents are: William Seres' 1559 patent for primers, reprinted in II Arber, *supra* note 2, at 60; John Day's patent of the same year, reprinted in *id.* at 61.

[22] Anthony Morlar received in 1542 a four years patent for printing of the English Bible. See Plant, *supra* note 3, at 101. Tallis and byrd received in 1575 a twenty one years patent for music books. *Id.* at 103.

had lapsed, and since sometimes the crown did not hesitate to reassign patents before they expired, the same texts were protected under different privileges granted to different persons in various periods. In 1553, for example, Queen Mary took the privilege of printing common law books from the queen's printer and gave it to Richard Tottel.[23] The existing patent protecting the *Eliot Dictionary* was transformed into a general class patent covering all dictionaries and chronicles when it was granted to Henry Bynneman in 1580.[24] In short, the possibilities and combinations were, at least in theory, endless. Printing patents were case specific policy tools that could be granted and shaped on the basis of a broad discretion.

What were the typical "policies" that the crown tried to promote through the specific grants? Unlike patents for invention, petitions for grants or the grants themselves rarely included explicit recitals of a specific "consideration" promised by the grantee. Nevertheless, there was a set of recurrent policies that seem to have underlain many of the grants and were sometimes echoed in their phrasing. One such typical policy was to insure order in the book trade. This usually meant the need to supply some protection to the investments of printers in order to guarantee the steady printing and supply of certain texts. In 1583 a commission appointed by the Privy Council to investigate the unrest in the trade over the printing patent recommended to "vphold her maiesties privilidge." It explained that otherwise the outcome might be: "no great bookes of valew to be printed."[25] Similarly, when in 1586 the Stationers submitted a petition which defended the printing patent from criticism, they argued that:

> "if priuileges be revoked no bookes at all shoulde be printed, within shorte tyme. For commonlie the first printer… is at charge for the Authors paynes, and somme other such like extraordinarie cost, where an other that will print it after hym, commeth to the Copie gratis, and so maie he sell better cheaper than the first prynter, and then the first prynter shall never vtter his bookes… These inconvenyences seen eury man will strayne curtesie who shall begynne, so farre that in the ende all prynting will

[23] Feather, *supra* note 15, at 12.

[24] *Id.* at 13.

[25] II Arber, *supra* note 2, at 784. The commission also counted the dangers of lack of good type and "want of householders" and the employment they provide in the absence of protection of the patent.

> decaie within the Realme, to the vndoing of the whole Company of Staconers."[26]

A second recurring theme in printing patents was the royal interest in rewarding particular persons in the book trade for such things as past services or proved loyalty. Thus for example, when in 1559 Elizabeth granted her "louyng Subiect William Seres" a privilege to print primers, the patent mentioned that "in the tyme of our late deare Syster Queen Mary [he] was not onlie defeated therof to his great losse but was also imprisoned long tyme and depriued of gret multitutde of the said primers… which tended to his vtter vdoyng."[27] Christopher Barker explained in 1582 that "the Prince or Magistrate had ever care to commit the printing of all good books… to some special men well known and tried for their fidelity, skill and ability."[28]

The third and probably most dominant general policy pursued through printing patents was royal control and supervision of specific religiously and politically sensitive materials. John Day's 1559 patent mentioned that the grant was made "so that noe suche booke or bookes be repugnant the holye Scripture or to the lawes and orders of our Realme."[29] When the Stationers defended the printing patent from criticism they did not neglect to argue in their petition that in the absence of such patents "it maie be a meanes, that heresies, treasons, and seditious Libells shall often be dispersed."[30]

These three policies tended to blend into each other. In many cases, the sure route for achieving an orderly printing and supply of a particular text or class of texts as well as royal control of the content of such texts was to grant the exclusive printing privilege to an entrusted loyal printer. The blurring of the lines was not only practical but also conceptual. The recurrent theme of "maintaining order in the trade" referred, as explained to protection

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[26] *The Argument Of the Patentees in Favour of Priviliges for Bookes.* in II Arber, *supra* note 2, at 805. The argument that the first printer's special cost derived from compensation of authors was somewhat disingenuous. Most of the printing patents, though not all of them, covered works that had no relevant authors to compensate, such as bibles or traditional scholarly works.

[27] II Arber, *supra* note 2, at 60.

[28] I Arber, *supra* note 2, at 114.

[29] A License to John Day 11 November, 1559, in II Arber, *supra* note 2, at 61.

[30] *The Argument Of the Patentees in Favour of Priviliges for Bookes*. II Arber, *supra* note 2, at 805.

of investment and insuring supply of books, but it often had also connotations of content control. It should be remembered that all of these policy considerations even when they were raised, as in the mentioned stationers' petition, in support of the general practice of patents, and even when they resembled later arguments in favor of a general copyright regime, did not create an entitlement or a right for a printing patent. Instead they were considerations and justifications employed in a case specific manner as the basis for the discretionary decision regarding the grant and its specific terms.

b. Printing Patents as Privileges to Print Books

The second common trait of the printing patent was the entitlement it created. The sole entitlement conferred by printing patents was the exclusive right to print a certain text or texts. The object of the entitlement was not conceived of as general control or ownership of and intangible entity, the equivalent of what we call today the "work." Instead, it had much more physicalist and dynamic connotations similar to those of the concept of exercising a "trade" as the object of patents for invention. Printing patents granted a limited exclusive right to engage in the activity of printing specified texts, usually referred to in the grants as "books." It would be wrong to understand such grants in modern terms as creating a right in literary "works" which simply covered a narrower set of entitlements than later copyright. The notion that printing was the reproduction of an intellectual "work" and that someone could or should have been given entitlements or "ownership" in such "works" was simply not part of the early conceptual world of printing patents. The right to print a particular text or texts was the sole object of the grant, rather than one entitlement within a bundle which constituted ownership in "works."

Correlative to this limited entitlement was the fact that the recipients of the privileges were printers or publishers. More accurately, the patents were printers-publishers' privileges. In the majority of cases this literally meant that the grantees were printers or booksellers. Commonly, but not always or due to any formal limitation, the grantees were also prominent members of the Stationers' Company. Yet, in rare cases, such as the 1563 twelve years grant to Thomas Cooper covering his *Thesaurus Linguae Latinae*[31], the grantees were not printers or booksellers but rather the authors of texts and sometimes even editors, translators or relatives of such

[31] Feather, *supra* note 15, at 12; Kirschbaum, *supra* note 9, at 47.

persons.[32] The crux of the matter, however, is that even in such cases the grantees were given their privileges as (indirect) publishers rather than as authors. Authorship was but a background ingredient in the conceptualization of the printing patent. Thus many patents, among which were the most valuable ones, covered works that had no identifiable relevant authors, such as bibles, books of prayer or classical texts. Even when authorship did play a recognized part, as in the stationer's justification of the printing patent on the basis of the cost of compensating the author born by the first printer, it was conceived as part of the context of the industry of printing. Conceptually, authorship was subservient of publishing rather than vice-versa. In short, the trait that united all printing patents, both those granted to stationers and the minority granted to authors, was being an exclusive privilege to print. The privilege was conferred in each case upon a particular person chosen by the crown as the most adequate of being the exclusive (direct or indirect) printer-publisher of certain books.

To sum up, the two main characteristics of the printing patents were similar to those of patents for invention. First, printing patents were particularistic policy decisions based on the royal prerogative. They granted ad-hoc privileges of varying terms according to a discretionary determination by the crown. Second, the object of such privileges was the exclusive entitlement to engage in a certain economic activity: the printing of specific books. Neither on the practical level nor on the conceptual one this economic privilege was exercised or understood as an aspect of more general control of some postulated intangible entity.

2. The Stationers' Copyright

a. Economic Interest Meets Political Interest

The second track of copyright's development stemmed from a peculiar internal guild arrangement that was known as the stationers' copyright. The history of the Stationers' Company- the guild of the English book trade- can be traced under different names and forms well back into the fourteenth century.[33] Its considerable rise in power and relevance to our

[32] For other examples of grants to authors, translators, editors and relatives see Feather, *supra* note 15, at 12-13; Plant, *supra* note 3, at 109; Kirschbaum, *supra* note 9, at 47-51.

[33] Blagden, *supra* note 2, at 21-23; Graham Pollard, *The Company of Stationers before 1557*, 18 The Library 1 (4th Ser. 1937).

subject, however, occurred in the sixteenth century and especially after it received its royal charter in 1557.[34] The stationer's copyright that appeared within this guild apparatus was a product of the stationers' economic interest and of the conceptual and practical world of the guild within which they lived and operated.

The economic interest solidified somewhere during the sixteenth century. The growing penetration of the printing press was gradually but steadily changing the structure of the profession and the economic and social realities of book production. One significant change was that the earlier common pattern of single book production in which a bookseller would undertake the production of a book upon a specific order was disappearing. Instead of a per-book production in which the bookseller and other craftsmen involved recouped their investment instantaneously on the basis of a single transaction, printing brought about mass production and sale. Production in the age of print required the investment of considerable capital both as part of the general overhead cost of the business and in financing specific undertakings.[35] A printer had to invest in such things as: a press; employing skilled labor; a stock of materials; the preparation of a text for printing and setting up the type. The enterprise became capital intensive and the return for such investments was slow. In order for specific undertakings to be profitable a measure of scale was needed. Cost could be recouped and profit made only upon the sale of a certain amount of a particular text. When the number of printing presses grew and the trade became more competitive the problem of high risk on relatively large investment that could be recouped only on the basis of large scale production and sale became more acute.

Printing patents were an important tool in this respect, but they covered only a small part of the books printed and could hardly be expected to be used as a standard means of protection applying to all books. It is not surprising that when stationers looked for ways to solve this problem and to secure their economic interests they turned to the apparatus of their trade guild. The period's incarnation of the trade guild in London was the Livery Company. The traditional role of the Stationers' Company like other Livery Companies had been to maintain order in the trade. This included a regulation

[34] The charter was granted by Queen Mary in 1557. It is reprinted in I Arber, *supra* note 2, at xxviii-xxxii.

[35] See Plant, *supra* note 3, at 99.

of a wide variety of trade related social and economic issues.[36] By the middle of the sixteenth century the need for protection of investment was probably one of the most pressing economic subjects on the stationers' agenda, and they turned to the familiar apparatus of guild trade regulation in order to face it.

The mechanism the stationer's came up with was the guild copyright. Since records preceding 1557 are lost, it is uncertain exactly when the stationers' copyright first appeared, but it was probably a few years before the grant of the charter in that year. This copyright was, in essence, a perpetual exclusive license to publish a book or a "copy" granted by the Stationers' Company to a specific freeman. These exclusive rights were recorded in a register kept by the Company. Although we know that as early as the 1550s Company's regulations made it mandatory for stationers to register the books they printed,[37] it is not entirely clear whether registration was constitutive of the right or served only as an administrative and evidentiary tool.[38] The general framework of the right, however, is clear enough. A stationer would acquire a text or a "copy." The copy was often acquired from the author, but not necessarily so, as in the case of translations or texts with no relevant authors. He would bring the copy to the Wardens of the Company who would authorize or "license"[39] it for printing by him and

[36] About the history and functions of the London Livery Companies see: GEORGE UNWIN, THE GILDS AND COMPANIES OF LONDON 155-175 (3rd ed. 1938).

[37] In 1557 there is a record of a stationer who was fined for printing a text without first entering it in the register. I Arber, *supra* note 2, at 45. In the same year another fine was registered for printing "contrary to our ordenanunces that ys not havynge lycense from the master and wardyns." *Id.* at 70.

[38] For these doubts see Patterson, *supra* note 4, at 55-64; John Feather, *From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 201-202 (Martha Woodmansee & Peter Jaszi eds. 1994). Both Patterson and Feather conclude that the most reasonable conclusion is that registration was both mandatory and a strong evidence of copyright, but that it was possible to acquire copyright by way of first publication without registration, at least during the early years of the system.

[39] There is some ambiguity around the character of this "licensing" by the officials of the Company. Formally, according to censorship legislation other

for registration in the register. This would entitle the stationer to a perpetual exclusive right to print the text. Cases in which other stationers infringed this exclusive right by subsequent printing or disputes regarding such infringements were resolved within the internal forum of the Company: the Court of Assistants.

Though it would be misguided to call it "private,"[40] the stationers' copyright was an internal guild arrangement. Its effectiveness, however, and hence its ultimate structure and meaning in practice, was heavily dependent upon government involvement. This dependence was twofold. First, in order for the stationers' copyright to have any substantial effect the Company had to have considerable enforcement ability backed up by governmental power. Second, the Company's monopoly and enforcement power had to be national ones. This required governmental support. But why would government get involved? Part of the answer was that the framework of a guild apparatus with group privileges and powers conferred by the crown was the common pattern at the time for government to exercise what was conceived of as both its right and duty to "maintain order" in specific trades.[41] In following this general pattern the Stationers' Company was hardly unique. Yet it was certainly unique regarding the vast amount of power granted to it, which was, in turn, reflected in its copyright. The Company could obtain this extraordinary power thanks to the significant interest that government had in

persons specified by such legislation were in charge of content control and the Company had no authority to authorize the content of a book for publication. In practice, however, in many cases the consent of the Wardens was the only authorization given. This created an obscure character to the Wardens' license. In essence, it was part of the internal economic regulation of the trade and allocation of printing rights within it, but it came to be associated also with licensing in terms of content and censorship. See Patterson, *supra* note 4, at 40; Feather, *supra* note 38, at 191.

[40] It is much more accurate to say that the guild framework within which the stationers' copyright originated and operated was a prime example of an institutional context, practices and consciousness that had no sharp public/private distinction, which only gradually appeared in much later periods.

[41] For a short survey of growing central royal involvement in economic regulation and the use of royal charters, monopolies and craft guilds in this respect since the fourteen century see Loewenstein, *supra* note 1, at 60-62 and the references there.

the book trade; an interest, that is, in censorship and control over the content of texts that were produced and distributed in the realm.

The sixteenth and seventeenth century in England were turbulent ones politically and religiously. Under such a climate the publication and dissemination of texts became a major point of concern for the government in power. Since the early sixteenth century the crown became increasingly conscious and active regarding this issue.[42] The appearance of the printing press and the radical reorganization it brought about in the book trade was, of course, a significant factor within this dynamics. From the perspective of governmental interest in controlling publication the new modes of producing, disseminating and consuming texts constituted a new danger but also substantial opportunities. The dangers of mass production and distribution are obvious. The opportunity lay in the fact that the new technological and socio-economic organization of the production of texts offered important "bottlenecks" that could be taken advantage of. In order to control the dangers of dissemination of unauthorized texts on a vast scale (in the period's terms) government only needed effective control of such bottlenecks. Since the middle of the sixteenth century this was exactly the direction that efforts to regulate and censor texts took. The scope of earlier regulations of publications, even those that preceded the press, occasionally went beyond authors. The sanctions of a 1555 proclamation by queen Mary, for example, applied not only to authors of "bookes, conteynynge wicked doctryne" but also to those who kept such writings.[43] With time, however, the balance of formal law and practical effort shifted dramatically toward direct and indirect regulation of printers or booksellers and the printing equipment rather than authors (or readers) of subversive texts.[44]

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[42] See *Id.* at 28; Patterson, *supra* note 4, at 23-24.

[43] I Arber, *supra* note 2, at 52. The proclamation was based on an earlier statute of Henry IV. 2 Hen. IV, c. 15.

[44] See Loewenstein, *supra* note 1, at 28 ("Tudor Royal proclamations and Star Chamber rulings that promulgate licensing is aimed specifically at the book trade and not at authors (or at readers)"), 55-56. Two landmarks in this respect were: A 1538 proclamation by Henry VIII that forbade the printing or publishing of any book without examination of members of the Privy Council and by that initiated the first licensing system in England. I STEELE, TUDOR AND STEWART PROCLAMATION, 1485-1714 (1910) Procl. No. 176; And a 1558 bill providing "That no Man shall print any Book or Ballad, &c unless he be authorized thereunto by the King and Queen's Majesties License, under the Great Seal of England." 3 PARLIAMENTARY HISTORY 354 (1751). Due to

This growing governmental interest in controlling the technology and activities of the book trade met the economic interest of stationers, or at least the interest of powerful members of the Company. This economic interest favored tight control and monopolization of the trade that would enable protection of investment and restraint of competition. This intersection was the genesis of the stationers' copyright. Government had almost no interest in the stationers' copyright itself, and probably no direct involvement with it. Copyright first appeared shortly before the heavy governmental involvement in the Company and some speculated that it would have developed even in the absence of such involvement.[45] But the stationers' copyright cannot be understood separately from its immediate context, and that context included the growing governmental backup and bestowing of powers on the Company. Both government and the stationers grasped this intersection of interests. Utterances from governmental figures regarding the regulation of the trade almost always refer to the need of censorship and to the connection between "order in the trade" and content control. Thus for example, Elizabeth's Fifty-first Injunction- her very first substantial action in the field of censorship- started by declaring that "because there is a great abuse in printers of bookes, which for couetousnes chiefly regard not what they print, so thei may haue gaine, whereby arriseth great disorder by publication of vnfrutefull, vayne and infamous bokes and papers."[46]

The stationers did not lag behind in understanding this connection. One of the earliest examples of stationers justifying their powers in the name of censorship was mentioned before in the context of the printing patent.[47] With time they had perfected the weaving together of content censorship and Company's privileges and powers to a degree of an art. This pattern repeated again and again for the next 150 years. One of the later and most sophisticated examples happened in 1643 in a petition called *The humble Remonstrance of the Company of Stationer's to the High Court of*

Queen Mary's death and the dissolution of parliament the bill was never passed. Both pieces of legislation marked a clear shift of attention of censorship efforts toward regulation of the press- a path that was followed in subsequent legislation. See Patterson, *supra* note 4, at 30.

[45] Patterson, *supra* note 4, at 21, 31-32.

[46] I Arber, *supra* note 2, at xxxviii.

[47] See *Supra* note 30 and accompanying text.

Parliament.[48] The purpose of the petition was to persuade parliament to create a new censorship system - including broad powers to the Company, of course - after the abolition of the Star Chamber and the older framework (which happened that year). The petition deployed a whole variety of arguments for justifying the Company's power. Its most masterful parts, however, are those that paint a picture of stationer's powers and content regulation as inseparable parts of one whole. The petition explains that "it is not meere Printing, but well ordered Printing that merits so much favour and respect"[49] and then goes on to tie the Gordian knot:

> "the first and greatest end of order in the Presse, is the advancement of wholesome knowledge. And this end is merely publike: But the second end which provides for the prosperity of Printing and Printers, is not merely private, partly because the benefit of so considerable a Body is of concernment to the whole; and partly because the benefit of the second end does much conduce to the accomplishing of the first."[50]

The government-stationers symbiosis was not simply a "deal" in which each party secured its own interest that was completely separate and external to that of the other. To some extent content control and tight monopolization and regulation of the trade blended into each other. A monopolized trade under a hierarchical and tight supervision of the guild was much more amenable to censorship. Government also had interest in the "internal" economic and social affairs of the stationers because substantial unrest in the trade tended to lead to independent and often secretive printing in defiance of guild regulation, which in turn was harder to control in terms of content. This convergence of interests produced the space within which the stationers' copyright could exist.

The first important outcome of the convergence of interest was the charter granted to the Company in 1557. The charter was explicit regarding the crown's main motive:

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[48] *The humble Remonstrance of the Company of Stationers to the High Court of Parliament*, April 1643 (attributed to Henry Parke Esq.). I Arber, *supra* note 2, at 584.

[49] *Id.*

[50] *Id.* at 585.

> "Know ye that we, considering and manifestly perceiving that certain seditious and heretical books rhymes and treatises are daily published and printed by divers scandalous malicious schismatical and heretical persons, not only moving our subjects and lieges to sedition and disobedience against us, our crown and dignity, but also to renew and move very great and detestable heresies against the faith and sound catholic doctrine of Holy Mother Church, and wishing to provide a suitable remedy in this behalf."[51]

For the stationers, however, the grant meant new important powers. Some of these powers were typical of charters of other London companies. Others, however, were quite exceptional even compared to grants of much more commercially important companies.[52] The two most important powers of the latter kind bestowed on the Company were a broad national monopoly and extensive search and enforcement powers. The charter provided that no one in the realm shall exercise the art of printing directly or through an agent unless he was a freeman of the Stationers' Company or a royal patentee.[53] As for enforcement, the Master and Warden of the Company were authorized to search the houses and business premises of all printers and book sellers in the kingdom; to seize any material printed contrary to any statute, act or proclamation; and to imprison offenders.[54]

The second channel through which governmental power flowed into the hands of the Company was a set of acts, decrees and other legislative measures dealing with censorship and control of the printing and distribution of texts. Elizabeth's 1559 injunction dealing with censorship merely ordered "the wardens and Company of Stationers to be obedyent."[55] The 1566 Star Chamber Decree, however, already assigned the Company a more dominant

[51] I Arber, *supra* note 2, at xxviii.

[52] See Blagden, *supra* note 2, at 20; Patterson, *supra* note 4, at 30.

[53] I Arber, *supra* note 2, at xxx-xxxi. The uniqueness of the trade monopoly was not only in its national scope, but also in the fact that contrary to custom it precluded even freemen of other London companies from exercising the trade of printing. See Blagden, *supra* note 2, at 21; Loewenstein, *supra* note 1, at 59.

[54] I Arber, *supra* note 2, at xxxi.

[55] *Id.* at xxxix.

role [56] The decree prohibited the printing of books contrary to laws and contrary to patents. It also empowered the Company's Wardens' and their agents with enforcement and search powers.[57] The next major censorship legislation the Star Chamber Decree of 1586[58], for which the stationers actively lobbied[59] vested even broader powers and responsibilities in the Company. The decree was the ultimate manifestation of the state-Company symbiosis[60] whose model survived for more than a century.

The heart of the 1586 decree was item four that forbade any printing of texts that were not licensed according to a detailed procedure by specific authorized office holders as detailed in the item and in previous legislation. The same item provided that no one:

> "shall ymprint or cause to be ymprinted any book, work or copie against the foroume and meaninge of any Restryant or ordonnaunce conteyned or to be conteyned in any statute or lawes of this Realme, or in any Iniunctyon made or sett foorth by her maiestie or her highnes pryvye Councell, or against the true intent and meaninge of any Letters patents, Commissions or prohibicons vnder the great seale of England, or contrary to any allowed ordynaunce sett Downe for the good governaunce of the Cumpany of Staconers within the Cyttie of London."[61]

The decree, then, warped the ban on printing contrary to governmental regulation together with the prohibition against printing contrary to a printing patent or the Stationers' Company ordinances. The stationers' received here the state backup they were seeking for the Company's regulation of the trade, including their copyright.

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[56] Reprinted in I Arber, *supra* note 2, at 322.

[57] For a more comprehensive survey of the decree see Cyprian Blagden, *Book Trade Control in 1566*, 13 The Library 287 (5th Ser. 1958); See also Blagden, *supra* note 2, at 70-71; Patterson, *supra* note 4, at 39-40.

[58] Reprinted in II Arber, *supra* note 2, at 807.

[59] See Greg & Boswell, *supra* note 2, at 16; I Arber, *supra* note 2, at 518, 524.

[60] See Loewenstein, *supra* note 1, at 38-39.

[61] Cited in I Arber, *supra* note 2, at 518, 524.

The other relevant items of the 1586 decree bestowed upon the Company broad enforcement powers and administrative responsibilities. These related to both the main arrangement of item four and to additional collateral issues- especially the regulation of printing presses- governed by other items. Item one created a duty to notify the Company of all existing and newly established presses. Item two prohibited any presses outside of London (with the exception of the two universities) and mandated that all presses shall be kept in an "open place" as to allow in all times access to the wardens of the Company and their agents for purposes of inspection and search. Item three which temporarily froze any establishment of new presses put the Company in charge of selecting new persons allowed to hold presses (upon a decision of the Archbishop of Canterbury and bishop of London that additional presses should be authorized). Item six gave wide authority to the Company's agents to search "woorkhowses shops, warehowses of printers, booksellers, bookbinders, or where they shall haue reasonable cause of suspicion," to confiscate all materials printed contrary to the decree, and to arrest offenders. Item seven authorized the Company to search for, confiscate and destroy presses and other equipment used contrary to the decree.

In sum, from the perspective of the Company the 1586 decree contained three significant developments It solidified and strengthened the Company's national monopoly by laying tight restriction on both the exercise of the trade and the possession of the equipment. It bundled the enforcement of printing patents and the stationers' guild regulations together with the enforcement of the governmental censorship regulation. Finally, it bestowed very broad enforcement powers on the Company.

For more than a century, until the last of the licensing acts lapsed in 1695 censorship legislation followed the same pattern. There were various pieces of legislation and regulation with some measure of variation on the details.[62] Regimes changed from Tudors to Stewarts to the Interregnum and

[62] The main ones were: Star Chamber Decree of 1637, reprinted in IV Arber, *supra* note 2, at 529; The 1643 "Ordinance for the Regulating of Printing" enacted by parliament, ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660 184 (C.H. Firth & R.S. Raith Rait eds. 1911) [hereafter: Firth & Rait]; The 1648 "Ordinance against unlicensed and scandalous Pamphlets, and for better Regulating of Printing," I Firth & Rait 1022; The 1649 "Act against Unlicensed and Scandalous Books and Pamphlets, and for better regulating of Printing," II Firth & Rait 245; The 1653 Licensing Act, II Firth & Rait 696; The Licensing Act of 1662, 13 & 14 Car. II c. 33. This act was renewed several times until it finally lapsed in 1695. For a general survey see Patterson, *supra,* note 4, at 114-138; Feathrer, *supra* note 15, at 40-50.

to the Restoration, the Star Chamber was abolished in 1640, but censorship persisted.[63] The interaction of censorship with the Stationers Company retained its general pattern throughout this period. Censorship was entangled with strict monopolization of the trade and with the internal guild regulations, and the Company held extensive powers in enforcing all of these. Copyright, that from the perspective of the Company was one of the most important of its internal regulations, existed, was practiced and received its meaning within this framework.

b. The Janus-Faced Character of the Stationers' Copyright

The stationers' copyright was heavily shaped by its growth within this intersection of governmental and guild interests and powers. When one tries to conceptualize the meaning of this institution, she faces two overlapping structures. The one is copyright within its immediate institutional framework, namely the framework of the guild. The other is copyright within the more general context of state power. The ultimate meaning of copyright and the way it functioned in practice involved the simultaneous existence and integration of these two dimensions.

Let us start with the internal guild perspective which is focused on the relations between the Company and its members. Here copyright was an individualist exclusive right to print a particular text. It was "individualist" in the sense that each copyright protected a specific individual stationer. The object of this protection was the exclusive entitlement to print a certain text. Like printing patents, copyright was not conceptualized or practiced as ownership of an intangible "work" that gave rise to various entitlements It was, rather, understood solely as the exclusive right or "license" to engage in the printing of a certain text. Finally, within the guild framework, copyright was much closer to the form of a general right rather than that of a privilege. That is to say, copyright was closer to being a standard entitlement bestowed upon any member who met predefined requirements, rather than a discretionary ad-hoc policy decision to confer tailored privileges.

Copyright was closer to the form of a general right, because, at least in most cases, it functioned as a standard measure granted to any stationer who presented a new "copy" to the Company. There is hardly any evidence

[63] There was a three years gap between 1640 when the Star Chamber was abolished and 1643 when the Long Parliament restored licensing and passed its first act to this effect.

to show that the Company routinely exercised substantial discretion in authorizing the registration of copyrights. The sheer number of entries indicates that it was granted as a matter of routine. When contemporaries referred to the stationers' copyright, it was with the same connotations of standardization and routine. The report of the 1583 royal commission inspecting the printing patents, for example, explained that when no patent is issued "the companie do order emongest them selves that he which bringeth a booke to be printed should vse yt as a priviledge."[64] It went on to say that "euerie of such Stationers hath diuers copies seuerall to them selues… eurie of them hath of order seuerall to him selfe any boke that he can procure any learned man to make or translate for him, or that can come to his hand to be the first printer of it."[65]

However, even within the internal context of the Company copyright had some discretionary and case-specific flavor. At the heart of this was the tendency of the governing institutions of the Company- the Wardens and the Court of Assistants- to operate as practical policy makers seeking to solve particular problems and mediate disputes through particularistic deals, rather than to apply rigid uniform norms.

It seems that this happened, though very rarely, even in the stage of initial registration of copyright. The best indication of that is a small group of cases in which the copyright was ordered to be registered as subject to an entitlement of a named party to perform the actual printing of the text. Such cases appear in a scattered manner in the register since the 1580s. In them the copyright atom was split into two different entitlements that were allocated to different persons: the exclusive right to publish a certain text; and the exclusive right to print the text. Thus for example in 1591 a group of books were registered to Thomas Adams under the condition that they "shalbe printed by John Charlwood for the said Thomas Adams: as often as they shalbe printed."[66] In 1595 the Court of Assistants ordered that Valentine Syms shall inherit all the unassigned copies of the deceased Benjamin and "shall haue the printinge of all such of them whiche are already disposed, for

[64] *The final report of the augmented Commission from the Privy Council on the controversy in the Stationers' Company* [extracts], II Arber, *supra* note 2, at 784.

[65] Final report of the Commissioners, with autograph signatures, in Greg, supra note 2, at 127.

[66] II Arber, *supra* note 2, at 596. See a similar registration to Harrison reserving the printing right to Waldergrave, *id.* at 435.

the behoof of such persons as they belonge vnto."[67] When in 1627 the right in the *Turkishe Historye* was assigned, the entry provided that "but mr. Islip is allwayes to have the workmanship of the printinge the whole book according [to the entent] of the ffirst entrance."[68]

The context of such occurrences was the delicate inter-guild relations between booksellers and printers. The late sixteenth century saw a growing professional specialization within the trade[69] and a continuous shift of power and dominance from printers to booksellers.[70] The booksellers or those who functioned as both booksellers and printers took control of most of the profitable texts as well as their copyrights. Many trade-printers (those who functioned only as printers) were reduced to the level of mere hired craftsmen. This, together with a general unrest around the concentration of patents gave rise to a growing agitation in the trade and to a series of specific and general conflicts.[71] The Company tried to mediate these conflicts through various measures.[72] It seems that the splitting of copyright into publisher and printer rights was one method in the arsenal of the Company, which was sometimes employed to mediate tensions and contain conflicts in specific disputes.[73] The important point to our subject, however, is that the tactic of subjecting certain copyrights to "printer rights" was employed by the Company on a particularistic and discretionary basis. Even if in most cases stationers could expect to receive the standard copyright as matter of routine, there was no such right. When the Company chose in specific cases on the basis of an important policy to alter the exact form and scope of the copyright granted, it simply did so. There is no evidence that anybody argued or could

[67] Greg & Boswell, *supra* note 2, at 53.

[68] Jackson, *supra* note 2, at 194. For the original entry see III Arber, *supra* note 2, at 223.

[69] About specialization in the book trade see: Plant, *supra* note 3, at 59-66; Blagden, *supra* note 2, at 74, 89-90.

[70] See Patterson, *supra* note 4, at 35-36; Plant, *supra* note 3, at 66; Feather, *supra* note 8 at 35-40. On the broader trend of shift of power in English economy and guild structure from the traditional craft interests to those of the rising merchant capitalism see: 5 THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE 464 (M. M. Postan et al eds. 1963-1989)

[71] See Patterson, *supra* note 4, at 49-50; Blagden, *supra* note 2, at 89-91.

[72] See *infra* text accompanying notes 89-91.

[73] See Blagden, *supra* note 2, at 69, 74; Patterson, *supra* note 4, at 49-50.

have argued that he had a right to receive a copyright which was not subject to the particular conditions that the Company sometimes chose to impose.

More commonly, however, the discretionary undertones of copyright entitlements came to the front in cases of ex-post disputes over infringement. In modern terms, the proceedings in the Court of Assistants appear to have been closer in character to arbitration or mediation procedures rather than a formal lawsuit.[74] Its orders in resolving such disputes bear a strong stamp of particularistic "settlements" meant to accommodate specific interests and policies rather than to apply uniform legal standards. In most of the cases the final order appears to create a compromise in which both parties make concessions and reap some benefits. In 1599, for example, a dispute involving two entries of copyright in the same text ended not in a determination of priority but in a Solomonic judgment. The copyright was to be divided into three equal parts and the three claimants were to "haue and enioye the said copye, nowe and at all tymes hereafter bearinge ratablie charge for the same accordingly."[75] Such orders were not limited to hard cases where there were especially complex competing claims of registration and ownership. There were many creative arrangements of this sort. These sometimes involved monetary transfers rather than the splitting of rights. When in 1590 a dispute broke between Richard Jones and Robert Dexter, the Court ruled that "Dexter shall Enioye the said Copie to his owne vse" and that Jones' entry should be crossed out. But it also provided that Dexter would compensate Jones and that there would be extra compensation in case Jones delivered copies that he already printed.[76] This was a rather common arrangement,[77] sometimes the compensation delivered by the "winning" party was a number of copies of the printed book rather than money,[78] and in yet

[74] See Feather, *supra* note 38, at 203; Patterson, *supra* note 4, at 33. The fact that many of the Court's orders regarding such disputes state the parties' consent led some to speculate that while members of the Company had to submit their disputes to the Court of Assistants they were not bound by an award ruled by the Court. See Patterson, *supra* note 4, at 34.

[75] Greg & Boswell, *supra* note 2, at 67.

[76] *Id.* at 37.

[77] For a similar arrangement of ownership and compensation to the other party in a 1591 dispute between Thomas Man and William Kerney see *id.* at 40.

[78] See for example: A 1591 dispute between Windet and Jakson where the former won the copyright but was ordered to "gyve vnto mr Iaxon C booke of the first impression thereof." *Id.*

other times the compensating party was given a choice as to the form of compensation.[79] In other cases, both parties "lost" while the Company "won." Thus for example, when it was found that Edward White and Abell Jeffes had each printed books registered for the other, it was ordered that both would pay a fine to the Company and that all infringing copies would be confiscated and disposed "to thuse of the poore of the Companye."[80] The list of disputes with many varieties of arrangements of this sort goes on and on. The Court's record reveal that these compromises, improvised settlements and creative solutions were the rule rather than the exception in case of ex-post disputes.

This ex-post treatment of copyright mitigated its function as a general right within the Company apparatus. While the determination of which party was entitled to copyright protection certainly played a substantial part in ex-post disputes, it was almost always only part of the story. In other words, when a dispute arose it was usually solved not by upholding a predefined entitlement protected by copyright, but rather by a local policy decision that allocated benefits and burdens on an ad-hoc basis. The picture that emerges from this glimpse at the actual practice of copyright disputes seems to go beyond what a modern lawyer might call "flexibility of the remedy." It seems that ex-ante the Company tended to grant copyright on demand as a matter of routine. But when disputes appeared ex-post, they were often solved not by trying to implement a uniform set of rules and entitlements, but rather by producing case-specific arrangements designed to accommodate both the interests of the parties and Company policies. In short, much of the case-specific character of copyright and of the role of the Company as a discretionary policy decision maker appeared not in the initial grant but in the stage of determining the actual content and scope of the entitlement when subsequent disputes appeared.

The effect of these occasional manifestations of ex-ante and ex-post specific discretion on the part of the Company was that the character of copyright as a right within the inter-Company framework remained somewhat ambiguous. In most cases a standard entitlement covering an exclusive right to print was given to any stationer who presented a new text. Yet on some occasions the actual content and boundaries of such entitlements were determined in ad-hoc decisions based on specific policy or on a balance of interests and fairness, rather than rigidly defined standard criteria. Such

[79] Such a choice was given to Richard Watkins in a 1577 order of the Court. *Id.* at 2.

[80] *Id.* at 44.

occurrences indicate a significant residue of the character of copyright as a discretionary privilege beneath its thin crust of a general right.

The second dimension of copyright's framework involved the relations between the state and the Company. Here copyright was based on a special group privilege to exclusively exercise and regulate the trade of printing. Copyright may have appeared before the charter and it is possible that it would have survived without it. But the character of the actual historical stationers' copyright, as opposed to a hypothetical one, was heavily dependent on the charter and the powers allocated to the Company in it and in subsequent legislation. Without such privileges the stationers' copyright would not have been much more than a set of particular agreements among a specific group of people. In the institutional context of the charter and the licensing legislation, however, it was a nation-wide entitlement enforceable against any person. Without the privileges copyright would have been backed and enforced by whatever internal sanctions the guild could use against (and only against) its members. In their presence it functioned in the shadow of a broad enforcement mechanism which included regulation of technology and powers to confiscate materials and to arrest infringers. Accordingly one cannot ignore the role of this institutional context in constituting the reality and meaning of copyright.

The charter and the empowering legislation created group privileges. They singled out a particular group of people. On the basis of a specific governmental policy it armed the group and its governing bodies with special powers and entitlements. From this perspective copyright was heavily colored with the character of a specific privilege rather than that of a general right. Unlike the printing patent the privilege was granted to a group rather than an individual. It created a blanket authorization to allocate exclusive printing rights rather than a particular exclusive right vis-à-vis a specific text. Yet it was still a privilege. One had to be a stationer- a member of the particular group which government chose to empower- in order to enjoy copyright. There was no general right that applied to any person who was not a stationer. No such person could demand either copyright protection or the grant of similar powers to the group of which he was a member.

In the last analysis, the meaning of copyright was constituted by the simultaneous seamless existence of both of these perspectives (see fig. 1). Copyright had two faces that merged into one. It was an individual entitlement to print a certain text. But it was simultaneously deeply rooted in a set of special group privileges and powers regarding the entire trade of printing. It was close to being a general right in the sense that a stationer who obtained an unregistered text could expect in most cases to receive a standard

entitlement of exclusivity with little discretion or variation involved. But it was also a highly particularistic privilege, since if a person did not belong to the limited group upon which the crown chose to bestow wide powers of monopolization and enforcement he could not expect to enjoy the entitlements of copyright. This complex Janus-faced character of copyright stemmed from the institutional framework within which it grew. It sprung from the intersection of guild and state power and from the paradoxical character of general regulations laid down by a guild whose very existence and effectiveness depended on special privileges from the crown.

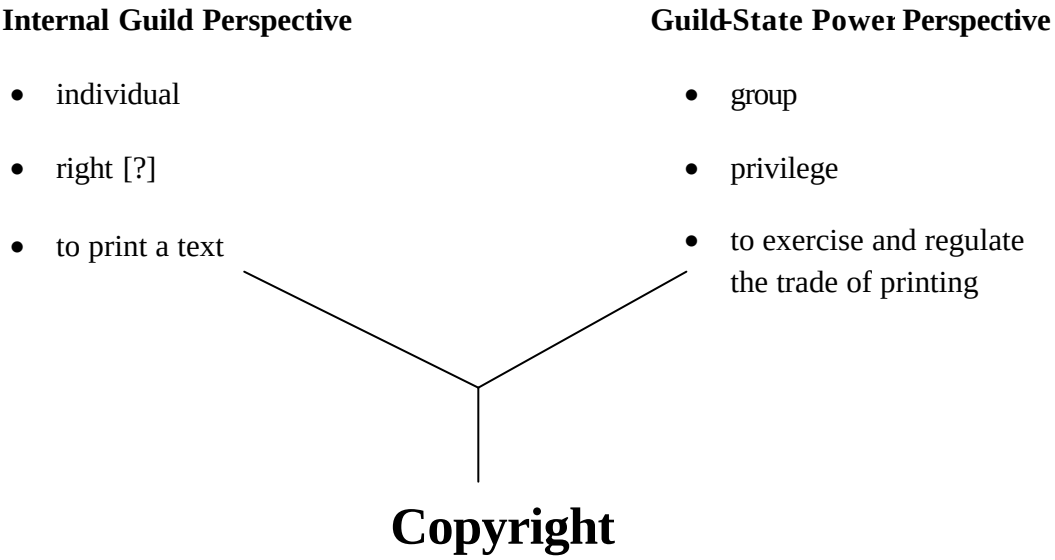

Fig. 1 The dual character of the Stationers' Copyright

B. Subsequent Developments

1. The Decline of the Printing Patent

Throughout the sixteenth and early seventeenth centuries the printing patent was a dominant part of the system of regulating and protecting the product of the press. Although patents were much fewer than registered copyrights, they were probably just as significant. The reason was twofold. First, patents, especially the old traditional ones, covered many of the most profitable works, individually or as class patents. To be the grantee of such a patent usually meant a substantial amount of wealth and power in the trade, often resulting in leverage for achieving even more control of other works. Second, the printing patent emanating directly from the royal prerogative was formally considered to be superior to the stationers' copyright, at least during the first part of the seventeenth century.[81] In cases of clashes between them the patent defeated any conflicting copyright. In fact it was the common wisdom that a later patent grant could override existing copyright. Thus when in 1628 a dispute arose between George Sandy the grantee of a 1627 patent to print his translation of Ovid's *Metamorphoses* and the assignees of a 1621 copyright registered for the same work, the Court of Assistants ruled that the copyright entry should be crossed out so "noe man shall laye anie claime to the printinge of the same or any pte thereof."[82]

The general trend, which started during the second half of the seventeenth century, was the gradual decline of the printing patent in terms of both frequency and importance. This did not happen overnight. In fact, James I granted many printing patents,[83] and even during the Commonwealth period, Parliament came to exercise its own version of the royal printing patent: the

[81] For later doubts, implying but not explicitly elaborating a weaker position of the patent see: The Company of Stationers v. Seymour, 1 Mod. 256, 258, 86 Eng. Rep. 865, 866 (C.P. 1667). One of the arguments to support the validity of the patent in this case was that the object of its protection- almanacs- had no author (implying that in case of a text with a relevant author a patent may not be valid).

[82] Jackson, *supra* note 2, at 201. In January 1631, probably due to recurrence of printing by the owners of copyright the Court reaffirmed this order. *Id.* at 235-236.

[83] See Kirschbaum, *supra* note 9, at 47-53; R. C. Bald, *Early Copyright Litigation and its Bibliographical Interest*, 36 Papers of the Bibliographical Society of America 81, 83-84 (1942).

exclusive parliamentary license to print.[84] Nevertheless, the dominant position of the patent was steadily eroded, until by the middle of the eighteenth century there was little left of its former glory. There were two main components to this process: the partial cooptation of some of the most commercially significant patents by the Stationers' Company apparatus; and the entanglement of printing patents with the general struggle over monopolies that eventually resulted in substantial circumscription of the permissible zone of such patents.

Beginning at the 1570s unrest grew in the trade over the concentration of patents in the hands of a few powerful figures. Many that felt aggrieved by the injustice of such concentration[85] launched an open struggle that took on many forms, from petitions and complaints to the Company and other centers of power to outright defiance.[86] Thus for example, in 1582 Roger Ward printed ten thousand copies of the patented *ABC*.[87] He argued that because "a verye small number in respecte of the rest of the Companye of Stacioners Prynters havinge gotten all the best bookes and Coppyes to be printed by themselfes by Priuyledge" the rest of the printers "can scarce earne breade and Drinke by their trade."[88]

Both government and the Company were troubled by the turmoil in the trade. The patent conflict was probably the most serious crisis with which the Company had to deal at the time. It did so in part by using its growing

[84] See Frederick N. Nash, *English Licenses to Print and Grants of Copyright in the 1640s*, The Library 174 (6th Ser. 1982).

[85] For elaboration of the various interest groups opposed to the concentration of printing patents see Blagden, *supra* note 2, at 63-64.

[86] John Wolfe, one of the dominant figures among the "insurgents" was reported to have declared that "it was lawful for all men to print all lawfull books what commandment soeuer her Majestie gave to ye contrary." The reporter Christopher Barker who was a major patentee had his own stakes in the controversy. See II Arber, *supra* note 2, at 781. For a description of Wolfe's career and his role in the patent controversy see Loewenstein, *supra* note 1, at 30-37.

[87] According to his own admission in the Star Chamber proceedings against him. See II Arber, *supra* note, at 760.

[88] *Id.* at 756.

enforcement powers,[89] but its dominant tactic seems to have been cooptation and containment. This included many specific measures such as "buying off" some of the dominant oppositional figures,[90] or decisions to allocate certain works for the general use of the "poore of the Company."[91] The most significant tactic of this kind however, was a constant push and encouragement emanating from the Company to spread the benefits of publication of protected works through various arrangements of assignment, cooperation and partnerships.[92]

The English Stock was the grandest initiative of the latter kind. It came to life through the Company's takeover of the most significant and valuable of the patents. In 1603 James I granted in two patents to the Company itself rather than to any specific person perpetual privileges formerly covered by individual patents, including the printing of psalms, primers, almanacs and prognostications.[93] The Company, that paid considerable sums to the grantees of conflicting unexpired privileges,[94] completed the move by purchasing

[89] For early instances of actions in the Company forum as well as the Star Chamber against infringers of patents, including fines, confiscation of materials and destruction of presses see: II Arber, *supra* note 2, at 753, 790, 794, 800; Greg & Boswell, *supra* note 2, at 20-21, 83.

[90] In 1584 the *ABC* patent was assigned to a group of five printers, all of whom were among those who defied it. II Arber, *supra* note 2, at 791. John Wolfe, the former unofficial leader of the insurgents transferred his freedom from the Fishmongers to the Stationers Company and in 1587 he became Beadle of the Company. See Blagden, *supra* note 2, at 52.

[91] See for example: Greg & Boswell, *supra* note 2, at 5.

[92] See Blagden ,*supra* note 2, at 68-69; Patterson *supra* note 4, at 100-101. For instances of spreading the ownership and benefits of patents see for example: II Arber, *supra* note 2, at 422, 771, 775.

[93] *Grant of James I To The Stationers' Company of Primers, Psalters, Almanacks and Prognostications For Ever*, 29 October 1603. III Arber, *supra* note 2, at 42. In 1616 this patent was surrendered for a broader one. See *Second and Larger Grant by James I to the Company of Stationers of London*, III Arber, *supra* note 2, at 679.

[94] See Patterson, *supra* note 4, at 107. See for example a 1605 order for annuity to Alice Wolf "in Recompence and full discharge for her clayme to the A.B.C." Jackson, *supra* note 2, at 13.

from Norton and Wight the privilege for common law books.[95] The ownership and management of all of these privileges were entrusted to a joint stock company that had three classes of shareholders corresponding to the three classes of the Company (Assistants, Liverymen and Yeomen) and a governing body. The English Stock organization managed the protected works, allocated their printing to specific printers and divided the profits among its members.[96]

Though throughout the years, there were allegations of oligarchic management and use of the English Stock in ways that preferred some interests over others,[97] it was a massive apparatus of spreading the benefits of the most significant privileges among many- if not all- members of the Company. The long-term effect of this substantial reorganization of entitlements was an indirect contribution to the decline of the printing patent. The English Stock itself was, of course, based on royal patents, but the fact that these were perpetual group patents to the Company meant that many of the most significant individual patents were taken out of the play of grants and re-grants (the fact that the exact content of the stock remained somewhat dynamic with different item "traveling" in and out notwithstanding). From shifting individual grants, they became a fixed group monopoly whose benefits were spread (not necessarily equally) among a significant portion of the entire membership of the trade in complex ways.[98] The English Stock remained the source of the Company's group power for a long time. Eventually though, other changes, legal and economic ones, that brought about the decline of individual printing patents eroded its importance too.

As unrest and controversy arose around the printing patent in the late sixteenth century the debate was often articulated in the terminology of the period's political thought about monopolies.[99] This is not surprising. As we saw, though the printing patent emerged as a somewhat unique sub-category it was also part of the general royal patent practice. When the latter came

[95] *Id.* at 108; Blagden, *supra* note 2, at 93; See Greg & Boswell, *supra* note 2, at 70; A list of the books covered by the English Stock circa 1620 can be found in: III Arber, *supra* note 2, at 668.

[96] On the English Stock see Cyprian Blagden, *The English Stock of the Stationers' Company*, 10 Library 163 (5th Ser. 1955).

[97] Blagden, *supra* note 2, at 99-101.

[98] For a similar argument see Feather, *supra* note 38, at 200.

[99] See *supra* Chapter 1, sec. I(B)(1)(a).

under growing attack from an increasingly conscious and powerful critics of "odious monopolies" the printing patent was entangled with the same dynamics.

A 1577 petition to Lord Burghely named "The griefes of the printers glasse sellers and Cutlers sustained by reason of privilege granted to privatt persons" deployed the usual complaints against monopolies. Patents, the petition explained, "will be the overthrowe of Printers and Stacioners… their wyves Children Apprentizes and famalies" and the cause of "excessive prices of bookes preiudiciall to the state of the whole Realme." Thomas Marsh's patent was accused of monopolizing "the generall livinge of the whole Companie of Stactioners."[100] This was the general logic of the attack on monopolies: monopoly patents are detrimental to the public good because they raise prices and take away the livelihood of free subjects. According to the account of William Seres (which may be somewhat partial due to his interest in implicating the insurgents) the attack on the printing patent was framed in the terms of attack on the royal prerogative to grant monopolies in general:

> "they pretended that in good Justice yt standeth with the best pollicye of this realme that the printinge of all good an laufull bookes be at libetye for every man to print without grauntinge or allowinge of any priviledge by the prynce to the contrary And in dede they… derogate the princes awthoritye aswell for grauntinge… of all lycenses for the transportacon of clothe wolle beare and suche like"[101]

While it is doubtful that the opponents of the patent chose or dared to frame their argument in terms of such a total attack on the prerogative, it seems quite reasonable that the description captured the overall framework of their argument as part of the emerging discourse of monopolies.

Half a century later when a new tide of unrest over printing patents rose again, the familiar (and by then established) critique of monopolies was deployed. In 1643 a petition to parliament denounced eleven men as "Patenttees and Monopolizers of Printing the most vendable Bookes of worth and quantity now in use; To the great detriment of the Kingdome and to the

[100] I Arber, *supra* note 2, at 111.

[101] II Arber, *supra* note 2, at 771.

ruine and destruction of this poore Company."[102] A 1641 pamphlet that detailed in length the price raise caused by various printing patents had the impressive title of: "Scintilla, or Light broken into Darke *Warehouses*. With Observations vpon the Monopolists of Seaven several *Patents*, and Two *Charters*. Practised and performed, By a Mistery of some *Printers*, Sleeping *Stationers*, and Combining *Book-sellers*. Anatomised and layed open in *Breviat*, in which is only a touch of their *forestalling* and *Ingrossing* of Books *patents* and raysing them to excessive *prises*."[103]

Despite these similarities at a time that the general attack on monopolies intensified the printing patent survived the storm much less affected than other forms of grants. In part this was due to the Company's tactics of cooptation and containment. Resistance to the patent came mainly from less privileged members of the trade and to the extent that the Company's tactics were successful they minimized the power of such resistance. Yet the relative resilience of the printing patent stemmed also from a more general ideological factor. Printing, as we saw, was thought of as a field of immense political and public importance. Government's interest in controlling the content of publications and in regulating the trade was considered one of the highest degree of importance and urgency. Thus even those who were ready to criticize monopoly grants in general as contrary to the public good, were more hesitant and more willing to concede that there was an overriding public need that justified the monopoly when it came to the press.

As mentioned before, those of the stationers who set out to defend the patent were quick to recognize this argument and seize upon it. The monopoly of the printing patent was justified by such stationers as designed to serve the public good on the basis of two grounds: the need to maintain order in the trade; and preventing the publication of heretical, libelous and seditious materials.[104] The strongest manifestation of the tendency to exempt the printing patent from limitations laid on the grant of monopolies supported by the assumption that it served some overriding public interest is the Statute of Monopolies.[105] Section X of the statute listed printing patents among the

[102] I Arber, *supra* note 2, at 583.

[103] IV Arber, *supra* note 2, at 35. The author of the pamphlet was Michael Sparke- a member of the trade who had, as one might have guessed, a commercial interest in attacking the printing patent. See Feather, *supra* note 15, at 38; Blagden, *supra* note 2, at 131-132.

[104] See *supra*, text accompanying notes 25-30.

[105] 21 James I cap. 3.

exceptions to the general ban on monopolies. We have no direct evidence of what motivated the sponsors of the statute to exempt the printing patent, but the general tendency to conceptualize the issue in terms of an overriding public need to control the press seems to be the most reasonable explanation. Some support to this assumption may be found in the fact that the provision exempted two other brands of grants, quite obviously on similar grounds: grants for activities related to the production of gunpowder and saltpeter and grants for the making of ordnance. Weapons and the printing press were considered to involve such level of direct national interest as to create a broad presumption that in their context monopolies were likely to serve the public good rather than hinder it!

Printing patents were more resistant to attacks than other monopoly grants and they survived longer, but they were not immune. Beginning in the second half of the seventeenth century they came under a series of attacks in the common law courts, similar to those that were directed decades earlier at other patents. These attacks were pointed both at individual printing patents and those granted to the Company (which constituted the English Stock). The terminology used in the controversies was in the vein of the general discourse about monopolies. Opponents of the patents challenged their validity by arguing that by limiting the subjects' freedom to exercise a particular trade they were contrary to the public good and hence outside of the scope of the royal prerogative. Defenders of the patents devised arguments to show that this brand of monopolies was both in the public interest and within the scope of the prerogative. In most of the cases patents were upheld, but the overall trend both in the parties' arguments and the courts' decisions was an ever-narrowing basis for supporting the patents and by implication ever-growing limitations on their justification and the royal power to grant them.

In the first (at least first reported) of these cases *The Stationers v. The Patentees (Atkins Case)*,[106] counsel for the patentees protected the patent before the House of Lords in the broadest terms possible. He argued that the patent was not a "publick grievance" because "the King by common law hath a general prerogative over the printing press."[107] The discussion of the sources of this prerogative is especially interesting. Printing, the argument went, could be conceptualized in two ways: "a ready means to convey the letters to our publique-view" (a public media); and "labor and exercise of the body whereby characters are engraven[108]" (a trade). The king's power over

[106] Cart. 89 124 Eng. Rep. 842 (H.L. 1666)

[107] *Id.*

[108] *Id.* at 90, 124 Eng. Rep. 843.

the first aspect derives from the fact that "Printing is of an universal influence." The prerogative is necessary "as to religion, conservation of the publique peace, and necessary to preserve the good understanding between King and people."[109] In other words, the broad prerogative power over the entire practice of printing and publication was justified on the basis of an extreme public interest in content control. As to the aspect of printing as a trade, the argument used an intriguing analogy to patents for invention: "in monopolies the inventions are preserved to them that invented it." Since the king "at his own price, brought it into England first then he was the first owner of it."[110] In other words, the argument used the somewhat fictional claim that it was the king who brought the printing press to England. The king was analogized to an "inventor" (in the period's sense) of a new trade, who acquired exclusive control of it. The case was decided in favor of the patent without an opinion. The argument of counsel, however, was a sweeping defense of broad prerogative powers over printing in general. Such powers were justified on the basis of a strong public interest in governmental content control.

The argument in the *Atkins* case contained, however, also a narrower basis for upholding the patent. This was the claim that since the patent at issue was for law related publications "the King hath a particular prerogative over law books."[111] The argument seems to have been that the crown had a special interest in and hence a special power over law books that were considered a brand of state documents.[112] Obviously, this argument relied much less on an aspersion of a general broad prerogative power over the press. The later development of the treatment of the prerogative in the context of printing patents consisted of a gradual shift of emphasis between the alternative arguments in *Atkins*. With time broad justifications of the prerogative power over the entire trade of printing lost ground to much narrower ones that justified the royal power only over particular brands of publications.

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[109] *Id.*

[110] *Id.* at 91, 124 Eng. Rep. 843. At this point the argument goes on to deploy an historical narrative describing the king's responsibility for the bringing of print into England.

[111] *Id.*

[112] The particular way in which the argument in *Atkins* supported the state documents claim is that "the laws of England are called the Kings laws," and that "the salaries of the Judges are paid for the King." *Id.*

The argument in the 1667 *Seymour* case[113] again contained a variety of justifications for the validity of the patent for almanacs. One of the arguments was the all-encompassing one that "the art of printing is altogether of another consideration, in the eye of the law, than other trades and mysteries are… great mischief and disorder would ensue to the commonwealth, if it were under no regulation; it has therefore always been thought fit to be under the inspection and control of the Government."[114] But there was also the much narrower ground that "[t]he book which this defendant has printed, has no certain author; and then, according to the rule of law, the King has the property."[115] The short opinion of the court upholding the patent seems to have preferred the narrower grounds. It alluded both to the argument that "matters of State, and things that concern the Government, were never left to any man's liberty to print that would," and to the fact that "there is no particular author of an almanack."[116]

The arguments in two 1680s printing patent cases had similar emphasis. In the 1681 *Lee* case[117] which dealt with the patents for primers it was argued for plaintiff that "the King is head of the Church and has a particular prerogative in ecclesiastical affairs… and were it otherwise it would be of dangerous consequence to Government."[118] Four years later in *Company of Stationers v. Parker*[119] the general argument that "printing is a thing of a publick use" was immediately qualified by the narrower ground that "matters of law and religion ought and always was under the immediate care and government of the King."[120]

A clearer indication of the move toward limiting the royal prerogative over the press to narrowly defined zones appeared in *The Earl of Yarmouth v. Darrel* which dealt with a patent for printing blank writs, bonds and

[113] *Supra* note 80.

[114] 86 Eng. Rep. 865.

[115] *Id.*

[116] *Id.*, at 866.

[117] The Company of Stationers v. Lee, 2 Show. K.B. 258, 89 Eng. Rep. 927 (Ch. 1681).

[118] *Id.*, at 928.

[119] Skinner 233, 90 Eng. Rep. 107 (K.B. 1685).

[120] *Id.*

indentures.[121] The court which "inclined that the patent was not good" ruled that "there is a difference between things of a public use and those which are public in their nature."[122] This apparently meant that the prerogative power was limited to certain categories where the materials covered by the patent had special public importance or character and did not cover printing in general. Interestingly the defense in this case alluded to the analogy of patents for invention. It argued that the patent was void for lack of novelty: "for where the invention is not new, there trade shall not be restrained." This was true both regarding "printing as an art exclusive from the thing printed" (since printing, was obviously not a new art), and "in relation to the thing printed" (since "the Company of Stationers printed the above for forty years"[123]).

In 1712 *The Company of Stationers v. Partridge*[124] reflected the same trend in the legal conceptualization of the printing patent. By that time the practical significance of the controversy was in regard to older existing patents (especially the English Stock) as the issue of new ones stopped.[125] The argument for plaintiffs employed the usual tactic of deploying a whole range of justifications for the patent. The variety stretched between a claim of broad royal power over printing in general and the justification of such power only regarding special categories where the crown had peculiar interest, such as Statute Books and the Book of Common Prayer. While the tactic of using alternative grounds employed by counsel is hardly surprising, it seems that the court expressed its adherence to the narrower concept of the prerogative in strong terms. According to the report the court said that "monopolies are odious; this case therefore is to be distinguished, by deriving to the Crown some special interest in almanacks."[126] In the 1769 *Millar v. Taylor* case

[121] 3 Mod. 75, 87 Eng. Rep. 48 (K.B. 1685)

[122] *Id.*, at 50.

[123] *Id.*

[124] 10 Mod. 105, 88 Eng. Rep. 647 (K.B. 1712).

[125] See Feather, *supra* note 15, at 47. According to Feather patents for individual works vanished before the end of the reign of Charles II, while a few class patents were still granted until the end of the century. Patterson refers to a 1693 individual patent to John Dunton for fourteen years (apparently as one of the last known). Patterson, *supra* note 4, at 149.

[126] 88 Eng. Rep. 648. The case was probably never decided. It is likely that the Company withdrew the action in fear of a general precedent striking down its almanac patent. See Bald, *supra* note 83, at 86.

Justice Willes read *Partridge* exactly as laying down the principle that in order for the royal patent to be valid "you must shew some property in the Crown," and that such special relation existed in special categories such as legislative materials and common prayer books because "[t]hese and such like are his own [the King's] works, as he represents the State."[127]

In short, by dawn of the eighteenth century there emerged a firm attitude of limiting the royal power to grant printing patents to narrow special categories of publications. The 1775 *Carnan* case[128] demonstrate how by this time such principles were already settled. At issue was again the almanacs patent. The arguments of both parties in the case were structured using the framework of limited categories of publications where the crown had power to grant patents. Plaintiff tried to analogize the almanacs as an issue of "the regulation of time" to the Acts of Parliament or to religious publications.[129] The argument for the defendant started with the same assumption that "codes of religion and of law ought to be under the inspection of the executive power," and therefore "Bibles, Common Prayer Books, and statutes are proper objects of executive patents."[130] It denied, however that almanacs fell under any of those categories. The court, implicitly adopting the framework of analysis, invalidated the patent. The *Carnan* case is a late one. It seems that when it was argued the circumscription of the printing patent to special categories was already accepted by all. It is hard to determine when exactly this came to pass on the basis of earlier cases, the reports of many of which are very partial. Nevertheless, it seems quite safe to conclude that the trend to limit the royal grant power in this area was gathering force during the later

[127] 4 Burr. 2302, 2329, 98 Eng. Rep. 201, 215 (K.B. 1769). See also a similar reading of *Partridge* in the dissent of Justice Yates. *Id.* at 243. Willes who was defending the common law copyright argument added another category in which the King had "property" and therefore could grant printing patents. These were cases such as Year-Books and Latin Grammars in which "the property of the Crown stands on exactly the same footing as private copyright," because the Crown paid and arranged for these projects to be undertaken. *Id*. Interestingly this limited the King's patent power to two (newly articulated) extremes: the extreme public where direct state relation could be shown; or the extreme private where the King was conceptualized as any other property owner who licenses his works.

[128] Stationers' Company v. Carnan, 2 Black W. 1004, 96 Eng. Rep. 590 (C.P. 1775).

[129] *Id.* at 591.

[130] *Id.* at 592.

part of the seventeenth century and that it took over sometime during the early eighteenth century.

The increasing limitations on of the printing patent were a staggered version of the same process that reshaped the general royal power to grant other monopolies. Printing patents were entangled in the general changing political and legal thought and rhetoric about monopolies. They escaped unscathed from both the early seventeenth century common law cases that limited the prerogative and from the statute of monopolies. This happened due to a wide consensus that singled out printing as a special case where an overriding public interest of controlling the content of publications was involved. This interest justified a broad prerogative power as promoting the public good. Yet the escape was only temporary. By the end of the seventeenth century, a time in which cracks in the consensus about governmental censorship began to appear, the royal power to grant printing patents was sharply restricted by the common law, much as happened earlier in other contexts.

The change in the legal restrictions on printing patents and in the attitude toward censorship in which they were embedded was joined by other developments. These included: the incorporation of the traditionally most valuable patents into the Stationers' Company framework through the English Stock; the general reluctance of the crown since the late seventeenth century to use broadly the grant of monopoly privileges; and the changing patterns of the market for books where the dominance of a few categories of books (such as bibles or law books) that could be effectively protected by patents was declining in favor of wider demand of a much more diverse character.[131] All of these contributed to the demise in importance of the printing patent. By the eighteenth century, this device, which formerly was the most significant form of protection in the trade, became growingly esoteric. It became limited to narrow categories of publications that covered an ever-shrinking segment of the market. The lead moved to copyright that was itself in the midst of transformation.

[131] About the changing patterns of demand in the book market see: Plant, *supra* note 3, at 35-58.

2. Copyright, Ownership and Authorship

a. The Status of Authors

What was the status of authors and authorship within the framework of the Stationers' copyright? As explained, both printing patents and copyright were mechanisms for protecting publishers rather than authors. Authorship was neither a requirement nor a guarantee for receiving either a printing patent or a copyright. Moreover, in all cases the only entitlement granted was that of a publisher, namely, the exclusive right to print. There were occasional cases in which printing patents were granted to authors. Those cases, however, merely expressed ad-hoc decisions that a specific author was the preferable person on which to bestow the publishing privileges. They did not make authorship the general basis of the printing patent. Copyright was even more estranged from authorship. It was an arrangement designed to serve the interests of stationers rather than authors. Despite occasional attempts to bend the rules[132] it could be awarded only to members of the Company. Copyright, as a rule, was limited to stationers, and the Company jealously fought to maintain this state of affairs. In 1598 the Court of Assistants issued an order to be publicly read "Against printinge for forens to the Company" backed up by sanctions against such incidents.[133] It reaffirmed it in a similar 1607 order.[134] Authors, as such, simply could not enjoy copyright protection.

This led some to conclude that until the eighteenth century the author "was of no account whatever in… the book industry;"[135] and that "so far as the author was concerned no rights existed."[136] This view is usually

[132] These were cases in which stationers registered copyright for others, occasionally authors, that in practice functioned as the publishers of the works. See for example I Eyre & Rivington, *supra* note 2, at 392; II Eyre & Rivington, *supra* note 2, at 304, 166, 122, 265, 307; III Eyre & Rivington, *supra* note 2, at 27. For a comprehensive survey of such cases see Kirschbaum, *supra* note 9, at 54-74.

[133] Greg & Boswell, *supra* note 2, at 59.

[134] Jackson, *supra* note 2, at 31. Order of 7 December 1607.

[135] Plant, *supra* note 3, at 68.

[136] MILLER, THE PROFESSIONAL WRITER IN ELIZABETHAN ENGLAND 137 (1959). Similarly Kirschbaum wrote that "neither the Stationers' Company nor the government was interested in the rights of the author." Kirschbaum, *supra* note 9, at 43.

accompanied by the assumption that the preliminary stage in which a text arrived in the hands of a stationer and the relations between the stationer and authors producing texts were utterly free from regulating norms.[137] However, the reality of the status of authors within the framework of the stationers' copyright was more complex. When one focuses on the way copyright functioned in practice and the gradual developments of related norms a more subtle picture emerges.

To begin with, it is obvious that as a matter of economic practice the interest of authors was, to some extent, part of the system right from the start, and that it gained increasing significance and recognition with time. Publishers were dependent upon texts that they could publish and protect by copyright. Authors producing new works were not the only source of such texts, but they were certainly one source. With time as the book trade and the market for books were transformed[138] new texts written by contemporary authors achieved a more dominant position. The most common way of stationers to physically get access to such texts was to obtain them from the authors, and that meant, with gradually increasing frequency paying. The typical transaction involved a purchase of a manuscript for a lump sum. Stationers bought in such transactions the physical manuscript- the actual access to the text. Authors had no formal rights vis-à-vis their texts that they could assign or sell.

Nevertheless, some of the later more complex transactions of this kind included further obligations of the author and demonstrated a latent rudimentary consciousness regarding the status of authors and their texts. The best known example is Milton's 1667 contract for the sale of *Paradise Lost* to Samuel Simmons.[139] In the contract Milton "hath given granted and assigned… All that Booke, Copy or Manuscript of a Poem intituled Paradise Lost." The contract also provided that:

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[137] Plant, *supra* note 3, at 114.

[138] On the transformation of the book market and the appearance new sources of demand for books- especially new books- see *id.* at 35-58.

[139] For analysis of the contract see Peter Lindenbaum, *Milton's Contract*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 175 (Martha Woodmansee & Peter Jaszi eds. 1994); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 27-28 (1993); Patterson, *supra* note 4, at 74.

> "hee [Simmons]…. shall at all tymes hereafter have, hold, and enjoy the same, and all Impressions thereof accordingly, without lett or hinderance of him… And that the said Jo. Milton… shall not print or cause to be printed, or sell, dispose, or publish the said Booke or Manuscript, or any other Booke or Manuscript of the same tenor or subject, without the consent of the said Sammll Symons."[140]

Milton, then, sold not only the physical manuscript but also his obligation not to make the text available to others or assist competing stationers in its publication. The contract reveals that as a matter of practice authors were beginning to be recognized, with gradually increasing consciousness, as possessing some control over a valuable resource. This resource was starting to be understood, albeit in an unarticulated fashion, as more than just the physical possession of a manuscript. This growing recognition is clearly demonstrated by the obligations in Milton's contract, additional to the actual transfer of the manuscript. Milton's contract was far from representative but it was an early sign of change. Some additional support to the assumption of latent recognition of the author as possessing control and conveyance ability of a resource boarder than the physical manuscript, even in the absence of such express stipulations, may be found in the emergence of incidents in which authors were accused of selling the same text twice.[141]

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[140] The text of the contract is available in: 6 DAVID MASSON, LIFE OF JOHN MILTON 509-511 (1880).

[141] Feather, *supra* note 15, at 29. Feather, *supra* note 38, at 207. The incident to which Feather refers is somewhat more complex than he seems to acknowledge. Feather explains that "the playwright Robert Greene was accused of selling the same text twice." The basis for this is a pamphlet called *Defence of Cony-catching* published in 1592 by one Cuthbert Conycatcher. Cuthbert Conycatcher was, of course, a pseudonym and the one using it was no other than Greene. Thus, Greene was the writer who denounced Greene as follows: "What if I prove you a cony-catcher, Master R.G., would it not make you blush at the matter?... Ask the Queen's players if you sold to them not Orlando Furioso for twenty nobles, and when they were in the country sold the same play to the Lord Admiral's men for as many more." Quoted in 3 E. K. CHAMBERS, THE ELIZABETHAN STAGE 325 (1923). The complex context notwithstanding, the fact that it was intelligible for Greene to accuse himself (using the voice of Cuthbert Conycatcher) of the sharp practice of selling the same text twice does imply the emergence of some latent recognition of the

The growing phenomenon of the purchase of texts from authors, the gradual rise with time of the sums paid,[142] and the scattered appearance of more sophisticated contractual arrangements like that of Milton, were all part of a changing system of the production and consumption of texts. Old patterns based on patronage were gradually giving way to new ones which moved toward independent professional authors who received payment for specific texts in a system of mass production and distribution. The first most significant implication of this change in economic practice was the growing need to compensate authors for the sale of their texts for publication.

The change, however, was not limited to the practical recognition that in many cases authors had actual control of their manuscripts and full intention to utilize such control for extracting payment. The "external" pattern of behavior that economic reality and changing social patterns of the production of texts imposed on stationers was accompanied by the gradually emergence of an "internal" social norm. According to this emerging norm the economic interest of authors deserved some protection as a normative matter. To paraphrase H.L.A. Hart the relation of stationers toward the compensation of authors gradually shifted from "being obliged" (an externally forced necessity) to "having an obligation" (an internally recognized norm).[143] Moreover, there are indications that such social norms were also translated within the apparatus of the Company's regulation of the trade into formal institutional recognition, though never in an unequivocal or complete fashion.

Very early along the path of these practices there are indications of at least ambiguity on this issue. Recognition of the mere economic necessity of compensating authors for surrendering their manuscripts often blended into signs of normative recognition that authors should be compensated. When in 1596 Burby and Dexter had their dispute over the printing of the *English School Master* handled by the Court of Assistants, it was decided that the future copyright would be equally divided among them and that "all charges aswell to the Aucthor as otherwise to be equally borne between them."[144] In 1615 the Company entered an agreement with James Pagget for the sale of

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author as controlling and assigning something which is more than the physical manuscript.

[142] For a survey of typical sums paid and their gradual increase over time see: Plant, *supra* note 3, at 73-78.

[143] H.L.A. HART, THE CONCEPT OF LAW 82-91 (2nd ed. 1994).

[144] Greg & Boswell, *supra* note 2, at 88. The two were also fined for printing the book without first obtaining the Company authorization.

the copy of "A certaine number of booke Called A promptuarye or Repretoyre generall of the yeare booke of the Comon Lawe of Englande" of which he was the joint author along with two others. Pagget received three hundred pounds and entered "a Couenant to saue the Company harmless" from the other authors and possible previous assignees.[145] While these incidents could still be interpreted as pure practical rather than normative recognition of the need to compensate authors, they do convey a noticeable flavor of an emerging social norm. A clearer case, which marks a move toward formal semi-legal recognition of this emerging norm, occurred in 1619. The Court of Assistants ordered Jones and Chapman who printed a book without the consent of the author to pay his widow twenty shillings "for a recompence."[146]

The glimpse offered by the stationers' register into the Company's practice suggests that at some point the normative respect toward the author's interest may have gone beyond mere compensation, though in an obscure and non-complete way. There is a series of cases that reveal an implicit recognition of an author's right not only to be remunerated, but also to control the first release of his work. In other words, these were first traces of what we would call today a property rather than a liability rule. There are known cases of authors who tried to employ different tactics in order to achieve control over first publication of their text, very early on (this in itself was a newly emerging concern). It seems however that the rare known examples in which such authors succeeded during the first decades of the system involved special circumstances. Usually one finds reliance on some powerful authority which could make the Company bend in specific cases, rather than recognition of any general norm. The emblematic example is Bacon who played the dual role. He was both the interested author and the powerful external authority. In 1597 a copyright of Richard Serger for Bacon's *Essays* was crossed out and entered to Humphrey Hooper, apparently due to Bacon's support for Hooper's authorized version and his direct involvement.[147]

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[145] Jackson, *supra* note 2, at 82.

[146] Jackson, *supra* note 2, at 119. This casts some doubt on Kirschbaum's sweeping declaration that "if the manuscript came into possession of the stationer without purchase from the author, the latter had no legal claims for payment… or for any kind of redress." Kirschbaum, *supra* note, at 44.

[147] See Loewenstein, *supra* note 1, at 104-105; PERCY SIMPSON, STUDIES IN ELIZABETHAN DRAMA 187-188 (1955); III Arber, *supra* note 2, at 79. Interestingly enough, according to the entry Bacon was the licenser of his

There are indications that decades later the Company started internalizing a norm of recognizing some authorial control over first publication, even in the absence of such massive external pressure. Thus, a 1638 entry to Clarke of "the religion of the Protestants a Safe way to Saluation" took care to mention that Clarke had "the Authors & the printers Consent" that was "Shewed in Cort."[148] When in 1625 an entry for a book by Mr. Farnaby was ordered to be crossed out, the Court of Assistants ordered not only compensation to the author for copies which were already printed but also that the copy would "be wholly left" to the author to "dispose of to some other of the Company to whom he will."[149] It seems that around this time it became a common practice, though not a general formal rule, that cancellation of registrations entailed the return of the "copy" to the author who could dispose of it as he saw fit.[150]

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own book. This duality or ambiguity between Bacon as the individual author and Bacon as the supervising bureaucrat runs deep. Bacon's thought revolved around the idea of knowledge in the service of the centralized state. Hence it had a strand of deep suspicion toward individuals who claimed to freely profess knowledge independently of the state apparatus and hierarchy. In this regard it remains deeply ambiguous and complex whether Bacon intervened on behalf of his authorized version in the name of the authority of individual authorship or in the name of state control. In the specific case he represented both perspectives. On the views of Bacon regarding the place and desired character of natural philosophy and knowledge see: Adrian Johns, *History, Science and the History of the Book: The Making of Natural Philosophy in Early Modern England*, 30 Publishing History 5, 10-11 (1991).

[148] Jackson, *supra* note 2, at 310. The reference to the printers' consent is to the printers of Oxford where the book was previously printed. The two University presses were exempted from the Company's strict monopoly on printing. The reference to the consent of the printers exemplifies how the growing recognition of the author's interest was still in its infancy. While the entry makes a point of mentioning the author's consent it imputes the same significance to that of the Oxford printers.

[149] Jackson, *supra* note 2, at 191.

[150] See for example: IV Arber, *supra* note 2, at 282; *id.* at 317; *id.* at 295; *id.* at 270. In a few more exceptional cases authors managed to use their bargaining power to locally achieve even more control over the publication of their works. There are at least three cases in which such authors entered contracts with stationers for the publication of a limited number of copies, stating that any additional printing would require the author's consent. A

These are clear indications of a slowly emerging social norm and also of the beginning of the consolidation of such norm into formal institutional recognition within the Company's framework of regulation. The line between the two remained obscure. Part of it was due to the fact that the development was entangled with the Company's apparatus and procedure. As mentioned before, the decisions of the Court of Assistants- the locus of most of the relevant developments- had a strong character of ad-hoc mediation procedures, always attempting to locally satisfy competing interests and concerns and rarely operating in the mode of strictly implementing or announcing general rules. Thus, there was never during this period, a general formal rule within or outside the Company's framework that mandated the compensation of authors or the need to obtain their consent for first publication.[151] In fact, authors' complaints about unauthorized publication persisted and intensified during the seventeenth century.[152] Nevertheless, it is hard to deny that there was a developing normative recognition of such rights and, in turn, some ambiguous and fragile institutional formal embodiment to it.

Probably the thorniest issues within this attempt to trace the slow emergence of ambiguous norms and rules is the question of whether there appeared any concept of authors' rights in their texts beyond compensation

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1607 entry for John Browne states that "this copie shall neuer hereafter be printed agayne without the consent of master fford the Aucthour." III Arber, *supra* note 2, at 344. A 1627 entry to William Jones included "Memorandum that this booke is not to be reimprinted againe, without the consent of the author Master Daynse." IV Arber, *supra* note 2, at 191. In 1628 another entry to William Jones states not only that he is "not to remprinte the same booke again with out the Aucthors Consent," but also that he must "surrender vp the said Coppie to him againe, when he shall require it." *id.* at 202. See also: Kirschbaum, *supra* note 9, at 77-78.

[151] In 1642 parliament ordered that "Printers do neither print or reprint anything without the Name and Consent of the Author." 2 JOURNALS OF THE HOUSE OF COMMONS 402, January 29, 1642. It appears, however, that this was part of concerns regarding censorship and suppression of uncontrolled publication rather than with authors' rights. This is apparent from the fact that the order further declared that a printer who failed to publish the author's name and consent would "be proceeded against, as both Printer and Author." See also: Rose, *supra* note 139, at 22; Loewenstein, *supra* note 1, at 162-163; Feather, *supra* note 15, at 40.

[152] See Loewenstein, *supra* note 1, at 149-150.

and control of first publication. Was there any recognition of authors' entitlement to control, not only the first publication of their text but also further uses of it such as adaptations, incorporations in other works and similar "derivative uses"? This is an important question. Compensation and control of first publication, to the extent they existed, carved out a status for the author within a framework of a publisher's copyright. This right was based on the sole entitlement of making copies and embedded in a view of copyright as a privilege to exercise a certain art. Any substantial existence of further entitlements to authors to control other aspects of the use of texts would imply a different conceptual structure. It would imply the existence of a concept closer to the modern one of authors' rights as general control of an intellectual "work."

Were there such entitlements to authors? Patterson suggested that the same dynamics of emerging norms just described in the context of compensation and control of first publication, applied to additional authorial rights in the "creative" aspects of the work.[153] According to this description the stationers' copyright- the publisher's right to print- lived side by side with an author's right to control other aspects of the use of works. This conclusion is based on some indications that the sale of a text to a stationer and its copyright registration was usually not understood as precluding the author from revising and altering his text. These indications are of two kinds: instances in which new copyright was registered for revised or altered works;[154] and contractual agreements for the sale of texts similar to Milton's contract in which authors took specific obligations not to release revised versions of their work.[155] Underlying these cases was an unarticulated understanding that the stationer's copyright was limited to an exclusive right

[153] Patterson, *supra* note 4, at 70-77.

[154] See for example: III Arber, *supra* note 2, at 406, a registration for George Vincent of a book "Altered and enlarged by the Author;" *id.* at 435, registration of a sermon "nowe newly corrected by Authors wherevnto is added another *sermon.*"

[155] The assumption here is that such obligations would be pointless if copyright were understood as vesting in the owner control of revisions and alterations of the text. For examples of such contracts see II Arber, *supra* note 2, at 457 an entry reporting that Dr. Bright the author of *A Treatise on Melancholie* "hathe promised not to meddle with augmenting or altering the saide book vuntill th[e] impression which is printed by the said John Windet be sold;"

to print a specific text and left the author free to revise and reprocess his text even after he sold it and copyright was registered.

In assessing this argument we first need to qualify the assumption that copyright did not preclude the publication and registration of adapted and modified texts. In fact, there was a constant tension between such cases and other instances in which the scope of existing copyright was stretched to preclude new modified texts, sometimes to the detriment of the authors.[156] The more fatal flaw of the argument, however, is that, to use Hohfeldian terms, it confuses a privilege with a right.[157] In other words, the fact that authors remained free to change and adapt their works even after they had sold it to stationers who obtained copyright, tells us nothing about whether they also had any right whatsoever to stop others from engaging in such activities. Nor does it tell us anything about whether such others had a duty to refrain from doing so. The existence of a privilege of adapting a copyrighted text does not imply the existence of a right. It is easy to concede that the stationers' copyright was understood and practiced as creating only a limited exclusive right to print a copy, which, at least to a large extent, left others free to use the text in other ways. This limited character of the right makes perfect sense within the Stationer's Company context. The little evidence we have, simply does not support the very different conjecture that alongside this limited copyright there existed an independent set of exclusive entitlements to authors.

The only faint indication of some antecedents to such an additional set of entitlements are a few cases in which authors tried to manipulate the system in order to achieve some control over attempts to modify their works. The main example of this sort is the 1619 Court of Assistants order that, following an approach by the Lord Chamberlain William Herbert, forbade the printing of any of the plays of the King's Men without the permission of their representative.[158] The lessons that one can draw from this case are complex. On the one hand it appears that a concern with preserving the "integrity" of a work was at least a substantial motive behind the episode. A later letter by the

[156] See *infra* text accompanying notes 189-190.

[157] Wesley Hohfeld, *Fundamental Legal Conceptions*, 23 Yale L. J. 16 (1913).

[158] See Jackson, *supra* note 2, at 110; Rose, *supra* note 139, at 21; Feather, *supra* note 15, at 31-32; Feather, *supra* note 38, at 204-206; W.W. GREG, THE SHAKESPEARE FIRST FOLIO ITS BIBLIOGRAPHICAL AND TEXTUAL HISTORY 15-16 (1955).

Lord Chamberlain explained that he took his action both in order to prevent "much preiudice" to the players and due to the "bookes much corruption to the injury and disgrace of the Authors."[159] On the other hand, it is important to point out that the author as such was not involved in the events. At the heart of the controversy was a collection of Shakespearean plays that the bookseller Thomas Pavier intended to publish.[160] The demand for protection came from a powerful patron protecting the interests of his protégés. In fact, the case is best understood as an ad-hoc decision of the Company to bow before a specific demand from a powerful external power rather than recognition of any general norm. That such a solid norm did not exist becomes apparent from the fact that in other cases it was a common practice to print and receive copyright for altered and corrupted texts.[161] It does not appear that such practices were considered irregular or problematic.

Another indication of faint beginnings of concerns regarding control of the integrity of texts can be found in a few reports about authors whose motivation for selling their texts to stationers was, at least in part, to control and prevent the appearance of altered and inaccurate versions of their works. Such authors hoped to achieve their purpose through the stationer's assertion of his copyright against others who might have distributed altered versions.[162]

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[159] The letter to the Company is lost, but its content was reproduced in a later letter on a similar subject written in 1637 by William Herbert's brother, and the successor of his title and office. Reprinted in *id.* at 24-25.

[160] *Id.* at 15-16.

[161] In fact, a few of these texts were corrupted versions of Shakespearean plays. See *id.* at 68; Feather, *supra* note 15, at 31; Feather, *supra* note 38, at 205. A similar occurrence of an influential figure trying to assert control of a text- this time a text written by him- occurred in 1660. In that year Percy Herbert the second Baron Powis complained to the company that the widow of the printer of a work written by him was trying to use the entrance for the original work to stop him from publishing a revised edition. This was not an unusual occurrence. However, the involvement of such an influential figure apparently motivated the Company to treat the complaint seriously and respond in its typical way of handling such crises. It tried to devise a workable compromise. The exact result of the controversy is unknown. See Bald, *supra* note 83, at 84-85.

[162] Feather, *supra* note 15, at 33; Simpson, *supra* note 147, at 186-92. The effectiveness of such strategies depended on the beginning of a latent recognition of the "copy" in which the stationer had exclusive printing rights as broader than the exact text he obtained and registered. In other words,

Similarly, some authors who received during the interregnum exclusive printing licenses from Parliament and assigned them to stationers who obtained copyright, were probably motivated by concerns regarding the distribution of corrupt and changed versions of their texts, especially in the case of sermons (transcribed versions of which were commonly printed). Thus for example, the title page of Richard Sibbes's 1638 *Light from Heaven* explained that it was "Published according to the author's own appointment, subscribed with his own hand to prevent imperfect copies."[163]

It is impossible to find in such incidents as well as in the 1619 order even an implied recognition of a general social norm, much less a formal rule, according to which authors had the right to control the alteration of their works by others. What is revealed, however, is the emergence of scattered beginnings of a relatively new concern among authors for control over subsequent mutations of their works or for the status of an author-ized text. That, in and of itself, is an important development. It supports other indications that since the late sixteenth century a narrow trickle of new concerns gradually appeared among a few authors, concerns that are the forerunners of the later consolidation of a new concept and practice of authorship.[164] Such early new concerns were sometimes accompanied by attempts to maneuver the system- which in itself did not yet internalize the concerns- in order to get some practical desirable results in specific cases.

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these were the early seeds of the conceptual transformation of the "copy" into the "work." On the other hand, if the unauthorized version was already copyrighted by a stationer the expansion of the protection coverage could preclude the later attempt of the author to publish an authorized version. See *infra* text accompanying notes 189-190.

[163] See Nash, *supra* note 84, at 183.

[164] The most common example in this context is Ben Jonson and his early seventeenth century attempts to represent himself- but more significantly William Shakespeare and his work- through a new concept of the author. The author in this new image became an individual who is the ultimate source of new original works, and who should as a normative matter command control over such work. See Lindenbaum, *supra* note 139, at 176; Joseph Lowenstien, *The Script and the Marketplace*, 12 Representations 101 (1985); JOSEPH LOEWENSTEIN, BEN JONSON AND POSSESSIVE AUTHORSHIP (2002); Loewenstein, *supra* note 1, at 86-88; Richard C. Newton, *Johnson and the (Re)-Invention of the Book*, in CLASSIC AND CAVALIER: ESSAYS ON JONSON AND THE SONS OF BEN 31-55 (Claude J. Summers & Ted-Larry Pebworth eds. 1982); Rose, *supra* note 139, at 26-27.

However, at most these were at the time embryonic developments that did not yet receive general social recognition or institutional expression. It seems that the stationers' copyright and the practices of the Company remained focused on the economic exclusive right to publish and hardly gave rise to formal protection of additional entitlements or to a general normative recognition of such entitlements. The most that one can say is that, in the words of Joseph Loewnstein "contests within the book trade concerning the regulation of literary property" (and I would add related economic practices) had "occasionally thrown off authorial protections, like regulatory sparks."[165]

Under the stationers copyright framework there was a gradual development of recognition of the author's place within the system. Such recognition emerged from the practical economic necessity to compensate authors in order to get access to their texts. With time economic practice and need were partially transformed into social norms regarding authors' rights for compensation and control of the first publication of their texts. Such norms were, in turn, partially translated into formal semi-legal recognition in the ambiguous and case-specific fashion characteristic of the stationers' Company operation. These were important developments, germs that with time would produce more dramatic changes. But until the eighteenth century authors and their entitlements were incorporated into a system that was built on a practice and on a conceptual scheme whose focus was the publisher (within the framework of the Stationer's Company) rather than the author.

b. Ownership and Commodification

The early stationers' copyright, as we saw, was not conceptualized as ownership or general control of an intangible object. Instead it was originally understood and practiced as an exclusive entitlement to peruse a certain economic activity, to print a specific text. Just as early patents were not thought of in terms of general control of certain information constituting an "invention,"[166] the direct "object" of the copyright entitlement was the action of printing rather than some postulated intangible entity. This focus of copyright on the entitlement to pursue an economic activity suited its existence within the framework of a trade guild. It was very different from the concept of copyright that crystallized during the late eighteenth century and later. Nevertheless in this respect too, one should not exaggerate the

[165] Loewenstein, *supra* note 1, at 40.

[166] *Supra* Chapter 1, sec. I(A)(2).

sense of rupture or ignore the gradual development of seeds of a different conceptual scheme starting at a very early point. Such a gradual dialectic between the old concept of practicing a specific economic activity and the future one of owning a "work" appeared on several dimensions within the practice of the Company.

One conspicuous manifestation of the subtle, probably unnoticed, change of the conceptualization of copyright was the evolution of the form of registration in the Company's books. The early entries in the register were formulated as a license to print bestowed by the Company on a particular member. The common phrasing during the first decades was that of "lycense for printinge" or similar forms.[167] Around the 1580s a new lingual usage starts penetrating the registration. Entries appear in which the action of printing is replaced with the ownership of a "copy." Thus the form of "lycenced for his copie"[168] as well as similar forms[169] becomes more common. This transformation of the registration form reflected trends in the Company's usage. Incidents in which stationers were fined for infringing copyright were referred to as printing "other mens copyes" as early as the 1560s.[170] By the last decade of the century the formal transformation was complete when a new usage became the norm: the copyright came to be registered as "entered for his copy."[171] Within half a century, then, the form of registration evolved from a license to print to ownership of a copy. Patterson who was the first to indicate this transformation noted that it was one of form only rather than substance.[172] It is true that the transformation of form did not reflect any change in the actual legal basis or content of copyright and that the conclusions we can draw from mere textual usage are limited. Still, it seems at least plausible that the change did indicate the appearance of subtle new nuances. These were first signs of referring to copyright as ownership of something, rather than as an exclusive license to pursue the action of printing.

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[167] See for example: I Arber, *supra* note 2, at 96; *id.* at 150.

[168] See for example: II Arber, *supra* note 2, at 373.

[169] See, for example the following forms: "tolerated vnto him" *id.* at 375; "admytied vunto him" *id.* at 378-379; "allowed vnto him" *id.* at 424; "graunted vnto him a copie" *id.* at 430.

[170] See for example: I Arber, *supra* note 2, at 239; *id.* at 274, *id.* 315.

[171] II Arber, *supra* note 2, at 513-536.

[172] Patterson, *supra* note 4, at 52-55; see also: Rose *supra* note 139, at 14.

The transformation of lingual usage was accompanied by the development of some corresponding economic practices. Thus it appears that among stationers copyright came to be treated as a commodity- a "thing" to be bought and sold. It seems that copyright was assignable very early on. The first recorded transaction is in 1564 when Thomas Marsh had registered two copies "which he boughte of" Luke Harrison.[173] Yet as the decades passed the commodified status of copyright became more pervasive in practice. Transactions in which the copyright was sold become more and more common in the register,[174] and by the seventeenth century they seem to have grown to be a standard part of business practice. Moreover, beyond straight-out sale, copyright had become the object of many other forms of business transactions characteristic of any other commercial asset. Copyrights were owned by joint owners. The first recorded example of such joint ownership occurred in 1566 when an entry appears to "John alde and Rycharde Jonnes for thayre lycense for prtninge of a *tru Description of chylde borne with Ruffes*."[175] Joint ownership consisting of many more partners, and occurrences of sale of one's share in a copyright gradually became common.[176] Copyrights were used as security for debts[177] and to secure mortgages.[178] It was even given in trust.[179] If copyright came to be referred to as ownership of a copy, economic practice came to treat the thing owned as

[173] I Arber, *supra* note 2, at 259.

[174] Patterson and Feather both mention this phenomenon. Patterson, *supra* note 4, at 54; Feather, *supra* note 38, at 197.

[175] I Arber, *supra* note 2, at 329.

[176] For a description of the rise of complex forms of joint ownership of copies and related transactions during the middle of the seventeenth century see Feather, *supra* note 15, at 42; Feather, *supra* note 38, at 197-198.

[177] See Greg & Boswell, *supra* note 2, at 9.

[178] IV Arber, *supra* note 2, at 377. Young had "entered for his Copie by venture of a deed of Mortgage…. All the Estate right and Title and Interest which the said Beniamyn ffisher hath in all the Copies and parts of Copies hereafter mencioned"."

[179] II Arber, *supra* note 2, at 123a ("Memorandum it is agreed that these copies thus entered for Edmund weaver may and shall be at the Disposition of master Thomas Wight to dispose of them to any freeman of this Companye.").

any other commercial asset, to be sold, owned in common or be mortgaged.[180]

One important trait of the early commodification of copyright that should be highlighted is its dual character. This was another manifestation of the duality of copyright that was rooted in the internal guild practice on the one hand, and in the state-guild relations on the other. Within the guild practice copyright reached the highest level of commodification. It was treated, conceptualized and used by stationers as any other business asset. On the other hand, this status of copyright was limited to a special privileged group of people, namely members of the Company. Once one looks beyond this group, which was sustained by special privilege, copyright loses its commodified character. Within the Company it became an assignable business asset like any other. Outside it its nature as a special privilege bestowed only on a specific group of people- and incapable of being assigned beyond that group - was retained.[181]

There is also the matter of referring to copyright as property. It seems that this lingual usage in which copyright was described as the property of stationers appeared somewhere in the first half of the seventeenth century. The best example is the *Humble Remonstrance*- the 1643 pamphlet mentioned before.[182] The argument in the pamphlet makes recurring references to "propriety in Copies,"[183] and "propriety in books."[184] Again,

[180] Holdsworth concludes form these economic practices that copyright "was clearly regarded as a form of property." 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 365, 378 (1924). Inasmuch as this means that in practice copyright was treated as a business asset the assertion is accurate. It is less accurate, however, to the extent it implies that there appeared a formal legal concept of copyright as a brand of property.

[181] Matters are a little more obscure with the printing patent. Though such patents were usually granted to members of the Company, in some cases non-members were patentees. Since patents were assignable one could conclude that in theory they could be assigned outside of the Company (one could even speculate further that a patent could be assigned from a stationer to a non-stationer). In practice, however, it seems that this did not happen, at least not as a matter of routine. It appears that the economic and guild context created circumstances under which when patents were assigned it was usually to a member of the Company.

[182] I Arber, *supra* note 2, at 584.

[183] *Id.* at 587.

one cannot infer too much from lingual usage. There is no indication that anybody attempted to construct a general theory or concept of property into which copyright could fit. Instead, when stationers were talking about copyright as property they were using the term to refer to the peculiar set of practices, privileges and guild regulations they were familiar with. In other words, "property" was not used as an overarching general model. The term functioned as a kind of a black box which received different content when used in different contexts. There was certainly no move in legal doctrine or theory (to the extent that there was any) to equate copyright with other forms of property or treat them under a uniform model.

Nevertheless, the *Remonstrance* contains the abstract argument that this exactly was the case, that copyright was "property" in the sense of being the same as other forms of ownership. The following remarkable argument appears in the petition:

> "there is no reason apparent why the production of the Brain should not be as assignable, and their interest and possession (being of more rare sublime and publike use, demerting the highest encouragement) held as tender in Law, as the right of any Goods or Chattels whatsoever"[185]

At this point at time time, this is both a highly abstract argument and a particular kind of wishful thinking. The nuts and bolts of legal doctrines and practices were not even close to treating different forms of ownership in goods or chattels and copyright as being incidents of some overarching joint model called "property." At the same time, however, it is a significant moment in the history of copyright. It is the first substantial assertion that copyright should be conceptualized and practiced this way.

Alongside of the first signs of the conceptualization of copyright as owning a thing, there appeared obscure beginnings of describing this "thing" in terms different from either an actual physical manuscript or an exclusive license to print. In other words, these were first signs of the later concept of the "work." Again lingual usage provides a starting point for assessing this subtle development. As we saw the word "copy" came to be used frequently in the registration of copyright and its assignment. The denotation of the word, as it was used in the trade, was obscure and elusive. It referred to both the actual manuscript and the exclusive entitlement to print it. During the

[184] *Id.*

[185] *Id.* at 588.

seventeenth century the word "book" started to supplement and sometimes replace the "copy" both in the register[186] and in the phrasing of transactions within the book trade.[187] Neither the obscure meaning of "copy" nor the rise of the use of "book" meant an appearance of a full-blown articulated concept of the object of copyright protection as an intangible abstract entity.

The latent seeds of such new concepts can be traced, however, to emerging economic practices. These practices were cases in which individual stationers sought to secure their economic interest by trying to broaden the scope of their exclusive printing entitlements. Milton's contract, mentioned above, is a good example of such developments. In the contract Milton took upon himself the obligation to refrain from hindering the publication or publishing independently not only the manuscript sold but also any other "Booke or Manuscript of the same tenor or subject."[188] The language of the contract and the scope of the obligation betray faint beginnings of a practical concept of the "work" which is broader than the exact form or phrasing of a particular manuscript. The distinction between the manuscript and the "copy" or the "book" as constituting a broader entity is extremely tenuous and implicit at this point. Still, the fact that the obligation covered books "of the same tenor or subject" demonstrates that embedded in the economic practices and interests rather than in any ordered conceptualization, there appeared an undeveloped grain of the later concept of the "work."

Other incidents demonstrated a similar dynamics of stationers trying to inflate the coverage of "their copies" by attacking attempts to publish various versions of what we would call today derivative works of copyrighted texts. As early as 1582, Henry Denham had to pay damages to Edward White due to a book he published "pte whereof was taken out of the copie of ye said Ed. white." It was also ordered that in future publications Denham "shall Leave out all yt was taken out of the said copie of the said Edward."[189] The same Edward White had an entry of a book registered to him under the condition that it was "not collected out of anie book already extante in print in English."[190] In 1618 the Court of Assistants ordered Thomas Jones not to

[186] See for example: Eyre & Rivington, *supra* note 2, at 272.

[187] Milton's contract for example referred to a "Booke, Copy or Manuscript of a Poem." See 6 Masson, *supra* note 140, at 510.

[188] *Id.*

[189] Greg & Boswell, *supra* note 2, at 12.

[190] II Arber, *supra* note 2, at 438.

include in *The Father's Blessing* published by him anything taken from *The Practice of Piety* which was "owned" by another stationer.[191]

In all of these cases stationers were using copyright to stop not straight-out publications of the exact manuscripts they "owned," but rather different adaptations and derivative uses of such manuscripts. Again, such stationers were not interested in theoretical conceptualization of the scope of the "copy" or the "book" and the Court of Assistants did not engage in such conscious formulations. Moreover, given the overall framework of copyright this early practical inflation of the copy did not always align with emerging authorial concerns of controlling their works. In some incidents authors (cooperating with a stationer) were bared from publishing new, sometimes very different, versions of their own works by earlier copyright registered for a particular stationer.[192] One strand of cases produced an especially dramatic conflict of this sort. These were cases in which authors worried about earlier inaccurate, partial or corrupt versions of their texts that were published and copyrighted by stationers tried to rectify the situation by publishing (through other stationers) amended or simply the original versions. In a few incidents such authors found that their attempts were blocked due to the broadening concept of the copy. Ironically (from our perspective), the author's approved "original" versions were blocked as infringing the copyright registered for the corrupt versions. When Edward White printed in 1592 a "newly corrected and amended version" of *The Spanish Tragedy* the Court of Assistants found that he infringed an earlier copyright.[193] Thus the emerging abstraction of the copy was neither part of a consciousness theoretical conceptualization nor unambiguously aligned with new concepts of authorship. Nevertheless, the attempts to inflate the scope of protection secured by owning a copy, as part of the economic maneuvers of stationers, were latent unarticulated beginnings of the later concept of the object of copyright as the "work"- an intangible abstract entity much broader than the exact phrasing of a particular text.

Throughout the seventeenth century many latent ambiguities buried in the stationers' economic practices and in the regulatory framework of the Company were subtly and gradually transforming the conceptual structure of

[191] Jackson, *supra* note 2, at 105.

[192] For a detailed survey and analysis of such cases see Loewenstein, *supra* note 1, at 100-108.

[193] Greg & Boswell, *supra* note 2, at 44. See also: Loewenstein, *supra* note 1, at 100.

copyright. Copyright came to be commonly referred to as the ownership of a "copy" or a "book" and in particular instances such ownership was treated as covering more than just the right to print the exact form of a particular manuscript. It is very doubtful whether such emerging usage and practices constituted or were consciously understood by anyone to be a sharp and clear move from the traditional concept of copyright as an exclusive license to print to a new one of ownership of a "work." Still, these subtle changes were latent seeds that in the next centuries germinated not as sharp breaks with the past but as continuation, and elaboration in a more conscious and explicit level of existing underlying practices and implicit assumptions.

C. English Copyright in the Eighteenth Century

1. The Statute of Anne

The 1710 Statute of Anne[194] plays an equivalent part to that of the Statute of Monopolies. It is the center of copyright's version of the story of progress. The Statute of Anne is usually described as "the first copyright act." It is the moment of dramatic transformation in which "real" copyright- that is to say author's copyright- displaces older guild practices. Yet as in the patent context, here too the story is more complex. There is no doubt that the Statute of Anne was a significant landmark in the history of copyright. It was marked by at least two major developments: the move to a general statute directly regulating copyright and the abandonment of the traditional guild framework; and the severing of the two centuries old formal entanglement of copyright with censorship and content control.

Nevertheless, the statute's break with the past was much less radical than is often realized. It incorporated into the new regime much of the older framework of copyright. Under the new regime the author's status remained obscure, and the entitlement the statute created was in essence a limited time edition of the traditional stationers' copyright- a publisher's right to print a copy. When one turns to the way the statute functioned in social reality during its first decades the break with the past shrinks even more. The London booksellers[195] did not only insist on interpreting the new normative

[194] 8 Anne, c. 19.

[195] In the eighteenth century the term bookseller continued to cover a somewhat obscured terrain. It applied roughly to members of the trade that engaged in activities more or less equivalent to what we would call "publishing," but often also engaged in retail sale of books. See: Terry

context as preserving their old system in a changed world, they actively operated in order to keep traditional economic and social practices intact. Thus, to the extent the Statute of Anne did contain significant transformation of the concept and practice of copyright, its realization was slow and gradual and it stretched till the end of the eighteenth century and beyond.

a. From Guild Regulation to Author's Property?

Two of important versions of the history of the Statute of Anne construct stories that stand in considerable tension with each other, though not necessarily outright contradiction. In Patterson's account the statute was an attack on the traditional stationers' monopoly. The figure of the author was used rhetorically and practically in order to facilitate this attack and break down the old monopolist power.[196] In Feather's version, however, it was the booksellers who used the rising rhetoric and ideology of the author in order to preserve as much of their traditional power and the familiar framework of copyright as could be saved in a changing social and ideological world. According to Feather this was exactly the outcome in the form of the Statute of Anne, at least as it was understood in the trade.[197] It is worth mentioning that both versions shrink dramatically the popular view of the statute as a dramatic move to authors' copyright. Both of them present authors' rights as a rhetorical device used mainly to promote other purposes rather than a genuine concern motivating the statute and addressed by it.

Which version is more accurate then? Did the Statute of Anne have a revolutionary focus on the rights of authors? Was authorship used as a cover

Belanger, *Publishers and Writers in Eighteenth Century England*, in BOOKS AND THEIR READERS IN EIGHTEENTH CENTURY ENGLAND 8 (Isabel Rivers ed. 1982). In this subsection I will be referring most of the time to "booksellers" rather than "stationers" in order to denote the fact that though many of the relevant figures were members of the Stationers' Company the new framework of copyright after the Statute of Anne no longer made such formal membership a key factor in the dynamics of publishing and copyright.

[196] See Patterson, *supra* note 4, at 14, 143-144.

[197] Feather, *supra* note 15, at 61-63. Similarly, Benjamin Kaplan argued that "I think it nearer to the truth to say that publishers saw the tactical advantage of putting forward authors' interests together with their own, and this tactic produced some effect on the tone of the statute." BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 8-9 (1967).

to retain most of the old framework of the stationers' copyright? Was it rather used to attack this framework and break the trade's monopoly? The disappointing answer seems to be that, to an extent, all three versions are right. Part of the issue is the usual familiar difficulties of locating an "original" intent or meaning of a piece of legislation produced by interaction of many different interests and actors with various motives as well as varying interpretations of the final arrangement. Moreover, the statute was a moderate and partial move towards changing the system while incorporating and preserving much of the existing framework. Thus, all three narratives can be discerned as part of the rather unstable whole called the Statute of Anne and the process leading to it.

The dynamics that led to the statute was rooted in the demise of the old ideology and practice of censorship and content control. As we have seen under the complex structure of the stationers' copyright the internal guild protection of copies was heavily dependent on the powers and privileges bestowed on the company by the state, mainly as part of the censorship regime. Although there were short lapses and certain changes in the legislative framework the members of the trade (through active lobbying) managed to maintain this general scheme until the end of the seventeenth century. When the last extension of the Licensing Act lapsed in 1695 the booksellers found they were facing a changed world. Their first reaction to the lapse of the act was the traditional one: lobbying for a new legislation regulating printing and vesting the company with broad powers. The early campaigns for new legislation exhibited the familiar tactic of deploying a wide range of justifications for such a regime but always putting the emphasis on the need to regulate the trade and the close relation of such regulation to censorship.[198]

The booksellers, however, were to learn that things changed and that old medicines were encountering new opposition. The proposed bills were defeated one after another.[199] The reasons and arguments deployed by opponents of the bills are interesting for our purposes. First, there was a

[198] Feather, *supra* note 15, at 51-54; Rose, *supra* note 139, at 34. It should be noted that there was also one bill that proposed a licensing censorship regime while ignoring the company. See Feather, *supra* note 15, at 51; Rose, *supra* note 139, at 33.

[199] Between 1695 and 1707 there were ten different bills. They were all defeated. All in all, including the bill that became the Statute of Anne and immediate amendment attempts there were fifteen bills between 1695 and 1714. See Feather, *supra* note 15, at 51.

growing opposition to censorship, at least in the traditional format of prior restraint and a tight licensing regime. Though some political interests were certainly in favor of restoring the old censorship system, the attempt to do it met both vociferous ideological opposition and a solid political resistance. The ideological opposition had roots in Milton's lucid attack on licensing in his 1644 *Areopagitica*[200] together with a few other critics of the system.[201] By the end of the seventeenth century, however, these relatively lonely voices had become a rising tide that drowned the renewal of the Licensing Act. Locke in his campaign against the renewal wrote in 1694: "I know not why a man should not have liberty to print whatever he would speak."[202] Defoe in his 1704 *Essay on the Regulation of the Press* argued that:

> "The People of *England* do not believe the Parliament will make a Law to abridge them of that Liberty they should protect, for tho' it were more true than it is, that the Exorbitances of the Press ought to be restrain'd, yet I cannot see how the supervising, and passing all the Works of the Learned part of the World by one or a few Men, and giving them an absolute Negative on the Press, can possibly be reconcil'd to the liberty of the *English Nation*."[203]

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[200] John Milton, *Areopagitica*, reprinted in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 716-749 (Merritt Y. Hughes ed. 1957). For elaborations of Milton's argument see Loewenstein, *supra* note 1, at 171-191; Rose *supra* note 139, at 28-30. Milton's, libertarianism regarding the freedom of speech should not be exaggerated. His views maintained many of the traditional tendencies of suppressing speech. Nevertheless, in his time his critique was quite powerful especially regarding the prior-licensing regime. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 91-93 (1985).

[201] One noticeable group was the Levelers- a mid century English radical group some of whose publications strongly attacked the licensing system and advocated restraints on the press. For a survey of their views as well as those of other early English thinkers in this context see: Levy, *supra* note 200, at 91-93 (1985). See also: ROBERT W. T. MARTIN, THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY 1640-1800 16-25 (2001).

[202] *Memorandum* in PETER KING, THE LIFE AND LETTERS OF JOHN LOCKE 203 (1884).

[203] DANIEL DEFOE, AN ESSAY ON THE REGULATION OF THE PRESS 6-7 (1704).

The attack on licensing and censorship was not limited to intellectuals. After the Glorious Revolution a wide cross-faction opposition to the traditional tight censorship regime had developed in English politics.[204] While opinions or governmental policy certainly did not change overnight to what we would call today full-fledged "free speech" positions,[205] by the beginning of the eighteenth century there was a broad consensus among both intellectuals and politicians against the traditional licensing and prior restraint system. The old censorship ideology and practice were falling out of favor and together with them the old power base of the Company's monopoly.

Second, the Stationers Company itself and its traditional powers and privileges came under direct attack as monopolies. Throughout the seventeenth century the anti-monopoly rhetoric was often employed in the trade's conflicts but it was usually directed toward the printing patent while the Company's other powers and its copyright remained untouched by such criticism. At the turn of the century this changed and some started pointing their attack of monopolies directly at the powers the Company was trying to renew. When in 1694 the Commons detailed eighteenth reasons for refusing to renew the Licensing Act many of the objections were directed at the powers of the Company, the limitations on exercising the trade of printing and the resultant monopolization.[206] This echoed a petition submitted to parliament that year depicting the Company's power as a monopoly inimical to the public good, that served as the real motive behind the demands for a licensing regime:

> "Were it not for their Mammon monopoly, the Master Wardens," &c of the Stationers' Company would cry out against the slavery and charge of Licensing as much as any of their Brethren."[207]

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[204] JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 21 (1988); 6 Holdsworth, *supra* note 180, at 374-375.

[205] Government kept using the tool of common law seditious libel for post-publication punishment and also subtler methods of prior regulation such as subsidies and taxes. See Levy, *supra* note 200, at 101-108; Smith, *supra* note 204, at 21.

[206] 11 JOURNALS OF THE HOUSE OF COMMONS 305-306.

[207] *To the Honourable Members, assembled in Parliament*, cited in Feather, *supra* note 15, at 54.

Third, entangled with the concerns about monopolies and resistance to censorship there emerged a new interest in the rights of authors. The novelty of such views is not so much the concern with the author per se. As we have seen, this concern had gradually developed since the end of the sixteenth century. The new element was a few signs of breaking out of the traditional pattern of incorporating the author into the stationers' copyright regime and of conceptualizing that regime as being potentially at odds with the author's interest.[208] Parliament's 1694 reasons for defeating the licensing bill included the objection that stationers "have an Opportunity to enter a Title to themselves, and their Friends, for what belongs to, and is the Labour and Right of, others."[209] Daniel Defoe argued in 1704 that:

> "… every Author being oblig'd to set his Name to the Book he writes, has, by this Law, an undoubted exclusive Right to the Propriety of it. The Clause in the Law is a Patent to the Author, and settles the Propriety of the Work wholly in himself or to such to whom he shall assign it. And 'tis reasonable it should be so: For if an Author has not the right of a Book, after he has made it, and the benefit be not his own, and the Law will not protect him in that Benefit 'twould be very hard the Law should pretend to punish him for it."[210]

[208] Of course, this trend too had its antecedents in the preceding century when in a few particular incidents some voices attacking the stationers' monopoly in the name of the interests and rights of authors were heard. Some motivated by such emerging concerns also tried during the seventeenth century to employ various methods- chief among which was the royal patent- in order to shift power and control in specific cases from the stationer to the author. Probably the best known case is that of George Wither and his conflict with the stationers during the first half of the seventeenth century. See HARRY RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710 57-60 (1956); Loewenstein, *supra* note 1, at 140-151. For a similar tactic of an author (Samuel Daniel regarding his History of England) using the royal patent in order to bypass the stationer's monopoly see: *id.* at 107-108. By the beginning of the eighteenth century such isolated incidents had gathered momentum and were transformed into a general dominant concern.

[209] 11 JOURNALS OF THE HOUSE OF COMMONS 305-306.

[210] Defoe, *supra* note 203, at 27.

These were not fully developed enunciations or justifications of a new model of copyright for authors. In Defoe's case, for example, the argument was grounded mainly in the reciprocity of punishment and reward vis-à-vis texts.[211] Nevertheless the new drive to locate the proper subject of entitlements in the author rather than the stationer is obvious.

The three strands- objection to censorship, concerns about monopolies and rising recognition of the author as the proper bearer of rights- combined to oppose the renewal of the old system. In 1693 a minority in the House of Lords opposing the renewal of the Licensing Act combined all three arguments. The act, it was argued, "subjects all Learning and true Information to the arbitrary Will and Pleasure of a mercenary, and perhaps ignorant Licenser, destroys the Properties of Authors in their Copies and sets up many Monopolies."[212] Since 1694 onward this consolidated into a stable opposition that blocked any attempt to restore the old regime.

In 1707, after several failed attempts, the booksellers who lobbied for protection seem to have recognized the power of the opposition and they made a brilliant shift in their strategy. The watershed moment was in a 1707 petition of the booksellers to Parliament premised on the following argument:

> "many learned Men have spent much Time, and been at great Charges, in composing Books, who used to dispose of their Copies upon valuable Considerations, to be printed by the Purchasers… but of late Years such Properties have been much invaded, by other Persons printing the same Books… to the great Discouragement of Persons from writing Matters, that might be of great Use to the Publick, and to the great Damage of Proprietors."[213]

The argument itself was not new. Almost an identical version of it appeared in the 1643 *Remonstrance of the Company of Stationer's*.[214] The brilliant

[211] For this argument and a broader discussion of Defoe's publications in this context see Rose, *supra* note 139, at 34-41.

[212] 15 JOURNALS OF THE HOUSE OF LORDS 280.

[213] 15 JOURNALS OF THE HOUSE OF COMMONS 313.

[214] See I Arber, *supra* note 2, at 587. The argument there read: "Community as it discourages Stationers so it's a great discouragement to the Autrhors of Books also; Many mens studies carry no other profit for recompence with them but the benefit of their Copies; and if this be taken away, many Pieces

maneuver was dropping all references to censorship and shifting the entire weight to the argument of protecting authors and encouraging learning. This responded to all three strands of opposition. Since content control was no longer the basis for the proposed legislation the anti-censorship criticism was neutralized. Indeed, in a complete reversal of their former position later petitions by the booksellers listed the fact that the press would not be limited as one of the merits of the legislation they promoted.[215] Monopoly concerns were met by insuring that the protection would serve the public good by encouraging useful writing. And finally authors were moved to the rhetorical front and presented as the prime beneficiaries of the proposed arrangement rather than being wronged by it. This, last move, however involved some subtlety. As Feather observed the booksellers framed their case in a way that gave prominence to the author without compromising their own interest.[216] In other words, it seems that when the booksellers were talking about protecting the author they were in fact proposing the traditional system of a stationer's copyright under which the author's interest received some indirect recognition.

This was the strategy that finally led to the act of 1710.[217] The title of the act testifies that the new argument of the booksellers served as its main premises: "An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the times therein mentioned." The act's preamble echoed the booksellers' argument with even more precision:

> "Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting and Publishing, or causing to be Printed, Reprinted and Published Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and often to the Ruin of

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of great worth and excellence will be strangled in the womb, or never conceived at all for the future."

[215] See *The Booksellers Humble Address to the Honourable House of Commons in Behalf of the Bill of Encouraging Learning* (1709).

[216] Feather, *supra* note 15, at 57.

[217] For a detailed account of the legislative history see: Feather, *supra* note 15, at 58-63; John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, 8 Publishing History 19 (1980); Rose, *supra* note 139, at 42-47.

> them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books;"

This did not mean, of course, that the act gave the booksellers exactly what they wanted, or that there were no ambiguities or different views regarding the exact content of the new arrangement. Still, this was the new framework within which ambiguities and conflicts were to be played out.

b. The New Copyright: Law in the Books

What was the exact character of the new copyright regime created by the Statute of Anne and to what extent did it differ from the traditional framework? At the heart of the statute lay two matching entitlements. First, regarding "Book or Books already Printed" there was a twenty one years exclusive right to print to the author, or in the more likely case that the author "Transferred to any other the Copy or Copies of such Book or Books" to the bookseller, printer or "Person or Persons, who hath or have Purchased or Acquired the Copy or Copies... in order to Print or Reprint the same." Second, for new books there was a fourteen years exclusive right to print to "the Author… and his assignee or assigns" (the right was renewable by the author for another term of fourteen years). This new arrangement created three major departures from the traditional framework. First the new regime severed the old entanglement of copyright protection with censorship. The rights in copies were the only issue dealt with by the act. Second, copyright, at least on the formal level, was no longer limited to a privileged group of people who were members of the Stationers' Company. The direct subject of the right was the author who could assign it to anyone. These two developments meant the end of the dual character of copyright characteristic of the century and a half of the Stationers' Copyright. Copyright was taken out of the hands of the Company, either as regulator or as a privileged body whose members were the sole potential subjects of the entitlement. Thus the two dimensions of the Stationers' Copyright- state-guild and internal-guild relations- collapsed into one. Copyright was now based on the relations of the state and all subjects without the mediating medium of the guild.

The third important development was the time limitation on the exclusive right to print, which markedly differed from the perpetual stationers' copyright. There could be little doubt that this reflected the diffusion of the political thought about monopolies into the context of copyright. The idea that some monopolies could be justified if they served the

public good and if they were limited in time was a major part of the structure of the common law and the Statute of Monopolies. It appears that by 1710 copyright came to be thought of in the same terms. The main justification the statute provided in its preamble for the monopoly of copyright was that it served the public good through the encouragement of learning. Similarly, the statute forbade the sale of books for "High and Unreasonable" prices and set out a complex (and probably unworkable) mechanism for price control. This had little effect in practice, but it further reflected the preoccupation with monopolies. Exorbitant prices were the most common concern and allegation in this context. Finally it is hard to believe that the durations that the Statute of Anne set were accidental. Twenty one years (for existing entitlements) and fourteen (for new ones) were exactly the time caps set by the Statute of monopolies for the exception of patents for invention (with the notable change that in the Statute of Anne these served as uniform terms rather than top limits on a discretionary term).

Thus it seems that the statute marks a point of convergence. The protection of literary works, that started with the printing patent from the same starting point as patents for invention developed in different directions under the guild framework. In 1710 these two fields intersected and to some extent re-converged. Some explicitly made this connection. Joseph Addison referring to "a Set of Wretches we Authors call Pirates" wrote in 1709:

> "All Mechanick Artizans are allowed to reap the Fruit of their Invention and Ingenuity without Invasion; but he that has separated himself from the rest of Mankind, and studied the Wonders of the Creation, the Government of his Passions, and the Revolutions of the World, and has an Ambition to communicate the Effect of half his Life spent in such noble Enquiries, has no Property in what he is willing to produce…"[218]

The trend of analyzing patents and copyright, inventors and authors, as two close parallels that have to either be treated under a joint framework or somehow be distinguished would intensify later in the eighteenth century.

[218] *The Tatler* No. 101, 1 December 1709, reprinted in 3 THE TATLER 119-123, 121 (Donald F. Bond ed. 1987).

i. Copyright as a General Right

The new legal and conceptual scheme produced by the Statute of Anne was a significant but limited transformations of all three aspects of the Stationers Copyright discussed above: the character of the entitlement; the subject who enjoyed the entitlement; and the object protected by the entitlement. As for the first aspect, the Statute of Anne marked the transformation of copyright into a general right. Copyright became a uniform set of entitlements conferred as a matter of right on any person who met a standard set of requirements, with no ad-hoc discretion involved. To some extent this move was the automatic consequence of eliminating the dual structure of the stationers' copyright. Within the internal guild practice copyright was treated as a general right for more than a century. The effect of the statute was to take this internal guild practice and apply it to all persons. Yet it also involved eliminating most of the significant residues of discretionary privilege that persisted within the Company's practice. The Stationers' Company and its governing bodies were no longer in charge of copyright, neither at the stage of the initial creation of the right nor in case of subsequent disputes. As to the ex-ante stage, registration in the Company Register "in such manner as hath been usual" was made a statutory requirement for a valid copyright. The statute, however, made it clear that the Company was to play only an administrative non-discretionary role in the registration. It created a duty to make the Register available to all persons at all "Seasonable and Convenient times" for registration and inspection, and mandated a fixed uniform fee. In the case of refusal to register there was a fine to the Clerk as well as an alternative procedure of publication in the Gazette. In other words, any opportunity for the Company (or any other institution) to play a discretionary role in the registration stage was neutralized. As for ex-post disputes, where traditionally the most significant residues of the discretionary character of copyright survived, the elimination of the Company's control of copyright also meant the end of the its jurisdiction to handle such disputes. The adjudication of copyright disputes was transferred to the law courts,[219] institutions that were much less likely to produce the specific "settlements," and ad-hoc compromises characteristic of the Company's Court of Assistants. Thus, both ex-ante and ex-post Company

[219] The Statute did not specifically name the common law courts as having jurisdiction. The only court specifically mentioned was the Court of Session in Scotland. Nevertheless both the general framework of a parliamentary statute and the references to "Actions, Suits, Bills, Indictments or Information" implied that common law jurisdiction was taken for granted. There was no subsequent controversy over this issue.

practices that mitigated copyright's character as a general right were swept away.

ii. Authors as the Subjects of the Right

Eliminating the intermediation of the Company also meant erasing the element of a group entitlement from copyright. Statutory copyright became a purely individual entitlement. The harder question is: which individuals did the new framework recognize as the direct subjects of the right? The statute itself spoke of Authors, Proprietors and Purchasers of Copies. As we have seen in the dynamics leading to the statute the figure of the author was used strategically both to attack the booksellers' monopoly and by the booksellers themselves who tried to preserve as much of it as possible. But what of the final legal arrangement produced by the Statute of Anne? John Feather described how the phrasing of the final statute differed from the original bill especially in parts that related to authors. Some parts of the preamble and the third paragraph that were changed or omitted led Feather to conclude that these parts were "anathema to the book trade" that was behind the change with the purpose of "watering down the original proposals to the point at which authors had their existence acknowledged but their right undefined or ignored."[220]

It is hard to assess Feather's argument and it is certainly possible that the book trade concerns were behind the textual changes. Still as far as the statute in its final version is concerned, strategic use of the author and changes in the phrasing notwithstanding, it appears that the author did receive an unprecedented legal status. Even when one realizes that the frequent references throughout the statute to the proprietor and the purchaser of a copy reflect the incorporation of much of the existing practice of copyright in which stationers were the real holders of the right, it is hard to deny that the author is placed in a new position. The statute unequivocally recognized the author as the original subject of the legal right. Its language makes it clear that the original entitlement is conferred on "the Author… or his Assignee and Assigns." Similarly, the author was identified as the unequivocal original bearer of the right to renew the copyright. According to the statute upon expiration "the sole Right of Printing or Disposing of Copies shall Return to the Authors… for another Term of Fourteen Years." Vesting the formal right

[220] Feather, *supra* note 15, at 62.

unequivocally in the author made the legal status of the assignee derivative of that of the author and dependent on his decision to assign his right.

This may be taken for granted by us, but at the time it stood the familiar structure of copyright on its head. Under the stationers' copyright, no independent right was vested in the author. The only person who could formally enjoy copyright was a stationer. To the extent that the author had any rights or economic benefits, they were derivative of the stationer's. As a matter of formal law the Statute of Anne reversed this relationship by making the author the original subject of the legal right. What effect this transformation of the formal legal structure would have in actual social reality was another issue that remained to be seen. In fact, on this point the gap between formal law and the way it functioned in social reality was probably the greatest, at least in the immediate period following the statute.[221] Similarly, the formal legal change did not entail immediate theorization of the exact role of the author in the system or an elaborate justification of his new status. These two elements were to be played out as the statute was put into practice throughout the century.

iii. An Entitlement to Print a Copy

When it came to the object protected by the right- the actual entitlement bestowed on authors and their assignees- the statute created the least change in the existing framework. Although the statute's title referred to "Vesting the Copies of Printed Books in the Authors" and repeatedly mentioned the "proprietors" of copies, it simply replicated the entitlement of the stationers' copyright. The only entitlement conferred on authors and their assignees was "the sole Liberty of Printing and Reprinting" a book for the prescribed term. The statute did not create a new concept of "ownership" of a copy as a general control of an intangible entity giving rise to a bundle of various entitlements. It was limited to the exclusive right to print a text. In keeping with the usage which developed in the seventeenth century, when the statute alluded to "property" in copies what was meant was merely the exclusive right to print, and nothing more. The outcome was that the new regime appropriated the traditional publisher's right- the right to print exclusively- and vested it in the author. There were no new entitlements, no new model of ownership and no elaborate appearance of the concept of the

[221] See *infra*, sect. I(C)(1)(c)(i).

work. The statute merely used the familiar concepts of the "sole liberty to print" and of "copies."

The statute was not a move to a general concept of authors' ownership of their works also in another respect. It was limited to the rights of authors of printed books and did not cover any other creative works or activities. This was yet another reflection of the fact that the statute's copyright was, in essence, a transplant in a new context of the traditional publisher's right that was conceived and wrought in the peculiar limited context of the book trade. Copyright had still a long way to go before it developed either a general concept of ownership of works or the notion that such concept applied to creative works in general rather than being a part of the specific and peculiar regulation of the book trade.

c. The New Copyright: Law in Action

The Statute of Anne was a very limited revolution. Its main innovations were: eliminating the mediation of the Stationers' Company (with the related effect of strengthening the character of copyright as a general right); relocating the traditional right in a copy in the author rather than the stationer; and limiting the duration of the right. When it came to "law in action"- to the way in which the new formal law functioned in actual social practice- the innovations were even more limited. In this respect eighteenth century copyright was a mirror image of the field of patents for invention during the same period. In the field of patents no formal legal change occurred during the early part of the century and nevertheless changing administrative and economic practices gradually transformed the character and meaning of the concept of a patent, until by the end of the century some of these changes finally diffused into formal legal doctrine. In copyright, the Statute of Anne constituted a major, although not revolutionary, change in the formal legal framework, but persisting economic and social practices preserved much of the traditional framework. This framework was only gradually and slowly transformed throughout the century. Two of the three main innovations of the statute were mitigated and hampered by persisting practices: making the author the focal point of the right and the limited duration of the right.

i. The Status of the Author

While on the formal legal level authors were made the sole original owners of copyright, related economic and social practice was hardly affected by the change. The fact that authors continued to enter transactions with booksellers in order to publish their works and that such deals usually entailed the full transfer of the copyright is hardly surprising or very significant. The fact that the publisher had a role to play or that the usual mechanism of publication involved the assignment of rights does not, in and of itself, show that vesting the original right in the author was devoid of all practical significance. Indeed, it seems that the phrasing of the statute with its frequent allusion to assignees and purchasers of copies assumed such practices. The degree to which existing practices were unaffected by the legal change, however, went well beyond the persistence of assignment. For decades little was changed in the details of such transactions, in the relative bargaining power of authors and booksellers and in the role they played or the power and influence they wielded in the process of publication.

The typical commercial publication transaction prior to the statute involved the sale by the author for a lump sum of the manuscript to a stationer who then obtained through registration the protection of copyright. In some exceptional notable cases, involving prominent authors like Milton, somewhat more sophisticated schemes of remuneration appeared,[222] but the rule was a deal in which an author received a lump sum and the stationer received full copyright protection. One could expect the Statute of Anne's transformation of the legal landscape to entail more complex transactions in which authors would use their new right to obtain better compensation schemes and maybe even retain some control over the publication of their works. In reality however, there was almost no immediate change in the economic patterns of publication after 1710. For the most part commercial publication utilizing the protection of copyright continued to follow the same patterns.

Terry Belanger lists four main routes for publication that were available to a writer at the end of the eighteenth century (a time in which some change and diversification was already taking place): publication in a local newspaper; publication in a London newspaper or a journal; a contract

[222] Milton's 1667 contract for *Paradise Lost* provided that in a case a second addition would appear he would get additional £5, as indeed happened. See Plant, *supra* note 3, at 74.

for printing and self-publication; and a contract with a London publisher.[223] The first two involved exposure to different audiences but usually no economic compensation and no copyright (which required the administrative procedure of registration the effort and expense of which was seldom undertaken in such cases). It was in the last two categories and their interaction that the effect of copyright should be discerned. As far as a publication through a London bookseller is concerned, the post 1710 period saw little change. The typical commercial deal continued to have the same form and effect as before. An author would sell his manuscript for a lump sum or sometimes for a subsidy during the period of writing (which was a sort of a hybrid between the traditional patronage and the newer commercial system).[224] Unlike the pre-statute era it was clear that what the author was selling was his legal right to print the text. Yet the practical effect was identical, since the publisher, as before, would get the complete legal right for himself.

There were, of course, some cases in which more sophisticated schemes of compensation appeared. But these were exceptions that started to appear already in the seventeenth century. Royalties and profit-sharing mechanisms were very rare until the end of the eighteenth century[225] and very few authors retained the copyright in their published works.[226] Booksellers were quite hostile to such attempts of authors to retain the copyright in their works.[227] In part this was simply the inertia of traditional familiar practice. Another factor was the bargaining power that allowed the booksellers to maintain such tough and solid positions. To a large extent the source of this power was in the fact that the trade that was formally de-monopolized remained concentrated in the hands of a few powerful London booksellers who controlled the trade in London and exercised much influence in the

[223] Belanger, *supra* note 195, at 5-6.

[224] In the first part of the eighteenth century payment for wittings was still considered a new and to some extent questionable phenomenon and some of gentlemanly background continued to write and publish for no monetary compensation. Such residues of the older system of patronage and non-professional authorship gradually disappeared throughout the century. See *id.* at 21.

[225] *Id.* at 6; A. S. COLLINS, AUTHORSHIP IN THE DAYS OF JOHNSON 108 (1929).

[226] *Id.*

[227] *Id.* at 42 ("the spirit of the booksellers was…. very illiberal towards an author who wished to use them merely as publishers of his work, while keeping the copyright to himself").

provinces as well.[228] These maintained their concentrated power and the close-knit character of the trade through an elaborate system of cross-ownership of the rights in the most profitable copies and persistent refusal to assign such rights beyond their closed circle.[229]

Only in one respect the practice of publication during the first half of the eighteenth century seems to have differed from that of the seventeenth century. The phenomenon of publication of texts without initial consent or authorization of the author was disappearing. As we saw, consent for first publication became an issue in the seventeenth century and with time there appeared both a social norm and some formal recognition in the Company's framework against unauthorized publication. In spite of such recognition, however, there was never during that period a general formal rule against unauthorized publication. Thus conflicts between authors and stationers who published versions of their texts (and obtained copyright) with no authorization continued to appear. Such disputes were not always resolved in favor of the author.[230] By the middle of the eighteenth century the phenomenon of unauthorized publication and such conflicts seem to have disappeared (with the exception of piracy, of course, which ignored both authors and owners of copyright).

Even in this context, however, the formal change introduced by the statute's vesting of the copyright in the author was not accepted all at once or without conflict. The 1741 case of *Pope v. Curll*[231] marked both the persistence of the phenomenon of unauthorized publication and the decisive

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[228] The provincial book trade remained heavily dependent on the London booksellers throughout the century. London was the unchallenged publishing center and provincial dealers had to establish connection with a London agent- usually one of the prominent booksellers- in order to insure steady supply of books. See Belanger, *supra* note 195, at 11-13.

[229] *Id.* at 10, 13-16; Terry Belanger, *Booksellers' Trade Sales, 1718-1768*, 30 The Library 281 (5th Ser. 1975); Cyprian Blagden, *Trade Sales, 1718-1768*, 5 The Library 243 (5th Ser. 1951);

[230] In fact, unless the author could mobilize the aid of some external powerful authority, he usually stood little chance of canceling or relocating a copyright for an unauthorized copy. Loewenstein, *supra* note 1, at 103-104.

[231] 2 Atk. 342, 26 Eng. Rep. 608 (Ch. 1741). See Mark Rose, *The Author in the Court: Pope v. Curll (1741)*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds. 1994).

legal change on this point. The case involved the unauthorized publication by Edmund Curll of letters written by Pope. The opinion was a resounding decision against unauthorized publication which was explicitly grounded in the Statute of Anne and its vesting of copyright in the author.[232] After *Pope v. Curll* it appears that receiving the author's consent became a standard undisputable part not only of the formal law but also of the practice of the legitimate publication process.

If the channel of publication through a London bookseller underwent little change after 1710, what about the option of self-publication? Formally this was a new option created by the legal change. Previously the only way a text could be published under copyright protection was through a stationer (some local attempts to bypass this through different arrangements notwithstanding). The new system created the possibility for an author to

[232] The reported opinion seems to take for granted the general premise that an unauthorized publication is forbidden. It revolves around the secondary questions of whether a letter is within the scope of the Statute of Anne, and whether a text which was printed in Ireland lost protection in England. Yet it is hard to know whether Curll initially imputed any special importance to the facts that the text was a letter previously printed or simply followed the familiar (though somewhat questionable by that time) pattern of unauthorized publication of any text that found its way to the hands of a bookseller. Similarly, Pope's own arguments and purposes were ambivalent and treaded a thin line between issues of property- assertion of ownership of commercial rights- and those of propriety- assertion of a gentleman's privacy right in his private letters. *Id.* at 212, 217-219. As to the reliance of Lord Chancellor Hardwicke on the Statue of Anne, this involved a certain leap that the opinion does not make clear. The statute itself protected only works that were published and entered in the register, which of course did not apply to Pope's letter. Hence Hardwicke's ruling was not based directly on the statute, but on a judge-made ancillary right that had to be recognized if the statute vesting of the copyright in the author was to be effective and not be evaded by pre-publication snatching by others. Later, the proponents of perpetual common law copyright seized upon this fact and presented *Pope v. Curll* and other pre-publication cases as recognition in common law copyright, the fact that Hardwicke's argument was phrased in statutory terms notwithstanding. See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 Wayne L. Rev. 1119, 1146-1147(1983) (arguing that the pre-publication cases shed little light on the issue of perpetual copyright since the recognition of the former was entailed as a matter of logic if the statute was to be effective).

publish his own books while enjoying copyright protection. In theory this could have served both as an alternative to the standard bookseller publication deal and as a leverage for bargaining for better terms in such deals. Self publication, however, was risky and problematic and did not grow into a vital alternative to the bookseller channel. In 1762 Samuel Johnson warned the political economist Arthur Young who started independent publishing of *The Universal Museum* that "such an effort would never succeed unless the booksellers had the property."[233] As late as the end of the century one observer wrote:

> "In general… where authors keep their own copyright they do not succeed, and many books have been consigned to oblivion… authors should sell their copyright or be previously well acquainted with the characters of their publishers."[234]

To a large extent this was the situation because booksellers actively worked hard to make it so. The booksellers were an indispensable agency for commercially marketing books both in London and the provinces. Yet they consciously refused to deal in and market books in which they did not hold the copyright. In 1728 one translator complained that "the booksellers will not promote anything which is not their own property."[235] Another author wrote in 1742 that "it is incredible what mischief the booksellers are capable of doing to an author by discountenancing the sale of his books."[236] Moreover, complaints of pressures exerted by booksellers on printers who printed "independent" books were common. In 1739 Johnson wrote: "[w]e can produce some who threatened printers with their highest displeasure, for having dared to print books for those who wrote them."[237]

The story of the Society for the Encouragement of Learning attests to the difficulties of publication outside of the bookseller channel. The society was established in 1736 with the purpose of enabling authors to publish their own works while keeping the copyright. After encountering difficulties in finding eminent authors who would risk publishing not through the traditional channel the society had to contract with the booksellers and finally

[233] Collins, *supra* note 225, at 17.

[234] *Id.* at 43.

[235] *Id.* 42-3.

[236] *Id.* at 43.

[237] *Id.* at 16; Plant, *supra* note 3, at 66.

the whole initiative was abandoned in 1748.[238] One commentator observed that "[t]hey also forgot, that the Booksellers were Masters of all Avenues to every Market."[239] Throughout most of the eighteenth century commercial publication meant in most cases resort to a bookseller, which in turn typically entailed the traditional transaction of the transfer of all rights for a lump sum.

Even at the beginning of the century, there were notable exceptions to this description. The most prominent one was Alexander Pope, whose strong role in the emerging assertion of authorial rights was already mentioned. Pope had both a strong motivation and an established status that enabled him to aggressively assert his interests as an author in his dealings with publishers. Such interests included monetary compensation as well as involvement in the publishing process and sometimes even control of the formal legal rights. Some of Pope's publishing contracts are remarkable even by modern standards. In some cases Pope limited the publisher's right to print to one edition only and he often insisted on reserving his own right to print and publish his works.[240] In 1732 he entered a contract in which he licensed an exclusive printing of his poem for one year, while reserving all further rights to himself. [241]

At the first half of the eighteenth century this was an exception that emphasized the rule. As the century progressed, however, some gradual change started to appear in the pattern of publication transactions and the status of authors. Authors of widely popular histories such as Hume, Gibbons and Robertson managed to secure profit sharing mechanisms.[242] Similarly,

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[238] Collins, *supra* note 225, at 20-1; Plant, *supra* note 3, at 223-4. See also: Clayton Atto, *The Society for the Encouragement of Learning*, 19 The Library 263 (4th Ser. 1938-9).

[239] James Ralph, *The Case of Authors by Profession or Trade* 60 (1758), reprinted in FREEDOM OF THE PRESS AND THE LITERARY PROPERTY DEBATE (Stephen Parks ed. 1974).

[240] John Feather, *The Publishers and Pirates: British Copyright Law in Theory and Practice,1710-1775*, 22 Publishing History 5, 14 (1987) ; Rose, *supra* note 231, at 216. On Pope's involvement in his publishing contracts and his assertion of control in such deals see: David Foxon, POPE AND THE EARLY EIGHTEENTH CENTURY BOOK TRADE 237-251 (James McLaverty ed. 1991).

[241] Feather, *supra* note 240, at 14-15; Foxon, *supra* note 240, at 117.

[242] Belanger, *supra* note 195, at 22.

the contract for the publication of the *Wealth of Nations* included profits sharing from the second edition onward.[243] By the end of the century outright sale of the copyright for a lump sum was still the most common form, but there were some signs that after ninety years the formal legal change in the status of the author was starting to acquire some reflection in economic practice.

ii. Persistence of Perpetual Copyright

While formally one of the most significant revolutions of the Statute of Anne was limiting the duration of copyright, it seems that for decades the book trade ignored the change altogether and was hardly affected by it. As in the case of publication transactions booksellers went on conducting their economic affairs as if nothing had changed. The best indication of this is the fact the sales of copyright in the traditionally most profitable works within the trade went on without any change. Prices of such rights remained the same and there was no other sign that these copyrights were about to expire.[244] In fact, such trade continued well after the statutory term had actually expired. Thus for example, in 1767 thirty six years after the statutory term of protection for existing works lapsed, the copyright in several classics including Shakespearean works was sold for a substantial price in one of the trade's auctions.[245] This was the case with the works of the other giants like Milton, Bunyan and others. The copyright in such works were traded in ever-rising prices both before and after their official expiration. [246]

In part the booksellers simply went on with their traditional practices as if nothing had changed in 1710. But they did not do so in open defiance of the statute. The London book trade had a self-serving argument explaining why there existed a perpetual copyright and why it persisted even after the Statute of Anne. This was the argument that perpetual author's copyright was protected as an independent common law right that preceded the statute and

[243] Collins, *supra* note 225, at 42.

[244] Belanger, *supra* note 195, at 16; Feather, *supra* note 240, at 6.

[245] Belanger, *supra* note 195, at 16.

[246] Feather, *supra* note 240, at 6; Terry Belanger, *Tonson, Wellington and the Shakespeare Copyrights*, in STUDIES IN THE BOOK TRADE IN HONOUR OF GRAHAM POLLARD (R.W. Hunt et al eds. 1975).

survived after it. Historically the common law argument was baseless.[247] Until the Statute of Anne copyright was constituted by a complex mixture of censorship regulation, royal commercial privileges and internal guild practices. No common law court had recognized a common law copyright during this period, much less elaborated on the nature and source of such a right.[248] Historical facts, however, never confused the stationers and in their early eighteenth century campaigns to obtain protection their traditional argument that copyright was their "property," (referring to the practices and regulations of the Company) was transformed into the argument that there had always been a common law perpetual copyright.

This probably first happened in a 1710 petition promoting the Statute of Anne - *The Booksellers Humble Address*.[249] The petition claimed, inter alia, that the statute merely confirmed "a Right which has been enjoyed by Common Law above 150 Years."[250] The rhetorical move was a subtle one. Members of the trade traditionally relied on ancient and established usage to justify their privileges. The leap to the argument of a common law right was, at least rhetorically, small. The significance, however, was vast. The almost unnoticed shift created the terms of the debate that would define eighteenth century copyright discourse. It seems that the booksellers immediately saw some of this significance. Their next petition - *More Reasons Humbly*

[247] See Abrams, *supra* note 232.

[248] The closest that a common law court came to deciding a copyright case prior to the Statute of Anne was in the (unreported) case of *Ponder v. Braddill* [C.P. 1679]. The case was argued in a period when the licensing acts of Charles II expired (in 1679) but no other licensing act was yet enacted (that only happened in 1685). A copyright dispute between two stationers was brought to the court of Common Pleas as an action on the case. This could have been a perfect setting for the question of common law copyright to arise, but the case was aborted before the court reached any decision or wrote any opinion. See *id.* at 1142; Bald, *supra* note 83, at 87. See also: Harrison, *Nathaniel Ponder: The Publisher of the Pilgrim Progress*, 15 The Library 257, 268-74 (4th Ser. 1934).

[249] *The Booksellers Humble Address to the Honourable House of Commons, in Behalf of the Bill for Encouraging Learning, etc.* Based on the title and content of the petition Rose dated it to 1710, sometime between the first bill of the Statute of Anne and the debate and amendment process. Rose, *supra* note 139, at 43 note 9.

[250] *Id.*

Offer'd[251] - had common law rights as its main focus. Common law was now directly used to justify a perpetual right: "if we have a Right for Ten Years, we have a Right for Ever. A Man's having possess'd a Property for Ten or Twenty Years, is in no other Instance allow'd, a Reason for another to take it from him, and we hope it will not be in Ours."[252] At this point this was a plea against including a time cap in the statute. Once the statute did just that, the rhetorical transition to the argument that the perpetual right survived, the statute notwithstanding, was smooth.

It is unclear whether the common law copyright argument was used by the booksellers merely as a self-serving fallacy, or if the past became obscure enough for some to actually accept it in good faith.[253] There are some indications that the booksellers had doubts about the existence of a common law right or at least recognized that courts might have such doubts. During the 1730s, immediately following the expiration of the copyright of the most profitable existing works, there were several (unsuccessful) attempts to attain new legislation mandating additional statutory copyright terms for existing works.[254] On the other hand, in the 1730s there were also a few Chancery cases in which *ex parte* injunctions were issued regarding works whose statutory copyright had expired.[255] These cases, however, that later became significant when the legal battle over common law copyright erupted, did not include any opportunity for defendants to argue the case or any discussion of the question by the courts. It is impossible to know whether the Chancery court was putting forth any new theory of copyright or was simply drawn by

[251] *More Reasons Humbly Offer'd to the Honourable House of Commonsfor the Bill for Encouraging Learning and for Securing Property of Copies of Booksto the Rightful Owners thereof* (1710).

[252] *Id.*

[253] Some support for the first option may be found in the fact that the booksellers continued their old practices and ignored new limitations set by the statute even when no obscurity or dispute regarding the new legal situation was involved. The best example is their complete disregard of the statute's deposit requirement which was seriously enforced only in the nineteenth century. See Feather *supra* note 240, at 6.

[254] For a survey of the different bills see *id.* at 7-14.

[255] See in general: Abrams, *supra* note 232, at 1143. The cases were: Eyre v. Walker (1735), cited in Millar v. Taylor, 4 Burr. 2303, 2325, 98 Eng. Rep. 201, 213, 228, 242 (K.B. 1769); Molte v. Falkner (1735), cited in *id.* at 2325, 98 Eng. Rep. 213 ; Walthoe v. Walker (1736); cited in *id.*; Tonson v. Walker (1739), cited in *id.* at 2325, 2353, 98 Eng. Rep. 213, 228.

the inertia of seventeenth century perpetual copyright while ignoring the statute.[256] If anything, these cases contributed to the obscurity around the issue of perpetual copyright. The Chancery, it seems, simply issued injunctions as part of an ongoing practice, much the same as the booksellers kept on selling and buying their old copyrights without much regard to their exact legal status.

One way or another, during most of the eighteenth century the Statute of Anne's time limit was ignored in practice and there was at least some genuine legal and ideological doubt whether such limit existed. Since the late 1740s this question would be brought before the courts in a series of legal struggles, first in Scotland and then in England. The final determination would be made only in 1774 with the decision of the House of Lords in *Donaldson v. Becket*.[257] Until 1774, however, the reality was both considerable obscurity regarding the formal legal question of the duration of copyright, and a rather firm signal from the economic practices of the trade that copyright was treated as perpetual, the Statute of Anne notwithstanding.

To sum up, the Statute of Anne was an important landmark that changed the structure of the stationers' copyright, but its revolution was limited and it incorporated much of the previous framework. When it came to social realities the statute's effect was even more restricted and some of its most significant changes were translated into economic, ideological and social practice only in a long gradual process that stretched until the end of the eighteenth century.

[256] See in general David Saunders, *Purposes or Principle? Early Copyright and the Court of Chancery*, 12 EIPR 452 (1993). Saunders resists the urge to find any principle or general theory behind the rulings of Chancery and describe these rulings as circumstantial, pluralist and pragmatist. He nevertheless thinks that the accumulating cases of Chancery "provided the uniform environment or backdrop for the consideration of cases that went to law." *Id.* at 456. I would argue that, to some extent, the insistence on "uniform environment" still has too strong associations of a cohesive and solid theory of copyright implied in the Chancery cases.

[257] 4 Burr. 408, 98 Eng. Rep. 257; 2 Bro. P.C. 129, 1 Eng. Rep. 837; 17 Parl. Hist. Eng. 953 (1774 H.L).

2. The Literary Property Struggle and Late Eighteenth Century Copyright

One important aspect of the gradual transformation of copyright throughout the eighteenth century was a series of litigations in which important components of the structure and meaning of copyright were further deliberated, rearranged and developed. On one level it was practical economic and social pressures, rather than any preoccupation with abstract theory that triggered to such deliberation. Booksellers were trying to preserve their interests against new sources of competition. A few authors, motivated by newly emerging self-image and status tried to assert in the courts new powers. Many key concepts of the statute that were simply transplanted from the traditional framework of the stationers' copyright- such as "copies" and "the liberty to print"- had to be clarified and endowed with specific meaning in order to accommodate these competing interests. Many of these conflicts, which were previously managed in the regulations and ad-hoc compromises of the Company's governing bodies, now arrived to the courts. As parties devised legal and political arguments to support their position and as courts made decisions in important junctions and wrote opinions to justify them, almost as a side-effect the meaning of copyright was reshaped.

The most significant of this series of litigations was the struggle over common law copyright that started in 1742 with a decision of the Court of Session in Scotland and ended in 1774 with the decision of the House of Lords in *Donaldson v. Becket*.[258] In this struggle the booksellers tried to

[258] The Scottish case that started the struggle was the 1742 *Millar v. Kinkaid* in which the Court of Session rejected the argument of common law copyright. Reports of the case are: HENRY HOME, REMARKABLE DECISIONS OF THE COURT OF SESSION FORM THE YEARS 1730 TO THE YEAR 1752 154 (1766); 2 PATRICK GRANT, DECISIONS OF THE COURT OF SESSION 251 (1813); JAMES FERGUSON, DECISIONS OF THE COURT OF SESSION 96 (1775); also cited in 96 4 Burr. 2319, 98 Eng. Rep. 210. In 1761 the King's Bench in *Tonson v. Collins* was probably inclined to rule in favor of common law copyright but eventually refrained from ruling when a suspicion of collusion designed to obtain a precedent arose. 1 Black W. 301, 96 Eng. Rep. 169 (K.B. 1761); 1 Black W. 321, 96 Eng. Rep. 180 (K.B. 1762). The information regarding the suspicion of collusion is provided by Mansfield in Millar v. Taylor, 4 Burr. 2303, 2400, 98 Eng. Rep. 201, 253 (K.B. 1769). In *Millar* a Majority led by Mansfield upheld perpetual common law copyright. Scottish resistance persisted, however, and in the 1773 *Hinton v. Donaldson* the Court of Session rejected again common law copyright. The case is reported in: James Boswell, *The Decision of the Court of Session upon the Question of Literary Property in the cause of Hinton against Donaldson* (1774), reprinted in THE

LITERARY PROPERTY DEBATE SIX TRACTS 1764-1774 (Stephen Parks ed. 1975). Matters came to a head with the 1774 great case of Donaldson v. Becket. 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774); 2 Bro. P.C. 129, 1 Eng. Rep. 837; 17 Par. Hist. Eng. 953. Other independent reports of the case are: *The Cases of the Appellants and Respondents in the cause of Literary Property, before the House of Lords: wherein The Decree of Lord Chancellor Apsley was reversed* (1774), reprinted in THE LITERARY PROPERTY DEBATE SIX TRACTS 1764-1774 (Stephen Parks ed. 1975); *The pleadings of the Counsel before the House of Lords , in the great Cause concerning Literary Property; together with the Opinions of the Learned Judges, on the Common Law Copy Right of Authors and Booksellers* (1774), reprinted in THE LITERARY PROPERTY DEBATE SIX TRACTS 1764-1774 (Stephen Parks ed. 1975). The final decision of the House of Lords rejected common law copyright and settled the question. There remained, however substantial obscurity regarding the exact grounds for the final decision. The most important doubt and confusion remained regarding the issue of whether the House of Lords decided that common law copyright never existed or that it did exist and was preempted by the Statute of Anne. There were several reasons for such confusion. The judges of the common law courts were presented with five questions on which to vote, but various reports supply somewhat different counts of the votes regarding the various questions, some of which are probably based on an erroneous record of the clerk. See Appendix B in Rose, *supra* note 139, at 154-158. Moreover, as a formal matter the opinions of the judges were not controlling. At the time the House of Lords still decided such cases by a general vote of all the peers including the lay ones, which in this case was simply a voice vote on the general question of whether to reverse the judgment or not. Hence it is impossible to know what were the exact rationales or views of copyright of the House of Lords supporting the decision. Abrams argued that the actual decision of the House of Lords was based on the assumption that common law copyright never existed. He based this conclusion on the fact that the dominant opinions of the Lords who spoke, chief among which was Lord Camden, denied that common law copyright ever existed. Abrams, *supra* note 232, at 1157-1164. As Rose points out, however, formally it is impossible to impute the exact opinions of Camden and other speakers as dominant as they were to the majority of voters. Rose, *supra* note 139, at 103 note 7. Thus the exact ground of the decision is doomed to remain obscure. On the other hand, Abrams is right in arguing that the traditional representation of *Donaldson v. Becket* as based on the assumption that common law copyright existed and was preempted by the statue is misguided. This presentation, which became common in later times both in England and the United-States is based on the

assert, with ultimate failure, the perpetual common law copyright argument they devised at the beginning of the century. Other less dramatic legal conflicts also contributed to the accumulative process of forming and rearranging the concept of copyright. The effect produced by the elaboration of legal details and the deployment of general justifications and conceptualizations of copyright can be divided into four inter-related clusters. The first is the emergence of a general concept of property and the attempt to present copyright as a particular instance of this general model. The second is the development of the concept of the author and his place in copyright. Thirdly, there appeared a concept of the "work" as the intangible object of copyright protection. Fourthly, there was growing articulation and of the relations between patents and copyrights and first signs of the consolidation of a general joint legal category.

a. Property

The stationers had occasionally called their copyright "property" since the early seventeenth century, but this was simply used to refer to the peculiar set of practices and arrangements that constituted copyright. As mentioned before, the 1643 *Remonstrance* made a bolder claim according to which "there is no reason apparent why the production of the Brain" should not be "held as tender in Law, as the right of any Goods or Chattels whatsoever."[259] It seems that this presented the argument that there was some general uniform model of a property right under which copyright could be subsumed. As a matter of fact the common law at the time had neither a general abstract model of "property" nor uniformity in the legal doctrines and entitlements that were referred to as such. The abstract argument, however, had been made and was left hanging in the air for nearly a century.

When in the eighteenth century the booksellers came to rely on their common law copyright argument, and as they were pushed to test it in the

various law reports of the case (as opposed to the independent reports and the one in the Parliamentary History), which covered only the arguments of counsels and the votes of the judges and ignored altogether the speeches of the Lords. One way or another, in 1774 the question was conclusively decided in England against common law copyright.

[259] *The humble Remonstrance of the Company of Stationers to the High Court of Parliament,* I Arber, *supra* note 2, at 587-588. See *supra* text accompanying notes 182-184.

courts and in public debate, the issue of copyright as property resurfaced. This happened because a main axis of the controversy came to be whether copyright could be a property right or have the essential qualities of property.[260] Opponents of common law copyright dismissed the idea as absurd because copyright could never be property, while proponents labored to elaborate general models of property under which copyright would not only fit but would constitute a perfect example. This is a momentous moment in Anglo-American law. The point is not so much the question of copyright as a property right, as the very assumption that there was such a thing as a general abstract model or essential traits of property. It is the moment in which one mode of argumentation and conceptualization of property starts to give way to a new one, and yet both coexist uneasily in the rhetoric and consciousness of jurists.

In the first traditional mode of thinking property was an amalgamation of various particularistic entitlements with no one unifying common essence (this does not mean that property doctrine or that the image of society underlying it was "chaotic" or "irrational"[261]). The way to argue about a particular entitlement under this mode was to try and locate it within one of these particularistic forms with its idiosyncratic specific characteristics. The second mode of thinking conceptualized property as an abstract unifying model to which anything that qualified as property had to conform. Of course, sub-classifications of property existed under this mode too, but all such sub-categories were integrated into one uniform model and shared a unifying essence. Argumentation under this new mode was first and foremost grounded in the abstract model. The way to argue about a specific entitlement was to identify in it the general essential traits of property.

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[260] For a discussion of the theoretical property discourse in the context of the literary property struggle see: BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW, 1760-1911 19-42 (1999).

[261] Unlike the image painted by some later denunciations of the capricious and irrational "feudal" law, such an amalgamation of particularistic entitlements actually combined into a rather coherent picture and was animated by an underlying image of society as an integrated whole made out of different relations or statuses. See C. REINOLD NOYES, THE INSTITUTION OF PROPERTY:A STUDY OF THE DEVELOPMENT OF SUBSTANCE AND ARRANGEMENT OF THE SYSTEM OF PROPERTY IN MODERN ANGLO-AMERICAN LAW 221-284 (1936).

The literary property debate is a dramatic moment in which the move from the former consciousness to the latter begins to take place in the English common law. General models or theories of property were not new in eighteenth century England. Indeed, the arguments in the debate are heavily based on the natural law giants of the seventeenth century: Puffendorf, Grotius and their main English interlocutor- Locke. These were probably familiar to sophisticated seventeenth century English lawyers and it is even possible that property discourse which was based on such theories had penetrated the equity jurisprudence of the time that was influenced by Civil Law.[262] Still the literary property debate is the first time that this mode of argumentation significantly appears in the main stream common law property discourse.

Two points should be highlighted about this process. First, the shift did not involve a complete abandonment of the older mode. Instead the jurists who took part in the debate tended to employ both modes of argumentation and oscillate between them, usually without explicitly realizing the tension involved. Property is analyzed in one moment as an abstract model based on general essential criteria and in the other as an amalgamation of highly particularistic forms. Second, although the rhetoric employed by the actors was usually that of the application of a preexisting model to a new kind of rights, the actual process was more complex. In fact, both parties in the debate shaped the abstract models they borrowed from the seventeenth century giants as they "applied" them to the case of copyright. They reshaped them in view of the new subject matter at hand: property in intangibles or copyright. Thus, to some extent, it is the rising phenomenon of intellectual property (at this point: "literary property") which shaped the general abstract

[262] In this regard one may speculate that the fact that the literary property debate was initiated in the Scottish courts was one of those contingencies of history that contributed to the introduction of the new property discourse to the English courts in this particular time and context. The reasons that the first locus of the legal conflict was Scotland are completely exogenous to the property discourse. Scottish printers and booksellers were the main competition to the concentrated London book trade. They were the first to reprint on a large scale books whose statutory term had lapsed. Accordingly the first cases involving common law copyright arrived to the Scottish courts. Yet, these courts were traditionally much more inclined to infuse civil law concepts in their jurisprudence. This may have made the introduction of the general theories of property discourse easier. When the same cases started arriving to the English courts the legal debate was already phrased in the terms of such abstract general model of property.

model of property, rather than vice-versa. The positions of both sides in the common law copyright struggle had a mystifying quality. The whole debate assumed a preexisting model of property and turned on the issue of whether copyright could fit such a model. In reality, however, the participants were constructing the hypothetical model of property and the very notion of a legal argument based on such a general abstract model, as they were arguing.

In the first shot of the legal struggle over common law copyright- *Millar v. Kinkaid*[263] decided in the Scottish Court of Session- the defendants argued that copyright could not be property. The given reason was a lack of object of property:

> "As property by all lawyers, ancient and modern, is defined to be *jus in re*, there can be no property without a subject. The books that remain upon hand are, no doubt, the property of the author and his assigns: but after the whole edition is disposed of, the author's property is at end: there is no subject nor *corpus* of which he can be said to be the proprietor".[264]

In 1747, William Warburton published, possibly in reaction to the proceedings of *Millar v. Kinkaid*, a pamphlet called *A Letter from an Author to a Member of Parliament Concerning Literary Property.*[265] Warburton set out to prove "that an Author has an undoubtful Right of Property in his Works."[266] His argument was based on constructing a general model of property:

> "Things Susceptible of Property must have these two essential Conditions; that they may be *useful* to Mankind;

[263] Not reported. Cited in 4 Burr. 2319, 98 Eng. Rep. 210 (1750). See also: HENRY HOME, REMARKABLE DECISIONS OF THE COURT OF SESSION FORM THE YEAR 1730 TO THE YEAR 1752 154 (1766).

[264] *Id.* at 107.

[265] William Warburton, *A Letter form an Author to a Member of Parliament Concerning Literary Property* (1747), reprinted in HORACE WALPOLE'S POLITICAL TRACTS 1747-1748 (Stephen Parks ed. 1974).

[266] *Id.* at 6.

> and that they be capable of having their Possession *ascertained*."[267]

He went on to classify property according to three dichotomies: movable/immovable; the latter divide into natural/artificial; the latter divide into products of the hand/products of the mind. Copyright which is product of the mind, Warburton explained, can be property:

> "For that the product of the *Mind* is as well capable of becoming property, as that of the *Hand*, evident from hence that it hath in it all those two essential Conditions which by the allowance of all Writers of Laws, make Things susceptible of Property; namely common *Utility*, and a Capacity of having its Possession *ascertained*."[268]

Warburton, then, identified two essential qualities for anything to qualify as property: common utility (presumably value[269]) and ascertainable possession. Since the object of copyright protection- the product of the mind- had these essential qualities, he concluded, it had to be property.

The arguments in the 1761 *Tonson v. Collins*[270] followed a similar pattern. Thurlow, arguing for the defendant directly mentioned Warburton's pamphlet and dismissed it as "miserable stuff".[271] He argued that "the idea of the composition as it lies in the author's mind…has no one idea of property attached to it,." However, instead of deploying a general model of property he went on to deploy specific objections that showed that copyright did not fit

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[267] *Id.*

[268] *Id.* at 7.

[269] But see Justice Aston's distinction between utility and value in *Millar v. Taylor*. *Infra* text accompanying note 294.

[270] 1 Black W. 301, 96 Eng. Rep. 169, 1 Black W. 322, 98 Eng. Rep. 180 (K.B. 1761). The case was never decided. Mansfield who presided over the case took the unusual measure of transferring it to the decision of all twelve judges of the three common law courts, most probably in an attempt to achieve the broadest legitimation possible to a decision in favor of common law copyright. As Justice Edward Wiles reported years later the judges were probably inclined to support common law copyright but refused to proceed when a suspicion that the action was based on a collusion designed to obtain a precedent had arisen. See 4 Burr. 2327, 98 Eng. Rep. 214.

[271] 1 Black W. 307; 96 Eng. Rep. 172.

any of the existing legal forms of property. In contrast, Blackstone, who argued for plaintiff, did exactly that. He suggested three heads of argument for perpetual copyright as "founded in reason":

> "1st. The natural foundation and commencement of property… 2ndly. The end of establishing and protecting property… 3dly. The one essential requisite of every subject of property."[272]

Blackstone, then, was offering a general philosophical rationale of property, a policy argument for it and a theoretical model to define it. As for the philosophical rationale Blackstone recited Warburton's pamphlet. The foundation of property, he said, is "invention and labour" and "[p]roperty may with equal reason be acquired by mental, as by bodily labour."[273] The policy argument was based on promoting "the common utility of mankind" by creating incentives for productive work and investment. "Agriculture and the arts," Blackstone argued, "are supported by vesting property in whatever a man's industry can produce. Without such a law, no man would build, plough or sow, weave, &c."[274]

As for the general model of property, Blackstone offered one essential criterion: "The one essential requisite of every subject of property is, that it must be a thing of value… Whatever therefore hath a value is the subject of property."[275] This is a dramatic moment in the common law's consciousness of property. Probably for the first time, an abstract model according to which value is the one essential criterion of property is put forth. Of course, legal doctrine at the time did not really recognize "everything of value" as property. Nor did lawyers deploy the argument in other contexts demanding

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[272] *Id.* at 180.

[273] *Id.* Blackstone also referred to Locke's *On Government*. Interestingly, Blackstone subsumed the right in mental works under the category of occupancy- covering the acquisition of property through appropriation of ownerless things. He explained that common law copyright was based on the "same right of occupancy in ideas, as in a field, a tree or a stone." *id.* In the *Commentaries* Blackstone followed the same path and classified copyright under occupancy as one of the ways of acquiring ownership in chattels. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 405-406 (1765-1769).

[274] 96 Eng. Rep. 180

[275] *Id.*

to recognize things of value as property, thereby pushing the model to its potential collapse. This would take another century to happen. The basic mode of argumentation, however, is introduced at this moment. Just as significant is the fact that Blackstone defines value in market terms as: "the capacity for being exchanged for other valuable things… every literary composition hath a value; which is measured by the sale it obtains… and it matters not whether that value be intrinsic, or merely capricious."[276] Blackstone was resisting here the traditional concept of intrinsic value of things that assigned objects in the world objective worth and potentially dismissed literary works as lacking such objective value due to their character as things of pleasure and vanity. Instead Blackstone relied on an emerging idea of subjective exchange value- whatever the "capricious" market was willing to pay. Thus he was not only introducing a new abstract model of property as value. He was also redefining such value as market or exchange value.

Yates, whose argument for the defendant was a compact version of his future opinion in *Millar v. Taylor*, also resorted to a general model of property. As he put it, the basis of his argument was "general principles of property."[277] Yates identified two qualities that disqualified a literary work from being property:

> "1st, it is incapable of separate and exclusive enjoyment…
>
> 2ndly, there are no indicia no marks of appropriation to ascertain occupation."[278]

Yates defined both of these criteria in physicalist terms. Exclusive enjoyment meant (at least potential) "manual possession."[279] Similarly, marks of appropriation were described as "manual occupation… visible possession."[280] Thus, Yates defined a general model of property that was grounded in physicalist notions, which "naturally" led to the conclusion that copyright could not qualify.

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[276] *Id.*

[277] *Id.* at 185.

[278] *Id.*

[279] *Id.*

[280] *Id.*

Tonson v. Collins was in many respects a rehearsal for the 1769 *Millar v. Taylor*. There were four opinions written in *Millar*. Mansfield, Willes and Aston upheld common law copyright and Yates, by this time on the bench, dissented. Mansfield and Willes avoided for the most part the abstract discussion of property, finding that "Metaphysical reasoning is too subtile."[281] Aston, however, built the bulk of his opinion as a mini-treatise on the nature of property. His basic premise was that the case should be decided on the basis of the question of whether copyright could qualify as property.[282] From this followed the structure of the argument: elaborating a general model of property and then demonstrating how copyright fits comfortably within it. As for the general model of property Aston turned to "the great law of our nature" containing "certain great truths and sound propositions."[283] What he derived from it was a version of Lockean[284] labor theory according to which the product of one's labor is his property.[285]

To simply conclude, however, at this point that since the work was produced by the author's labor it was his property was not adequate. Aston was aware of the fact that seventeenth century labor theory as well as its elaboration by contemporary lawyers was heavily fraught with the notion of

[281] 98 Eng Rep. 218. See Mansfield's similar sentiment: *id.* at 253.

[282] "If the above principles and reasoning are just, why should the common law be deemed so narrow and illiberal, as not to recognize and receive under its protection a property so circumstanced as the present?" *Id.* at 220.

[283] *Id.*, at 219.

[284] Aston's direct reference is not to Locke but rather to *The Religion of Nature Delineated*. This was a work published in 1724 by the rationalist moral philosopher William Wollaston. The work which aimed to base a general moral theory on the eternal natural truths was quite popular in the eighteenth century among English (as well as American) intellectuals.

[285] Aston's, rather tedious way of putting it (following Wollaston) was:

"The labour of B. cannot be the labour of C.; because it is the application of the organs and power of B., not of C. to the effecting of something : and therefore the labour is as much B.'s as the limbs and faculties made use of are his. Again the effect and produce of the labour of B. are not the effect of the labour of C.: and therefore this effect or produce is B.'s not C.'s. It is as much B.'s as the labour was his, not C.'s; because, what the labour of B causes or produces B. produces by his labour; or it is the product of his labour. Therefore it is his; not C's or any other's." (quotation marks omitted) 98 Eng. Rep. 220.

ownership of physical tangible things. If the argument of copyright as property was to be persuasive it had to be further elaborated. Aston's strategy was to tell a narrative of progress. Traditional definitions and accounts of property including that of labor theory, Aston explained, were "very inadequate to the object of property at this day."[286] Philosophers were preoccupied with stories about a "primitive (not to say imaginary)"[287] natural state when all things were in common. As a consequence they narrowed their focus to "the necessities of life and the grosser objects of dominion, which the immediate natural occasions of men called for: and for that reason the property so acquired by occupancy was required to be an object useful to men, and capable of being fastened on."[288] In other words, the focus on the hypothesized natural state in which people appropriated their necessities from nature entailed a concept of property which was both physicalist and based on notions of objective utility.[289] This, according to Aston, produced an anti-progress effect: "Thus, great men ruminating back to the origin of things lose sight of the present state of the world; and end their inquires at that point where they should begin our improvements."[290] For a fleeting moment Aston's text conveys here explicit consciousness that what is being done (by each of the participants in the debate) is not simply reciting or "applying" the model of the giants. The concepts of Locke, Puffendorf and Grotius were in fact being reshaped as the natural law concept they elaborate was used to accommodate a new context. A 1771 argument in the Scottish courts by the proponents of common law copyright conveys the same explicit consciousness: "The idea of property and its subjects, adopted by many early writers, even such as *Grotius*, has been too confined and inadequate to the whole subjects of it, at this day."[291]

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[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] According to Aston this physicalist and objective value based concept was also the source of the famous "as much and as good" left for others proviso and the "no spoil and waste" limitation in Locke's theory of property. Presumably if this narrow focus was deserted, as Aston suggested, these limitations on the right of property would also disappear. *Id.*

[290] *Id.* at 221.

[291] *Information for John Mackenzie of Delvine, Writer of the Signet and others, Trustees appointed by Mrs. Anne Smith, widow of Mr. Thomas Ruddiman, Late Keeper of the Advocates Library, Pursuers against John*

Instead of a narrative of static eternal truths, Aston suggested one of universal truths gradually being developed through a process of progress and improvement:

> "… property was gradually introduced, according as either the condition of things, the number and genius of men required, or as it appeared requisite to the common peace. Since those supposed time of universal communion, the objects of property have been much enlarged by discovery invention and art…. The rules attending property must keep pace with its increase and improvement, and must be adapted to every case."[292]

Here, at last, Aston got to the punch line. In the modern society, he argued, the forms of property were no longer limited to those of physicalist character. Nevertheless, these various forms all conformed to one general model or fundamental criteria of property, namely:

> "A distinguishable existence in the thing claimed as property, and actual value in that thing to that true owner; are its essentials."[293]

Thus the two essential characteristics for anything to qualify as property were identified by Aston as: a separate ascertainable existence; and value.

Regarding the second criterion, Aston distinguished between utility and value. The former was the notion of some objective worth or necessity while the latter was subjective or market worth. Troubled by the conception of books as things of mere pleasure, Aston in a move that echoes Blackstone in *Tonson* explained that "things of fancy, pleasure or convenience [his examples: parrots and monkeys] are as much objects of property." He too

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Robertson Printer in Edinburgh, Defender 7 (1771) [Lord Monbodo Reporter], reprinted in THE LITERARY PROPERTY DEBATE: SEVEN TRACTS 1747-1773 (Stephen Parks ed. 1974). The argument goes on to repeat that of Justice Aston in claiming that the narrow understanding of property based on notions of physical possession should give way to a more general concept adapted to the conditions and needs of the modern society.

[292] 98 Eng. Rep. 221.

[293] *Id.*

relied on a market definition of property: "in short anything merchandisable and valuable."[294]

The strategy was brilliant. By converting physical existence into ascertainable existence and intrinsic utility into market value Aston had tailored a sandal to match Cinderella's foot. The surprise is small, then, when indeed it does fit and the essentials of property are found to be "not less evident in the present case than the immediate objects of those definitions."[295] Moreover in this model literary works turned out to be an even purer case of property than the classic physical property obtained by occupancy. Unlike the latter, Aston explained, literary works were never appropriated from the common; rather they belonged to the author right from their inception.[296] Aston's strategy was as follows: erect a general model of property; assume that anything that conforms to that model is a legally recognizable property right;[297] construct the general model so that literary works fit within it; conclude that literary works are the object of a recognizable property right.

The opinion of Justice Yates in *Millar*[298] was a mirror image of Aston's. The heart of the opinion is usually read to be the argument that once

[294] *Id.*

[295] *Id.*

[296] "And there is a material difference in favour of this sort of property, from that gained by occupancy; which before was common and not yours; but was to be rendered so by some act of your own. For this is originally the author's: and therefore unless clearly rendered common by his own act and full consent, is ought to still remain his." *Id.* Aston's argument echoed a 1735 pamphlet- *A Letter from an Author to a Member of Parliament Occasioned by a Late Letter concerning the Bill Now Depending In the House of Commons* (1735). The pamphlet argued that "it cannot be said that an Author's Work was ever common as the Earth originally was to all the World." This argument was one of the most conspicuous reflections of the rising ideology of the original author in legal discourse of the time. See *infra* text accompanying note 367.

[297] "The best rule, both of reason and justice, seems to be, 'to assign to every thing capable of ownership, a legal and determinate owner.'" 98 Eng. Rep. 221.

[298] According to the reporter Yates, who was another veteran of the common law copyright wars, "spoke near three hours in support of his opinion." *Id.* at 229.

the work was published there could be no property in it since like land thrown into the highway it became free for all to take. Mansfield was quick to identify the circularity of this argument: exclusion of others depends on the law, yet the law is made to depend on the ability to exclude others.[299] This form of the argument certainly appears in Yates' opinion, but there is also a very different level of argumentation within which some of his descriptions of the inability to exclude are integrated. Like Aston Yates made the question of common law copyright dependent on the issue of the qualification of a literary work under a general model of property. The notion that an author has the right to the fruits of his labor, he said, "has indeed a captivating sound; it strikes the passion with a winning address," but it is "fallacious" and "begs the very question in dispute."[300]

The real question, he explained, was whether there could be property in literary works:

> "'That every man is intiled to the fruits of his labour,' I readily admit. But he can only be intiled to this, according to the fixed constitution of things; and subject to the general rights of mankind, and the general rules of property"[301]

Yates was not falling here in yet another circularity of simply saying that the law should recognize property in literary works if there was such property. He rather had an Archimedean vantage point on which to rest his argument. This was a postulated preexisting general model of property, a set of essential criteria to which anything must conform in order to qualify as property. Implicitly, Yates was rebuking here Mansfield, who skipped the metaphysical question of property and simply asserted that according to natural justice it is just that the author would enjoy the profit of his work.[302] Natural law which was the "grand foundation"[303] of property law, Yates implied, did not merely

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[299] *Id.* at 253 ("The copy is made common because the law does not protect it: And the law cannot protect it because it is made common"); See also Wedderburn's argument in *Tonson v. Collins*: "Laws are the guard of property in society, not bolts and bars." 96 Eng. Rep. 170.

[300] 98 Eng. Rep. 231.

[301] *Id.*

[302] *Id.* at 252.

[303] *Id.* at 229.

mean asserting that a certain outcome was just as Mansfield had done.[304] Instead it meant relying on a set of universal axioms grounded in the objective nature of the world, the equivalents of the laws of physics.

What was Yates' universal model of property? He started with the plaintiff's argument that "the object of property is value; and literary compositions have their value which is measured by the extent of their sale."[305] Yates did not deny the relevance of value as a necessary condition of property but he did deny that it was a sufficient one. A specter in which an over-abstraction of property based on the criteria of value might cause it to go out of control appears at this point. Although for Yates, unlike jurists in the next century, this was only an ad-absurdum:

> "The air, the light, the sun are of value inestimable: but who can claim a property in them? Mere value does not constitute property. Property must be somewhat exclusive of the claim of another"[306]

Although it is somewhat ambiguous, when Yates introduced here the second criterion of "exclusive of the claim of another" he did not merely mean ability to exclude. Instead, he was striving to maintain pre-political objective borders to property, some naturally existing demarcation that the law could discover or yield to rather than make. As he explained:

> "All property has its proper limit, extent and bounds. Invention or labour (be they ever so great) cannot change the nature of things; or establish a right; where no private right could possibly exist."[307]

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[304] In *Donaldson v. Becket* Chief Justice De Gray made this critique of Mansfield's position explicit: "This idea of moral fitness is indeed an amiable principle" but "[b]eautiful as it may be in theory, to reduce it into the practice and execution of the common law would create intolerable confusion; it would make laws vain and judges arbitrary." 17 Parl. Hist. Eng. 890. Of course, Mansfield's assertions had their own taken for granted model of the world to fall back on: the rising ideology of original authorship that conceptualized the author as a creator ex nihilo.

[305] 98 Eng. Rep. 230.

[306] *Id.*

[307] *Id.*

When it came to the natural and objective "proper limit, extent and bounds" of property Yates' model, as opposed to Aston's, persistently stuck to a physicalist notion of property. In his words:

> "And it is well known and established maxim, (which I apprehend holds true now, as it did 2000 years ago,) that nothing could be object of property, which has not a corporeal substance…. There may be many different rights: but the object of them all, the principal subject to which they relate, or in which they enjoy must be corporeal. And this I apprehend is no arbitrary ill-founded position: but a position which arises from the necessary nature of all property. For property has some certain distinct and separate possession: the object of it therefore must be something visible… which has bounds to define it and some marks to distinguish it… It must be something which is visibly and distinctly enjoyed; that which is capable of all the rights and accidents and qualities incident to property; and this requires a substance to sustain them."[308]

Thus Yates was clinging to a physicalist model exactly because it seemed to supply preexisting and objectively-ascertained borders. It supplied a seemingly natural scheme to which the common law (and the judge) could yield because it was simply "out there."

Yates was not a simpleton who could not grasp the notion of rights in intangibles. He lived in eighteenth century England, a commercially sophisticated society in which such abstract assets and entitlements already played a significant part in economic life. Moreover, as Justice Mansfield, Blackstone in *Tonson*[309] and counsel for the plaintiff in *Millar* reminded him, he also operated within a legal system that recognized various kinds of

[308] *Id.* at 232.

[309] In *Tonson v. Collins* Mansfield constantly presented Yates who was arguing before him with examples of legally recognized intangible rights. When Yates dismissed the argument that good-will is "every day sold for valuable consideration," Mansfield responded that "[t]here are many decrees which make these things assets." 96 Eng. Rep. 185-186. When Yates argued that property "should be something that may be seen, felt, given, delivered, lost or stolen," Mansfield asked "[h]ow would you steal an option, or the next turn of an advowson?" *Id.* at 187.

incorporeal property rights. As Blackstone put it: "He has omitted the distinction between corporeal and incorporeal rights; the latter of which are as much considered by the law as the basis of property as the former. Your Lordship gave an instance in option; the same may be said of advowsons, commons, ways, &c. The right of presenting to a church is not more visible or material, than the right of publishing a book."[310] This argument about business practices and established legal rights seems put the opponents of literary property on the defensive.[311] Yates, fully aware of this, struggled to face both the legal-conceptual and the practical-contextual objections in order to save his physicalist grounding of property.

As to the legal context, he distinguished between rights which might be incorporeal and the final object of the rights which was always tangible. Thus, according to Yates, at the end of every incorporeal property right there was eventually a piece of land or some tangible object that was the real object of the right:

> "Every perspective inheritance every title whatever has respect to the land in which they are exercised. No right can exist without a substance to retain it and to which it is confined."[312]

As for economic and social practices, Yates offered an instructive analysis. He recognized that business practices often treated intangible subject matter as ordinary business assets to be bought and sold. His examples were the 1720 South Sea Company stock[313] and good-will. But

[310] *Id.* at 188.

[311] A 1762 pamphlet criticizing literary property made partial attempts to face the issue of existing intangible rights. See *An Enquiry into the Nature and Origin of Literary Property* 27-8 (1762), reprinted in HORACE WALPOLE'S POLITICAL TRACTS 1747-1748 (Stephen Parks ed. 1974) [(probably) wrongly attributed to William Warburton]. It is possible that the pamphlet was trying to face the troubles into which Yates ran at this point in the argument of the 1760 *Tonson v. Collins*.

[312] 98 Eng. Rep. 233.

[313] It is not entirely clear what Yates meant by describing the South Sea stock as a practical example of an intangible asset. To, the extent he pointed to the mechanism of shares in general his analysis of incorporeal rights as a chain at the end of which there was a corporeal object could apply. Hence, it is possible that he was pointing at the South Sea bubble as an example of

though these were "constantly bargained for and sold is if they were property… none of these cases can establish an absolute, perpetual exclusive property."[314] Business practices were just business practices and though people could create whatever private contractual arrangements they wanted, although they could buy and sell what ever they wanted (even nothing); they could not create new forms of property in the absence of the essential objective physical existence:

> "Whatever ideas individuals may form, or however they may traffic among themselves in imaginary claims, they cannot affect the real right of the public, who are parties to such contracts they can't create law."[315]

No person, Yates explained, can "annex to his estate any novel conditions that are inconsistent with the nature of the estate."[316] In the case of intangible business assets the essential trait of preexisting naturally defined (physical) borders was missing and hence these could never be legally recognized as property. Yates was fighting the chaos that he thought would ensue if under the pressure of business practices the law of property lost its grounding in such an objective basis. "[I]f the ideas and sentiments and apprehensions of individuals," he wrote, "were sufficient ground whereupon to establish a species of property; what a vast extent would that carry it to!"[317] The specter of intellectual property carried with it for Yates the ultimate downfall of the pre-political natural law basis of property which he was determined to preserve.

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raising money and assuming ownership in an especially abstract and elusive object: the entrepreneurial "idea" or "initiative," which indeed evaporated over night.

[314] 98 Eng. Rep. 236-237.

[315] *Id.* at 237.

[316] *Id.*

[317] *Id.* at 236. From Yates' perspective the South Sea bubble was a perfect example. When the bubble exploded in 1725 many who had assumed they had solid "property" found themselves "owning" nothing. While for modern minds that are used to the market value definition of property this may seem perfectly natural, for Yates it was the ultimate example of the instability and the destruction of the natural demarcation of property that would follow if the traditional physicalist basis were deserted. Any "thing" that could go from considerable value to nothing in an instance could not qualify as property.

Yates' tactic was identical to Aston's. He constructed a general abstract model of property and proceeded to review copyright's adequacy under it. Unlike Aston, however, he refused to convert the criterion of physical existence- the basis of physical possession and excludability- into the more abstract "ascertainable existence." From his perspective too much was at stake. Losing physicality meant losing the supposedly objective natural basis of property. Once the general model of property was so constructed, it followed that copyright did not fit and could not qualify as a property right.

Further on in his opinion Yates reverted to more traditional patterns of conceptualizing property. There he returned to treating property as an amalgamation of particularistic idiosyncratic forms rather than a coherent overarching model. What species of property is copyright? He asked. Since it was not a landed estate it had to be chattels. But "all chattel property consists of goods, and debts and contracts"[318] and copyright did not fit any of these forms. Then again, copyright "is a mere right of action" and hence should be classified as a chose in action, but "there is no maxim in our law more clear and plain than this, 'that things in action are not assignable.'"[319] The conclusion was: "since this claim will not fall within any one known kind of property at common law; and can not, therefore, be a common law right."[320]

This was traditional property discourse in its best, strikingly different from the previous analysis. Instead of trying to locate in copyright a set of essential criteria based on a general abstract model of property, it inquired whether it could be classified into one of the specific idiosyncratic forms the amalgamation of which was "property." In Yates' opinion the two modes of arguing about property coexisted uneasily. He moved between them without recognizing the tension. Aston solved this problem by supplying yet another

[318] *Id.* at 245.

[319] *Id.* A century later English jurisprudence was still debating whether copyright could be a chose in action. Assignability was still one of the main axes of the debate. See 7 Holdsworth, *supra* note 180, at 529-530; 11 Spencer Brodhust, *Is Copyright a Chose in Action?*, 11 L.Q.R 64 (1895); Cyprian Williams, *Property Things in Action and Copyright*, 11 L.Q.R. 223 (1895); Charles Sweet, *Choses in Action*, 11 L.Q.R. 238 (1895).

[320] 98 Eng. Rep. 246. In *Tonson v. Collins* Yates deployed the same argument- surveying specific forms of common law property and concluding that "under what denomination of property that can fall, unless the Legislature will give it one, I cannot comprehend." 96 Eng. Rep. 187.

uneasy coexistence formula. "[I]t was not necessary," he said, "that every species of property should be liable to all the same circumstances, incidents or remedies."[321] This fitted into his functionalist-evolutionary narrative: while the general model of property was stable and eternal, new forms with various specific characteristics appeared according to the development of society, provided always that such forms exhibited the essential criteria defined by the general model.

The literary property debate was a crucial moment in the emergence of the concept of intellectual property. Jus as importantly, it was an important moment in the appearance of a mode of legal argumentation that was based on the notion of a uniform abstract model of property. The irony was that while participants in the debate deployed their argument as if they were measuring copyright against some preexisting general model of property, they were, in fact, constructing the model. The specific case that was the focus of the debate- literary property- played an important part in the construction of the general model under which it was examined. This was true both regarding the opponents of common law copyright who clung to a physicalist understanding of property and its proponents that elaborated an abstract model detached from physicalist definitions and limitations. Although, as a matter of formal legal outcome, it was the opponents who won the final battle, in an important sense the debate was the moment in which the dephysicalization of property within Anglo-American legal thought began. The abstract definition of property as anything that has market value was introduced into legal discourse for the first time. The process would reach culmination at the late nineteenth century. At the moment, there was no overall reshaping or re-conceptualization of property law doctrine in a way that could live up to the abstract model or essential traits argument. For the most part, property doctrine remained an amalgamation of idiosyncratic forms. Outside of copyright, there was also no parallel attempt to obtain legal recognition of other new property rights on the basis of their supposed adequacy to the abstract model of property that was put forth. This would happen only a century later, and would entail the very destabilization that Yates was dreading.[322] Yet the roots of the late nineteenth century

[321] 98 Eng. Rep. 224. When Blackstone encountered the need to classify copyright under one of the existing forms he subsumed it under the category of title by occupancy- the equivalent of goods salvaged at sea or taken from an enemy. 2 Blackstone *supra* note 273, at 405-406.

[322] See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 145-151 (1992); Kenneth J. Vandevelde, *The New Property of the*

dephysicalization of property can easily be traced to this crucial moment in the development of eighteen century copyright.[323]

b. The Concept of the Work

During the literary property debate there emerged a concept of copyright as ownership of and intangible entity. Courts and commentators were thus faced with the questions of what exactly this entity was and what its protected borders were. To some extent, the question was not new. Very early in the stationers' practices there were conflicts and about the breadth of copyright protection which were triggered by economic interests. Copyright holding stationers tried to expand the scope of protection as broadly as possible. Competitors (and sometimes authors) tried to shrink it as to insure their ability to publish subsequent modified works such as revised editions or abridgments. The difference was that such early conflicts were grounded in the concept of copyright as an economic guild regulation of a printer's right to print.[324] Notions of the "work" were at most latent in a rudimentary form in such debates. In the eighteenth century when the issue was reframed as the ownership of a "work" the metaphysical question of the character of such a work was directly confronted.

The first significant development was a gradual move from conceptualizing the object of copyright protection as the activity of printing to seeing it as ownership of a "thing." Under the traditional framework, that was incorporated into the Statute of Anne, the sole copyright entitlement was framed in the terms of the printer's economic trade privilege to print a text. The elaboration of copyright under a general model of property, however, shifted the focus to the notion of ownership and possession by authors of

Nineteenth Century: The Development of the Modern Concept of Property, 29 Buffalo L. Rev. 325 (1980).

[323] In this respect the Vandevelde-Horwitz narrative, inasmuch as it portrays a sharp break between the eighteenth century concept of property and its dephysicalization and abstraction in the late nineteenth century, should be modified.

[324] See *supra* text accompanying notes 186-190.

some intangible object in the world.[325] Eminent jurists struggled to define this object.

In *Tonson v. Collins* Wedderburn, arguing for plaintiff conceptualized the object of copyright as the profits from the sale of the book:

> "From the industry of the author, a profit must arise to somebody: I contend it belongs to the author; and when I speak of the right of property, I mean in the profits of his book, not in the sentiments, style &c."[326]

By turning to the more familiar notion of profit as the ultimate object of the right, Wedderburn was apparently trying to escape the metaphysical complexities in elaborating the new concept of the work (i.e. the "sentiment, style &c") and arguing that it could be the object of property. Profits were for him a mediating link between the argument about the moral aptitude and the social utility of recognizing the rights of authors[327] and the problematic abstract concept of the work.

The entanglement of copyright with the rising discourse of original authorship, however, pushed others exactly toward the complex concept of the work that Wedderburn was trying to avoid. The 1741 *Pope v. Curll* is considered a dramatic moment in this respect.[328] Chancellor Hardwick who was responding to the argument that the "property" of a letter is in the receiver rather than the writer, resorted to a distinction between the physical object and something else:

> "… possibly the property of the paper may belong to him, but this does not give a license to any person whatsoever

[325] This tendency was common to both the proponents and opponents of common law copyright. See Rose, *supra* note 139, at 88.

[326] 96 Eng. Rep. 169.

[327] Wedderburn argued that: "The author who is the first mover ought in justice be paid too… This doctrine is also consistent with public utility. Learning would be prejudiced I authors would be stripped of this independent provision for themselves." *Id.* at 170.

[328] See Rose; *supra* note 139, at 64-66; Rose, *supra* note 231, at 223-224.

> to publish them to the world, for the most the receiver has only joint property with the writer."[329]

Hardwicke, was obviously reaching toward a concept of some other entity, separate from the physical manuscript to which property attached. But his description remained obscure. He never elaborated what this something else in which the author had property was. The reference to a license to publish seems to fall back on the traditional notion of the object of copyright protection as the exercise of the action of printing vis-à-vis a particular text. The notion of the "work" remained implicit and unarticulated.

The latent and vague notion in *Curll* of an intangible entity that formed the object of the right was soon elaborated. In 1747 Warburton, while developing the idea of property in the product of the mind, identified the object of such property. In the case of property in the product of the mind, he explained, the property "is not confined to the original MS. but extends to the *Doctrine* contained in it: Which is, indeed, the true and peculiar Property in a Book."[330] Here was the full-fledged concept of an intangible entity as the object of the right. In *Tonson v. Collins* Blackstone followed the same route. Blackstone that identified property with "a thing of value" located the value/property in the "sentiment" of the work:

> "Characters are but the signs of words, and words are the vehicle of sentiments. The sentiment therefore is the thing of value from which the profit must arise."[331]

Counsel for defendant- the future Justice Yates- agreed that the object of the entitlement was the sentiment: "I agree that the author has a property in the sentiments till he publishes them." He argued, however, that with publication the sentiments are "thrown into a state of universal communion."[332] In *Millar v. Taylor* both Yates and Aston repeated and articulated the concept of the work as an intangible entity separate and independent from the physical existence of a book. Aston used it to convey his outrage at the idea that "if a man buys a book it is his own": "What! Is there no difference betwixt selling the property in the work, and only one of the copies?"[333] Yates, now from the

[329] 26 Eng. Rep. 608.

[330] Warburton, *supra* note 265, at 8.

[331] 98 Eng. Rep. 181.

[332] *Id.* at 185.

[333] 98 Eng. Rep. 222.

bench, echoed this same distinction. The right, he said, is in "a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever."[334]

On an abstract theoretical level the object of the right came to be identified with an intangible entity constituting the work- the "sentiment" or the "doctrine." Yet courts struggling with more practical questions found themselves trying to limit the scope of copyright protection. Cases about unauthorized publications of abridgments, extracts and commentaries of copyrighted texts were streaming to the courts which had to decide whether these were copies of the "work" or constituted new independent works. Most of the cases tended to draw relatively narrow borders to the protected work. In 1720 *Burnett v. Chestwood*[335] ruled that a translation "in some respects may be called a different book, and the translator may be said to be the author."[336] In the 1740 *Gyles v. Wilcox*[337] it was decided that an abridgment that was not simply intended to evade the copyright was a new non-infringing work, a rule that was confirmed in *Tonson v. Walker*.[338] The 1770 *Macklin v. Richardson*[339] is especially interesting since it involved a printed version of an unpublished play that was composed out of transcription of the oral version. The plaintiff claimed the defense that the printed version "was not the same as the farce itself throughout but differed from it in some part, was an aggravation of the offence, because it misrepresented the work."[340] The court decided that the central question was: "[w]hat proportion the part

[334] *Id.* at 251.

[335] 2 Mer. 441, 35 Eng. Rep. 1008 (Ch. 1720)

[336] *Id.*, at 1009. Interestingly the case was decided on another ground that harked back to patterns of the seventeenth century thought about the product of the press. An injunction stopping the publication of an English translation of Thomas Burnet's Latin *Archaeoligia Philosophica* was issued on the ground that the book contained strange notions not intended to be read by the vulgar and that the court had a broad jurisdiction to stop the publication of books containing reflections on issues of morality and religion. *Id.* See also: Rose, *supra* note 139, at 49-52.

[337] 2 Atk. 141, 3 Atk. 269, 26 Eng. Rep. 489, 957 (Ch. 1740).

[338] 3 Swans. 671, 678-9, 36 Eng. Rep.1017, 1019-1020 (Ch. 1752).

[339] Amb. 694, 27 Eng. Rep. 451 (Ch. 1770).

[340] *Id.*

published in the Magazine bears to the whole work out of which it was taken?" Finding that "half the work" was reproduced it found that "[t]his is not an abridgment but the work itself." and ruled for the plaintiff.[341] *Macklin* is especially important since the infringing reproduction was not made out of a printed version of the original. Thus the ruling that the reproduction "was the work itself" necessarily relied on a latent concept of the work as an abstract intangible entity broader than the exact language of the "book." In that sense, the opinion, though it remained true to the rule that abridgments and other adaptations were not infringements, showed first signs of abstracting the scope of the work. By and large, however, the scope of the work and of copyright protection remained relatively narrow. In the 1769 *Millar v. Taylor* Justice Willes summarized the relevant law:

> "Certainly bona fide imitations, translations and abridgments are different, and in respect of the property may be considered new works: but colourable and fraudulent variations will not do."[342]

There is a clear discontinuity between the two levels of legal analysis. The theoretical discussions pointed at the work as the object of copyright and identified it with abstract ideas or the "sentiments." When it came to actual practical or doctrinal questions, courts insisted on limiting the scope of protection. Translations, abridgments and other related uses were considered new works rather than copies. What can explain this? To begin with, there is no reason to assume that theory and practice were always temporally synchronized. In fact, in this case there was a clear gap between the two. Theoretical discussions of copyright moved to new concept of the work as an abstract intangible entity. But doctrinal analysis, even when exercised by the same jurists, was still rooted in the traditional concept of copyright as a publisher's right to print a copy. Justice Aston was an ardent supporter of literary property and took an active part in constructing the theoretical notion of the work. Yet when he discussed doctrine in *Millar* he naturally assumed that whoever obtained a book "may improve upon it, imitate it, translate it; oppose its sentiments: but he buys no right to publish the identical work."[343]

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[341] *Id.*

[342] 98 Eng. Rep. 205.

[343] *Id.* at 226; Similarly, Francis Hargrave explained that "nothing more is meant by the term Literary Property, than such an interest in a written composition, as entitles the Author, and those claiming under him, to the sole and exclusive right of multiplying printed copies for sale." Francis Hargrave,

Animating this tendency to exempt almost all forms of derivative uses was the traditional view under which copyright meant the economic right of a publisher to exclusively print a certain book. Having the power to control abridgments, adaptations and other activities did not easily fit into this perspective. It was clearly this older framework that dominated doctrinal thinking.

Second, a similar lack of synchrony existed regarding the figure of the author. Many of the theoretical reflections on copyright brought into the center of the stage the image of the author as an original creator of absolutely new works. Such presentations heralded original creation of this kind and implicitly degraded whatever they identified as its antithesis. At the same time, however, many of the court opinions did not internalize this outlook. Many of them failed or consciously refused to make a sharp qualitative distinction between original works and derivative ones.[344] The latter were exempted as non-infringing not merely because they were deemed "useful" but because as courts would often say they were seen as "new and meritorious work[s],"[345] having the same status as the original ones. In *Burnett* translations were deemed non-infringing because "the translator may be said to be the author in as much some skill of language is requisite thereto, and not barely mechanic art."[346] The formulations of Justices Willes and Aston in *Millar* are most instructive. They both included in the category of works which were considered new ones not only abridgments and translations but also "bona fide imitations."[347] From a modern perspective this is remarkable. The imitation that Willes recognized as a prime example of a new work not qualitatively different from the original is for the modern ideology of original authorship the epitome of an inferior and subordinate class of works. Thus by the late eighteenth century a new ideology of the author as a creator ex nihilo was already articulated in the discourse of copyright. But it was limited to theoretical discussions and had little effect on copyright's doctrinal thinking.

An Argument in Defence of Literary Property (1774), reprinted in Four Tracts on Freedom of the Press, 1790-1821 (Stephen Parks ed. 1974).

[344] In this respect using the term "derivative works" here is not only anachronistic but also inadequate since it entails the connotations of a hierarchical binary opposition of original/derivative.

[345] Newbery's Case, Lofft 775, 98 Eng. Rep. 913 (Ch. 1773).

[346] 35 Eng. Rep. 1009.

[347] 98 Eng. Rep. 205.

Third, persisting concerns about monopolies contributed to narrow interpretations of the scope of copyright protection. Ironically, it was particularly the proponents of perpetual copyright that emphasized the narrow scope of copyright protection. They used this narrow scope in order to answer allegations of monopolies. They were pushed to this position by their rivals who recast the traditional hostility to monopolies into an elaborate critique of the social cost of copyright, grounded in a conception of knowledge as accumulative and inter-dependent.[348] Knowledge and science, Lord Camden said, "are not things to be bound in such cobweb chains."[349] Monopolies in ideas, it was argued would be destructive to learning: to the dissemination of knowledge to the public in general,[350] to subsequent authors who would want to use or develop ideas of others,[351] and (once assigned to a bookseller)

[348] See Bently & Sherman, *supra* note 260, at 28-30.

[349] 17 Parl. Hist. Eng. 1002.

[350] See for example: Donaldson v. Becket, 1 Eng. Rep. 840 ("Public utility requires, that the production of the mind should be diffused as wide as possible, and therefore the common law could not upon any principle consistent with itself, abridge the right of multiplying copies"); *Information for John Robertson Printer in Edinburgh against John Mackenzie of Delvine, Writer of the Signet and others, surviving Trustees appointed by the Widow of Mr. Thomas Ruddiman, Late Keeper of the Advocates Library in Edinburgh, for behoof of the Daughter of the said Mr Ruddiman and her Husband, Pursuers.* 11 (1771) [Lord Monbodo Reporter], reprinted in THE LITERARY PROPERTY DEBATE: SEVEN TRACTS 1747-1773 (Stephen Parks ed. 1974). ("The diffusion of learning is a matter of general concern, and it might be a means of obstructing this, if any person who has bona fide acquired as his own property either a written or printed copy of a book, might not transcribe, print and circulate such book at his pleasure"); Lord's Camden argument in Donaldson v. Becket, 17 Parl. Hist. Eng. 1000 ("If there be anything in the world common to all man kind, science and learning are in their nature *publici juris* and they ought to be as free and general as air and water").

[351] Donaldson v. Becket, 1 Eng. Rep. 845 ("But the consequences of this new doctrine were it established, would be fatal to the interest of letters and the fame of every valuable author… Useful commentaries upon valuable works cannot be made…"); In the Scottish case of *Hinton v. Donaldson* Lord Gardenston made a similar argument. After imagining the absurd law tract about literary property covering, among other things, "property in nonsense," he lists what he considered yet another absurdity: the possibility that the author in the name of his property right would have the power to prevent others from translating or quoting his work. See: James Boswell, *The*

possibly even to authors who would want to modify their own works.[352] One writer explained that the advance of knowledge demanded open access to the ideas of others directly using the metaphor of standing on the shoulders of giants:

> "The Learning of the present Age may be considered as a vast Superstructure to the rearing of which the Geniusses of past Times have contributed their Proportion of Wit and Industry, to what Purpose would they have contributed if each of them could insist that none should build on their Foundations."[353]

Proponent of perpetual copyright resorted to the restricted coverage of copyright protection in order to fence off such attacks. Justice Willes in *Milar* expressed this tendency when he responded to the argument that perpetual copyright runs against the established anti-monopoly principle according to which once an inventor communicated his art to the public (after a limited term of protection) it becomes free for the use of all:

> "… all the knowledge that can be acquired from a contents of a book, is free for every man's use: if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if, reading an epic poem, a man learns to make epic poems of his own; he is at liberty… But printing is a trade or manufacture. The type and press are the mechanical instruments: the literary composition is as the material; which always is property. The book conveys knowledge, instruction, or entertainment: but multiplying copies in print is quite distinct thing from all the book communicates. And there is no incongruity to

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Decision of the Court of Session upon the Question of Literary Property in the cause of Hinton against Donaldson 25-26 (1774), reprinted in THE LITERARY PROPERTY DEBATE SIX TRACTS 1764-1774 (Stephen Parks ed. 1975).

[352] Donaldson v. Becket, 1 Eng. Rep. 845 ("his [the bookseller's] avarice, his timidity his want of sense, may tell even the original author that he shall not reprint his own book with further improvements… the bookseller becomes the author's leave-giver").

[353] An Enquiry into the Nature and Origin of Literary Property, *supra* note 311, at 4-5.

> reserve that right; and yet convey the free use of all the book teaches."[354]

Willes denied that copyright protected the ideas. When he came to explain what it was that copyright did protect, he fell back on traditional notions of a publisher's right. In opposition to the knowledge communicated in the book (that remained free for all) he placed the action of printing- the verbatim reproduction of a "copy."

The problem with the persisting concept of copyright as a publisher's right to print a verbatim copy and especially of the tendency to retreat to such a concept as a defense against the monopoly accusation was twofold. As a practical matter, this supplied a protection which was narrower from what some hoped to achieve.[355] Conceptually, reverting back to the concept of the object of the right as the action of printing stood in tension with the rising property discourse that presented copyright as ownership of an intellectual entity in the world. If it was not the idea that was owned and possessed what could it be? These difficulties pushed some to reformulate their concept of the work in a way that gave rise to first antecedents of the modern idea/expression dichotomy. Blackstone's argument in *Tonson v. Collins*, which began by referring to the object of property as the "sentiment," provided also a narrower description of the work as an intangible object:

> "Style and sentiment are the essentials of a literary composition. These alone constitute its identity. The paper and print are merely accidents, which serve as vehicle to convey that style and sentiment to a distance. Every duplicate therefore of a work, whether ten or ten thousand, if it conveys the same style and sentiment, is the same identical work, which was produced by the author's invention and labour."[356]

The concept of the work in the *Commentaries* is even more consolidated and lucid:

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[354] 98 Eng Rep. 216.

[355] See Bently & Sherman, *supra* note 260, at 32.

[356] 96 Eng. Rep. 189. Similarly at one point in his *Millar* opinion Yates described the work not merely as the ideas but as ideas "communicated in a set of words and sentences." 98 Eng. Rep. 251.

> "Now the identity of literary composition consists intirely in the *sentiment* and *language*; the same conceptions cloathed in the same words, must necessarily be the same composition; and whatever method be taken of conveying that composition to the ear or the eye of another, by recital by writing or by printing in any number of copies or at any period of time, it is always the identical work of the author which is so conveyed;"[357]

A few others followed this trend. They attempted to conceptually narrow down the scope of the protected work into a middle ground between the abstract idea and the exact language. Enfield defined it in 1774 as a "series of thoughts and expressions produced by the continued exertions of the powers of the mind."[358] The new form of "sentiment and language" or "the same conceptions clothed in the same words," which identified the work with a somewhat narrower entity than the pure "ideas" was a rudimentary form of the later idea/expression dichotomy. As if to confirm Yates' fears of the loss of clear objective physical borders, the new formula also started to exhibit the instability so characteristic of that dichotomy under which the protected scope of the work oscillates in the broad terrain between a verbatim copy and pure "ideas."[359] This potential instability is evident in Blackstone's text. Nevertheless, these were just first signs. The tendency to maintain a narrow scope to the protected work in actual legal doctrine persisted even after the introduction of the new theoretical formula well into the nineteenth century.

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[357] 2 Blackstone, *supra* note 273, at 405-406.

[358] William Enfield, *Observations on Literary Property* 10-11 (1774), reprinted in THE LITERARY PROPERTY DEBATE: EIGHT TRACTS, 1774-1775 (Stephen Parks ed. 1974).

[359] In *Donaldson v. Becket* Lord Camden located this instability in the new definition of the protected object and poured his rage over its supposed implications for judicial objectivity:

"Then what part of the work is exempt from this desultory claim: does it lie in the sentiments, the language and style, or the paper?… These questions shew how the argument counteracts itself, how the subject of it shifts, and becomes public in one sense and private in another… And how are the judges, without a rule or guide, to determine them… ? What diversity of judgments! what confusion in opinion must they fall into!... and could they all agree in it, it would not be law at last, but legislation." 17 Parl. Hist. Eng. 998.

c. Authorship

Intertwined with the discourse of property and the grappling with the concept of the work one can discern another rising trope: the figure of the author. Throughout the debates and conflicts of the eighteenth century authorship was rising to a dominant position in the field of copyright. This happened on three distinct levels: the general new understanding of copyright as focused on and built on the principle of protecting authors' rights in their works; the diffusion into legal discourse and construction within it of the figure of the author as an original genius; and the change of actual legal status of authors.

The pre Statute of Anne move to justifications based on the encouragement of learning and the protection of authors and the statute itself were significant. But they still left authors in an ambivalent position within copyright's framework. The interests of authors were still understood as part of a larger system of publication that was dominated by bookseller. As the eighteenth century progressed authors were brought to the rhetorical and conceptual front of copyright, while publishers gradually sank to the background.

The use that booksellers lobbying for new protective legislation during the 1730s made of the figure of the author was still ambivalent, but indicative nonetheless.[360] The arguments of both sides in this episode and the

[360] In a 1735 Pamphlet (*Reasons Humbly Offered to the consideration of the Honourable House of Commons, in Support of a Bill for making more effectual an Act passed in the Eight year of the Reign of her lat Majesty Queen Anne*) the booksellers started their argument with the need of "Encouraging Learned Men to Compose and Write useful books and to secure and protect them in the Enjoyment of the Fruits of their own Labours," and claimed that "Authors should have a more certain and durable Property in their works." But they quickly reverted to the older pattern by focusing on the investments and needs of the book trade and on booksellers "who are not only enabled to maintain themselves and Families, but also great Numbers of Printers, Bookbinders, Women and Children" who "are employed in the several branches of this Trade." Another pamphlet probably published in 1735 (*Some Reasons Humbly Offered to the Parliament of Great Britain For Making more effectual an Act made 8 Ann. Cap 49.*) argued for extending the Statute of Anne protection to Ireland. It is not clear whether the book trade was behind the pamphlet, but one may suspect so since Irish printing was one of the main concerns of the trade at the time. The interesting fact about the pamphlet is that it is phrased as the personal story of an author who wrote a

legal struggles that followed came to be phrased solely in the terms of the interests of authors and the character of authorship. Booksellers now based their arguments almost exclusively on protecting the property rights of authors. Their opponents accused the booksellers of being occupied with their own monopoly rather than with the interest of authors and claimed that the best way to protect authors and avoiding the trade monopoly was through the limited term of the statute. The one thing on which the rhetoric of both sides agreed was that the author was and should be the center of the system.[361]

This does not mean that the protection of authors was always the real goal of those who used their image. Opponents of the booksellers, such as defendant's counsel in *Donaldson v. Becket*, frequently took delight in exposing them as those "who now come with glossing colours, and under a pretence of serving the cause of literature, [but] mean only to get the fruits of genius into their own hands for ever."[362] It also does not follow that the actual interests of authors were always served by arguments deployed on their behalf or by using their image.[363] Finally, as should be clear by now, the

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General Abridgment of Law and Equity- a work whose kind "was recommended by great Persons of the Law upwards of Two Hundred Years past and downward to this very Time, But has been looked upon as a Thing almost or altogether impossible to be finished by One and the same Person," only to reveal that it was freely pirated in Ireland where "Printers.. will do what those in *Great Britain* dare not" resulting in "the Discouragement of Learning, or the Ruin of Authors." For a general survey of the booksellers lobbying during the 1730s and their use of the author see Rose, *supra* note 139, at 52-58; Feather, *supra* note 240, at 7-12.

[361] For this argument and a more detailed analysis of the arguments in the 1730s campaign see Rose, *supra* note 139, at 52-58.

[362] 1 Eng. Rep. 845.

[363] The best example is the perpetual common law copyright struggle. The proponents of the perpetual right based their argument on authorial rights. But given the trade's conditions in the eighteenth century, it was not clear at all that authors, as a class or the majority of them, would have been served by a rule of perpetual copyright. To a large extent the semi-monopolistic power of the London booksellers was based on their rights in the old traditionally profitable works. This power was used to suppress competition and in turn preserve their bargaining power in their dealings with most authors. Furthermore, the focus on the risk-free traditionally profitable works made the booksellers less interested in new works and in rewarding their authors accordingly. Under these circumstances the effect of perpetual copyright on

trope of the author did not always dictate one solution or pointed in one direction. Opposing interests manipulated the concept in various contexts in order to justify different result. The point is that during the century the discourse of copyright gradually came to be focused on the author as the heart of copyright. Authorship became the center of almost any debate about copyright and the main source of rhetorical and conceptual tools for formulating arguments in the field.

At the same time that authorship was moving to the center of copyright a new conception of the author was being formulated outside and inside legal discourse. The image of the author as an intellectual genius who introduces original works created ex-nihilo into the world was taking shape.[364] The most cited example of this new conception in eighteenth century England is Edward Young's *Conjectures*:

> "An original work… may be said to be of a vegetable nature it rises spontaneously from the vital root of genius, it grows it is not made. Imitations are often a sort of manufacture wrought by those mechanics, art and labor, out of preexisting materials not their own."[365]

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authors was at best unclear. For an argument that the final ruling against common law copyright in fact worked for the benefit of contemporary authors see Feather, *supra* note 15, at 6; Feather, *supra* note 240, at 25; Gwyn Walters, *The booksellers in 1759 and 1774: the battle for literary property,* 29 The Library 287 (5th Ser. 1974). As for reactions of authors themselves, Samuel Jonson- maybe the most authorial figure of the time, paid tribute to the argument of authorial rights but supported the outcome of *Donaldson v. Becket* (though he suggested a longer copyright term). See Rose, *supra* note 139, at 108.

[364] On the rise of the ideology of the author see Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 Eighteenth-Century Studies 485 (1984); Rose, *supra* note 139, at 113-129.

[365] EDWARD YOUNG, CONJECTURES ON ORIGINAL COMPOSITION (1759). Rose points out that the commercial context- economic interest and commodification- appears only in the unconscious subtext of Young's preoccupation with the author's relation to his work. See Rose, *supra* note 139, at 118.

The legal debates over copyright started to reflect and to construct, similar notions of the original author. The literary property debate that presented the work as the intellectual creation of the author- the fruit of his mental labor and genius was fraught with the image. It can also be located in attempts made by some to distinguish the author from the inventor who was depicted as a mere "mechanic."[366] But the best example of this emerging conception of authorship is in the recurring argument, made by some, that the literary work was the purest case of property because the author, through his labor, introduced a completely new thing into the world, rather than appropriated or improved something which already existed in the commons.[367]

Nevertheless, as far as actual legal doctrine was concerned, the penetration of the original author ideology remained limited during the eighteenth century. This was most obvious in the persisting narrow interpretation of the scope of copyright protection and the refusal of judges to make a qualitative distinction between "original" and "derivative" works. Various kinds of derivative works, with the "imitation" as the jewel in the crown, were hailed by judges as new authorial works rather than infringements. This demonstrated the limited power of the original author conception within doctrinal thinking. Similarly, many participants in the common law copyright debate developed conscious and elaborate arguments about the inter-dependence of texts and the cumulative nature of authorship.[368] As one of them put it:

> "If this idea of property in compositions of the mind, is it all gone into, it is difficult to see where we are to stop. The author of a song or of a piece of music, the person who makes a speech in public, or who whistles a tune, will have the same property in his composition, and may equally insist in lawsuits against every one who pretends to borrow from, or to repeat after him. The author of this paper may be prosecuted, for having taken many of his

[366] See *infra* text accompanying notes 375-380.

[367] See *supra* note 296 and accompanying text.

[368] See *supra* text accompanying notes 348-353, See also: Bently & Sherman, *supra* note 260, at 37-38.

> arguments from the works of others; yet he could not otherwise have justice to his client."[369]

The image of the romantic original author was not even uniformly accepted in theory. In copyright doctrine it was hardly present.

Finally, there is the question of the actual status of the author and degree of protection offered to his interests within (formal) law. On this point the Statute of Anne and its vesting of the right in the author were important developments. Yet this was the beginning rather than the end of a process of change. After the act the status of the author was still contested even as a matter of formal law. Pope's legal struggles demonstrated that the basic points that the act clarified were still disputed or simply ignored. In *Pope v. Curll* Pope had to defend his rights as an author against an unauthorized publication by a publisher who simply relied on the traditional seventeenth century practice of the bookseller who could publish (and obtained copyright) in any text that found its way into his hands.[370] Earlier in 1743 Pope filed suit against Henry Lintot who published the *Dunciad* after buying the copyright in a chain of transactions. Lintot who went on publishing after the first fourteen years of protection expired flatly denied that after the first term the copyright returned to the author for another fourteen years, in direct contrast to the very clear language of the statute on this point.[371]

These cases and a few others in which authors asserted their rights established these basic entitlements of authors. By the late eighteenth century such basic issues were no longer disputed. This was not a dramatic change in the formal legal status authors, but it was still quite a difference from the situation at the beginning of the century. Thus on all three levels of the concept and status of authorship, important changes have occurred

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[369] Information for John Robertson, *supra* note 350, at 18.

[370] The seventeenth century normative state of affairs regarding this issue was complex. While specific cases indicated an emergence of a social norm against unauthorized publication and some formal recognition of the norm by the Company in particular incidents, there was no general firm rule against it and the practice continued. See *supra* text accompanying notes 145-150.

[371] The case is unreported. See Foxon , *supra* note 240, at 249-250. The case apparently ended in a settlement, possibly one according to which Lintot was allowed to continue selling his edition until fourteen years had elapsed from the date of the assignments of the original copyright. See also: Feather, *supra* note 240, at 15-16.

throughout the eighteenth century, but none of them was total or complete by the end it.

d. Copyright and Patents for Invention

The eighteenth century copyright debates drew much argumentation about the issue of patents for inventions and about the relations between the two fields. At first, as with Addison's 1709 call to equalize the status of the author to that of the "artisan" patents,[372] the common argument was that the cases of literary works and inventions were identical and hence the former should receive the same legal protection as the latter. This was the position of those who were seeking legal protection after the collapse of the seventeenth century framework. Soon, however, the more ambitious claim of perpetual common law copyright was gathering force and the dynamics changed. Now it was the critics of copyright who argued that literary works and inventions were the same. Since no one doubted that patents were limited monopolies and not perpetual property rights, it followed that the same applied to copyright. The argument first appeared during the debates over the booksellers attempt to obtain further statutory protection in the 1735 *Letter from an Author to a Member of Parliament*.[373] In *Tonson v. Collins* it was explicitly argued by defendant's counsel:

> "It will be difficult to confine this merely to books, and not extend it to other inventions… The right of property in books and machines is therefore the same. Both have arisen from [t]he extraordinary Acts of the State."[374]

Proponents of common law copyright did not deny the axiom that patents were state granted limited monopolies and did not argue for perpetual property in inventions. This pushed them to desperate attempts of distinguishing inventions from literary works and copyrights from patents. Warburton in his 1747 *A Letter from an Author* tried to face the problem. Inventions he said were a third category "of a complicated nature." While property in works of the hand extended only to the material object and property in works of the mind covered the ideas produced, inventions ("*mechanic Engines*") constituted a middle ground:

[372] *Supra* text accompanying note 218.

[373] *Supra* note 296.

[374] 96 Eng. Rep. 172.

> "Now these partaking so essentially in the Nature of *manual* Works the Maker hath no *perfect* Right of Property in the *Invention*…. Yet because the Operation of the Mind is so intimately concerned in the Construction of these Works, their Powers being effected and regulated by the right Application of geometric Science, all States have concurred in giving the Inventors of them a License of Monopoly, for a Term of Years, as on a Claim of Right."[375]

Warburton based his distinction on the degree of "purity" attached to the mental character of the object of property and the person creating it. Books were entirely a matter of "labour of the Mind" and hence the property was in the ideal object produced. Inventions, on the other hand, were of a mixed kind. To a large extent they were based on "labor of the Hand," involving mechanical work and arts, and hence the main property was only in the material object produced. Nevertheless, since some mental work was involved, the inventor was entitled to a weak diluted right in the idea in the form of a limited patent. This, as Mark Rose points out appealed to traditional distinctions based on the hierarchy of spirit and matter.[376] But the analysis also drew on new ideas. The author was freed from traditional connotations in which he was an artisan or a craftsman and presented him as purely an intellectual genius.[377] In contrast, those traditional connotations were, obviously, invoked when describing the inventor.

Warburton's distinction was vigorously attacked both in *Tonson v. Collins* and in *Millar v. Taylor*. "[I]n some machines the labour of the head is much greater than that of the hand" said Thrulow in reference to Warburton's "miserable stuff."[378] Yates elaborated on this argument:

> "Yet every reason that can be urged for the invention of an author may be urged with equal strength and force for the inventor of a machine… Mr. Harrison… employed at least as much time and labour, and study upon his time-keeper as Mr. Thomson could do in writing his Seasons:

[375] Warburton, *supra* note 265, at 12.

[376] See Rose, *supra* note 139, at 73.

[377] See Woodmansee, *supra* note 364, at 427.

[378] Hence "Sir Isaac Newton had no greater property in hi Principia than Lord Orrey had in his machine." 96 Eng. Rep. 172.

> for in planning that machine, all the faculties of the mind must be fully exerted. And as far as value is the mark of property, Mr. Harisson's time piece is, surely, as valuable in itself, as Mr. Thomson's Seasons."[379]

He dismissed hierarchical distinctions between literature and commerce or technology, and between authors and inventors, as anachronistic:

> "How comes his right to be superior to that of the ingenious inventor of a new and useful mechanical instrument? Especially, when we consider this island as the seat of commerce, and not much addicted to literature [as] in ancient days, and therefore can hardly suppose that our laws give a higher right or more permanent property to the author of a book, than to the inventor of a new and useful machine."[380]

Yates was writing in order to limit copyright to the supposedly settled character of patents. Ironically, decades later the same claims would be used as arguments for expanding patent protection.

Proponents of perpetual copyright deployed a second line of defense, this time trying to distinguish the literary work from the invention on the basis of the process of dissemination and reproduction. Wedderburn presented the argument in *Tonson v. Collins*:

> "Books cannot be compared to mechanical inventions, with any propriety: for those are capable of improvement at every copy made. Books are usually reprinted verbatim."[381]

Wedderburn's argument relied on the traditional concept of the book or the copy and of copyright as merely the right of a publisher to make verbatim reproduction of such a copy. But why, one may wonder, should inventions be fundamentally different in this respect? Justice Aston dealt with this issue in his more elaborate version of the argument in *Millar*:

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[379] 98 Eng. Rep. 246

[380] *Id.*

[381] 96 Eng. Rep. 173.

> "They appear to me very different in their nature. And the difference consists in this, that the property of the maker of a mechanical engine is confined to that individual thing which he has made; that the machine made in imitation or resemblance of it, is a different work in substance, materials labour and expense, in which the maker of the original machine can not claim property; for it is not his, but only a resemblance of his: whereas the reprinted book is the very same substance; because its doctrine and sentiments are its essential and substantial part; and the printing of it is a mere mechanical act, and the method only of publishing and promulging the contents of the book… The imitated machine, therefore, is a new and different work: the literary composition, printed on another man's paper, is still the same"[382]

The basic structure of this argument was based on a clever manipulation. When describing copyright, Aston introduced the abstraction of the "work"- an intangible entity independent from the physical object. Yet he abstained from introducing a similar abstraction in the case of the invention. Thus, in his hypothetical, when a book was reproduced the new physical materials used were merely incidental. The crucial fact was the persistence of a postulated intangible entity (the "doctrine and sentiment") which ontologically was the very same one created by the author. By contrast when an invention was reproduced the new machine simply bore resemblance to the original one, the substances (and the work exerted on them) were new and not those of the inventor. Since in the case of inventions Aston did not introduce a postulated intangible entity, the outcome was that there was nothing in the subsequent machine which was the very same thing created by the inventor. Thus distinguishing the invention from the work was achieved by a latent double standard.

Justice Yates' critique was again sharp. The inventor, he explained might "insist upon the same arguments, the same chain of reasoning, the same foundation of moral right, for property in his invention"[383] Yates filled in the piece that Aston left out. By introducing the postulated intangible entity in the case of inventions he showed the parallel to copyright. Did the inventor, he asked, "gain the sole property in the abstract principles upon

[382] 98 Eng. Rep. 226.

[383] *Id.* at 232.

which he constructed his machine? And yet these may be called the inventor's ideas, and as much his sole property as the ideas of an author."[384]

Mark Rose suggested that when Blackstone changed his definition of the "work" from the idea (or rather the "sentiment") to the combination of style and sentiment he did it under the pressure to distinguish the work from the invention.[385] This indeed might have been the case since Blackstone first performed this move in *Tonson v. Collins* exactly in the context of trying to establish such a distinction. To the extent, however, that Blackstone was attempting to distinguish copyright from patents by presenting the intangible object of copyright protection as more concrete- as the mental equivalent of the exact words used- his tactic was problematic. The first problem was that at the very same time English jurists were engaged in an identical struggle to define the intangible object of patents in narrower terms than the idea or the general principles.[386] The second problem was that almost as soon as it was introduced practical and theoretical pressures caused the concept of the work to start expanding beyond the exact phrasing of a particular text.[387]

The proponents of perpetual copyright could not easily shake away the patent parallelism. It came back to haunt them in the argument of *Donaldson v. Becket*.[388] There were two significant aspects to the debate over the comparison of inventions and literary works. First, the debate demonstrated that despite the changes of patent law this field was still very strongly grounded in traditional concepts. The two sides fought over the patent-copyright parallelism, but the one thing that no one denied was that a patent was a limited state conferred monopoly. Despite the changing practices, the occasional references to patents as "property" and some judicial utterances that questioned the traditional understanding of patents,[389] at the end of the eighteenth century it was still impossible to think of a patent as a standard property right. Second, the constant comparison and joint analysis of

[384] *Id.* at 230. Again the reader should keep in mind that establishing the identity between a literary work and an invention meant for Yates that perpetual property could be recognized in neither and that the former should be treated under the settled case of a patent.

[385] Rose, *supra* note 139, at 89.

[386] See *supra* Chapter 1, sec. I(C)(4)(a).

[387] See *supra* text accompanying notes 353-357.

[388] 1 Eng. Rep. 837, 842.

[389] See *supra* Chapter 1, sec. I(C)(4)(b).

patents and copyrights was the first steps toward a conceptualization of an overarching legal category. It was not explicitly put in these terms, but it was clear that after two hundred years of divergence the paths of the two fields were intersecting again (even if they were not completely converging). There appeared a strong sense that the two belonged to the same family, that in an important way they were "the same," and that they should be treated and analyzed under common principles. At the very least, if one wanted to rebut this presumption of common principles in a specific context, he had to work hard to establish a distinction. These were very embryonic beginnings, of course, but, nevertheless, these were the first signs of intellectual property as an overarching legal category. It would be only in 1823 that Richard Godson would give formal recognition to a loose overarching category by publishing a joint treatise on patents and copyright, explaining that though they "differ in their *Origin*.. they are similar in their *Nature*."[390]

e. Copyright at the End of the Eighteenth Century

At the end of the eighteenth century copyright had traveled quite a distance from its 1710 state. New concepts had appeared and other which were only equivocally implied in the Statute of Anne were developed and articulated. Copyright had become the general right of individual authors in their works. The author had moved to the front of copyright rhetoric and to a smaller extent it appeared in copyright doctrine. Copyright was no longer thought of as a right of publishers that created a background author's entitlement. A new concept of the object of copyright- the "work"- was put forth. Copyright was thus explicitly recognized as a right in an intangible intellectual object. Copyright was also placed and debated within a general abstract model of property. The final outcome of the literary property litigation denied perpetual common law copyright, but the conceptual framework of constructing a general model of property and analyzing copyright under it was introduced. Finally, within the debate about the relationship between copyright and patents, there appeared first signs of an overarching legal category of intellectual property. All of these developments were accompanied by indications that, to some extent, the actual practices of the book trade were gradually changing to reflect such new ideas.

[390] RICHARD GODSON, A PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND COPYRIGHT v (1823).

It is just as important to remember that the conceptual and doctrinal structure of copyright was still very different from that of the late nineteenth century and that the theoretical and doctrinal implications of newly introduced concepts were only beginning to develop. First and foremost, in spite of the rise of the ideology of original authorship and of theoretical speculations about ownership of one's creation, copyright remained for most of the century limited to the product of the press. At the end of the century there were signs that protection of original authorship began to spread to other subject matter. But these were sporadic statutory arrangements that were still far from constituting copyright as a universal framework for protection of creative works, based on the unifying principle of original authorship.

The main companion of copyright in literary works during most of the century was The Engraving Copyright Act of 1735[391] (known also as the Hogarth Act). The act was passed after active lobbying by engravers who complained about the copying of their works by print-sellers. The lobbying was based on the, by now, familiar arguments of just reward for the artist's labor and encouragement for the production of quality creative works.[392] The act introduced a fourteen years exclusive right of printing and reproducing engravings and etchings to "every person who shall invent and design" such a work. Despite several variations of details it is clear that the act was closely modeled after the Statute of Anne. It was replaced in 1767 by a new one[393] which extended the protection to any engraver and etcher, omitting the former limitation of "invention and design" that left the bulk of the prints of the period- being mostly reproductions of other media- unprotected.[394] Similarly, it also expanded the subject matter covered by explicitly including

[391] 8 Geo. II c. 13. For a general survey of the scope of copyright protection during the eighteenth and early nineteenth centuries see 15 Holdsworth, *supra* note 180, at 37-41.

[392] On the sources, content and implications of the act see David Hunter, *Copyright Protection in Engravings and Maps in Eighteenth-Century Britain*, 9 The Library (6th Ser. 1987). As part of the campaign for the act a pamphlet entitled *The Case of Designers, Engravers, Etchers &c. Stated in a Letter to a Member of Parliament* complained that engravers do not enjoy the "Profit of their Labor" (which is snatched by the Shopkeeper) and that "the standard of art falls and nothing new is attempted." Cited in *id.* at 134.

[393] 7 Geo. III c. 38. This act was further amended in 1777. 17 Geo. 3 c. 57.

[394] Hunter, *supra* note 392, at 143.

prints of "any portrait, conversation, landscape, or architecture, map, chart or plan or any other print or prints whatsoever."

The Engraving Act Was deeply rooted in the traditional pattern of protecting the product of the press. Engravers and print-sellers were considered a specialist subsection of the trade, but still they were part of the book trade broadly defined.[395] The protection of these works was a natural, though not an inevitable, concomitant to that of books and followed very similar patterns.

Somewhat more innovative and indicative were two later pieces of legislation. A 1787 act gave "Designers, Printers and Proprietors" of new and original patterns printed on various fabrics an exclusive right to print such patterns for two months.[396] This was the ancestor of the modern industrial designs protection. At the time, however, it simply followed the familiar pattern of a limited term exclusive right to print, albeit a much shorter one. In 1798 the Models and Casts Act provided that any person who shall make any new model, cast, bust and statues of certain kinds "shall have the sole Right of Property" in them for fourteen years.[397] These were important developments. They exemplify that the new justificatory principle of copyright was beginning to expand toward covering various subject matter under the unifying principle of creative authorship. Still, at the end of the century the subject matter covered was limited. Other forms of existing creative works were not protected and no noticeable argument that they should be protected appeared.[398] Moreover, the treatment of fields that were

[395] See Belanger, *supra* note 195, at 9.

[396] 27 Geo. 3 c. 38. The act which was temporary was made permanent in 1794. See 34 Geo. 3 c. 23.

[397] 38 Geo. 3 c. 7. The statute exhibited some signs of the beginning of the expansion process of the "work," at least in practical terms. It forbade not only exact reproduction but also the making of a copy "either by adding or diminishing" to any protected model. The statute also forbade importation, procurement and sale of infringing copies.

[398] Although the importance of the technological factor cannot be ignored here, it is impossible to completely reduce the issue only to technological factors, namely the fact that at the time the printing press was the only media involving mass production and dissemination. From the perspective of the ideology of authorship and the concept of copyright as protection of the original creator mass production may be an exacerbating factor, but not the ultimate base of protection. This is demonstrated by the protection awarded

covered remained quite fragmented conceptually and practically. The different relevant laws were, for the most part, trade-specific legislation designed to regulate the affairs of a particular branch of industry as a response to a specific grievance. Although, lobbying for such laws often resorted to analogizing the case at hand to previous specific legislation, no general framework or common broad principles had emerged.[399] Rather than "intellectual property" or even general copyright law, at the end of the century there were a few trade-specific statutes with loose conceptual ties connecting them. From this amalgamation of fragments the concept of copyright as an overarching category for protecting creative authorship based on general inclusive principles was beginning to emerge. But at this point it was only in an implied an incomplete fashion. The possible implications and full scope of the new underlying ground of copyright as protection of the creator of creative works remained to be further elaborated in the next century.

Similarly, although the legal concept of copyright was shifting from a trade privilege to exercise a certain activity to ownership of an intangible entity, the entitlements created by such ownership remained limited to the exclusive right to print. Rhetorically the right of property was often described as absolute control of all aspects of the object owned. In Blackstone's words it was "the sole and despotic dominion"[400] of something. As far as copyright was concerned, however, no concept of absolute control or even of a bundle of entitlements had developed. Copyright protection remained "the sole liberty to print" a copy of the work. All other aspects and possibilities of using copyrighted works remained unregulated. No serious argument in favor of other entitlements even appeared.[401]

Yates identified the logic of general control and expanding entitlements that was latent in the property concept:

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in later times to creative works that were not the subject of mass production and reproduction (such as paintings and pre-recording era musical works).

[399] See Sherman & Bently, *supra* note 260, at 17-18.

[400] 2 Blackstone, *supra* note 273, at 2.

[401] Again it is impossible to reduce the causal explanation of this situation to the technological factor. While some uses regulated by copyright were not yet technologically-feasible or conceivable others were not only possible but commonly practiced (e.g. public performance, certain derivative works etc.)

> "If the buyer of a book may not make whatever use of it he pleases, that will not tend to suppress all of his dominion over it? He may not lend it, if he is not to print it, because it will intrench upon the author's profit… I don't see that he would have a right to [manually] copy the book that he has purchased... for printing is only a method of transcribing."[402]

For Yates, however, that was yet another ad-absurdum- a proof that the idea of ownership of literary works was silly. Blackstone came the closest to expanding the scope of copyright when in describing the concept of the work in the *Commentaries* he wrote:

> "whatever method be taken of conveying that composition to the ear or the eye of another, by recital by writing or by printing in any number of copies or at any period of time, it is always the identical work."

The implication was that if these various activities, or as we might say today various media, conveyed the same work they were restricted by copyright. But Blackstone did not explicate this implied conclusion. As far as doctrine was concerned no hint of a bundle of entitlements appeared. All that was protected was the traditional publisher's right to print. This was not even what we call today the right of reproduction, since as Yates' argument implied it did not necessarily include manual reproduction.

Related to the narrow coverage of entitlements was the persisting narrow interpretation of the scope of the work. Although the borders of the work were constantly tested by litigations that continued into the nineteenth century, [403] by and large the attitude of the courts described above [404] remained firm. The scope of the "work" was not yet expanded to cover many derivative uses. Abridgments, translations, and the instructive category of "good faith imitation" all were considered new independent works.

All of these- the limited subject matter of copyright, the narrow single entitlement and the limited scope of the work- were symptoms of the fact that many of the new conceptual ingredients of copyright were not yet fully elaborated. Their possible implications were not yet put into use and worked

[402] 98 Eng. Rep. 234.

[403] For a general survey see: Kaplan, *supra* note 197, at 9-25.

[404] See *supra* text accompanying notes 335-342.

out. To a large extent, the doctrines and concepts of copyright law were still grounded in the framework of a publisher's trade privilege to exclusively print copies. The ideology of original authorship, the notion of the work and the concepts of property and ownership all appeared. They effected some limited doctrinal change and laid the infrastructure for changes to come. Yet it was only in the nineteenth century that such conceptual ingredients would be further developed and together with other economic, political and technological factors bring about a more complete and fundamental change in the framework of copyright.

II. Early American Copyright

A. Colonial Regulation of the Printing Press

The American colonies did not develop an equivalent of the stationers' copyright. Nor was there in the eighteenth century any counterpart to the protection of the Statute of Anne. The closest that one can find during this entire era to anything resembling the English practices, is a rudimentary local and very sporadic version of the printing patent. This absence can be understood only in the context of the local political concept and treatment of the printing press as well as the commercial realities of printing and publishing, much the same as the English developments were an inseparable part of such context in England.

The printing press first arrived to the British American colonies in 1639 when the first press was brought to Cambridge Massachusetts by Jose Glover.[405] The appearance of presses in other colonies was gradual and slow. In a handful of colonies presses were introduced in the last two decades of

[405] Glover himself died en route to America. Although it is unclear whether Glover initially hired a professional printer, the man who actually became the first printer was Stephen Day- a locksmith by profession. See 1 JOHN TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 6-12 (1972); HELMUT LEHMANN-HAUPT, THE BOOK IN AMERICA: A HISTORY OF THE MAKING, THE SELLING, AND THE COLLECTING OF BOOKS IN THE UNITED STATES 7-8 (1939); LAWRENCE C. WROTH, THE COLONIAL PRINTER 16-18 (1938); 1 ISAIAH THOMAS, THE HISTORY OF PRINTING IN AMERICA WITH A BIOGRAPHY OF PRINTERS AND ACCOUNT OF NEWSPAPERS 38-42 (1874).

the seventeenth century,[406] but in many others- not necessarily the younger ones- it was only in the eighteenth century, sometimes even the second half of the century, that this happened.[407] For most of the colonial period there were no more than one or two presses in each colony, even in areas such as Boston where the book trade had developed and included relatively large numbers of booksellers and bookshops.

Colonial governmental treatment of the press varied. It oscillated between viewing the press as a dangerous instrument of religious heresy and political unrest, sometimes resulting in a complete ban; and acknowledgment of such dangers accompanied by appreciation of the worth of the press in promoting governmental purposes or the "public good." The latter approach usually produced a mixture of governmental sponsorship, involvement or aid and different levels of control and suppression. Although in some cases the English central authorities were involved in matters relating to the regulation of the press, by and large, the initiative, power to shape exact policies and actual control remained in the hands of local colonial centers of power: both the royal governors and the assemblies.[408]

Virginia was a glaring example of the stricter approach toward the printing press. When in 1683 William Nuthead set up a press in Jamestown and printed various laws passed by the assembly, he was brought before the governor and the council that ordered him and his patron John Buckner to post bond and refrain from any other printing until instruction from England

[406] The first press in Maryland was set by William Nuthead in 1685. William Bradford established a press in Philadelphia in the same year. The same Bradford, after a clash with the authorities in Pennsylvania moved to New York in 1693 and introduced its first printing press. See Lehmann-Haupt, *supra* note 405, at 11-13; 1 Tebbel, *supra* note 405, at 38-43.

[407] The press was brought to Connecticut in 1709 and to Rhode Island in 1727. Virginia had a short episode with the press in 1685 which ended with a complete ban and the forced departure of William Nuthead. It was reintroduced to Virginia only in 1730. The first press was set up in South Carolina in 1731 and in North Carolina in 1749. James Parker brought the press to New Jersey in 1754. After being persecuted in Boston Daniel Fowle moved to New Hampshire and established its first press in 1756. In Delaware it was introduced in 1761. Finally, Georgia got its first press in 1763. 1 Tebbel, *supra* note 405, at at 11-16.

[408] See Wroth, *supra* note 405, at 173.

would arrive.[409] Several months later such instruction arrived along with a new Governor. It instructed the Governor "[t]o forbid the use of any printing press upon any occasion whatever."[410] Although the order was modified in 1690 to allow printing under special permission from the Governor, the ban meant the end of printing in Virginia until 1730 when William Parks set up another press in Williamsburg.

Massachusetts was the chief example of a more accommodating approach toward the press. Although, formally the first printing press was privately owned it was in effect treated as a community resource. Harvard College was involved in its management.[411] The Massachusetts General Court often made orders regarding the operation of the press. When equipment for keeping the press working or another professional printer were needed the Court was petitioned and eventually it took the required measures in order to provide both.[412] The other aspect of treating the press as an important public resource that had to be used for the purposes of the commonwealth was a tight regulation of its operation and product. The Massachusetts licensing legislation was the most comprehensive in the colonies and it came the closest to constitute an actual licensing "system." In 1662 the General Court in reaction to "irregularitjes & abuse to the authority of this country by the printing presse" ordered that no copy shall be printed unless licensed by two appointed licensers.[413] The order was repealed in 1663 when it was declared that the "presse be at liberty."[414] In 1664, however a comprehensive permanent licensing system was established. The new law forbade the setting up of any press except the one in Cambridge and subjected all publications to licensing by a special board appointed by the

[409] LAWRENCE C. WROTH, A HISTORY OF PRINTING IN COLONIAL MARYLAND, 1686-1776 1-2 (1922); Lehmann-Haupt, *supra* note 405, at 13; 1 Tebbel, *supra* note 405, at 42; Thomas, *supra* note 405, at 551.

[410] 11 STATE PAPERS, COLONIAL SERIES, AMERICAN AND WEST INDIES 1681-1685 558 (J.W. Fortescue ed. 1964), instruction num. 1428 of December 3 1683.

[411] See 1 Tebbel, *supra* note 405, at 11.

[412] *Id.* at 17.

[413] 4 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND (PT. 2) 1661-1674 62 (Nathaniel B. Shurtleff ed. 1853-1854), (Hereinafter: MASSACHUSETTS RECORDS). The two licensers were Captain Daniel Gookin and Mr. Jonathan Mitchel.

[414] *Id.* at 73.

Court, all under threat of forfeiture of equipment and of the liberty to exercise the trade of printing.[415]

In the other colonies where the press arrived and was allowed the general attitude showed various degrees of support and suppression, but the overall pattern resembled that of Massachusetts. The press was, for the most part, treated as an important public resource to be encouraged and employed in the service of government but also to be regulated and kept within proper bounds as to avoid its serious dangers. These were flipsides of the same coin. Both aspects were exercised under a concept of governmental right and duty to actively act in order to promote the public good. Printing was just another activity incorporated into this framework. Thus, there were often titles and offices of "public printer to the colony" which carried with them government patronage in the form of some compensation or at least the exclusive right to print some governmental documents (most commonly: the laws of the colony). In general government-related publications supplied the bulk of the work of many of the printers. Hence the very securing of such print jobs was a form of patronage. Although in some places the private market gradually increased and the balance shifted, in many others printers remained dependent on governmental works up until the end of the colonial period.

At the same time the trade of printing was heavily regulated. The setting up and the operation of a press required governmental permission, which was not easily given. There was also prior licensing of the content of publication. In 1685 Thomas Dongan the Governor of New York was instructed in terms that were repeated in instructions to other colonies:

> "And for as much a great inconvenience may arise by the liberty of printing within our province of New York, you are to provide by all necessary orders that noe person keep any press for printing, nor that any book, pamphlet or other matters whatsoever bee printed without your special leave & license first obtained."[416]

[415] *Id.* at 141.

[416] This was probably a standard phrasing of the orders which were sent to many colonies regarding printing. In 1691 and 1694 the governors of Maryland received royal orders almost identical in phrasing (the 1694 instructions to Francis Nicholson read: "And forasmuch as great inconveniences may arise by the Liberty of Printing within our Province of Maryland, you are to provide by all necessary Orders that no person use any

Despite this example, what had most influence in the colonies was neither direct royal intervention that was rare, nor English legislation which did not directly apply.[417] Instead, it was the general ethos of licensing and prior restraint that dominated seventeenth century English political culture. In most colonies licensing tended to be exercised on an ad-hoc basis with occasional intervention of governor, council or assembly. Massachusetts' was the most comprehensive and organized licensing procedure and legislation. It was a miniature version of the English licensing acts. When the authorities decided to act their actions could be quite harsh. Persons who published unlicensed materials could find themselves fined, jailed or even deprived of their equipment.[418] On the whole, however, the absoluteness of the licensing regime was more a matter of theory than of practice. Intervention tended to be sporadic and inconsistent.[419]

The prior licensing limitations survived longer than in England. While the final English licensing act lapsed in 1695 there are clear indications that licensing existed in the colonies well into the eighteenth century. Some early eighteenth century books published in Massachusetts display an official

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Press for printing upon any occasion whatsoever without your special License first obtained."). Cited in Wroth, *supra* note 409, at 18. Very similar terms were used in the 1690 instructions to Lord Francis Howard of Effingham Governor of Virginia. *Id.* at 2.

[417] Only in one isolated incident there was a reference to English legislation. When in 1693 William Bradford was tried in The Pennsylvania for publishing without license the English 1642 parliamentary decree, ordering that every printed publication would display the name of the publisher and the place of publishing, was cited. See Worth, *supra* note 405, at 174; Lehmann-Haupt, *supra* note 405, at 39.

[418] When in 1692 William Bradford ran into troubles with the Pennsylvania assembly for publishing an unlicensed pamphlet by one of the parties in the political skirmishes in the colony, he was arrested and his equipment was seized. It was restored to him only when the new appointed Governor of New York and Pennsylvania Benjamin Fletcher had intervened on his behalf. See 1 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 366-367 (1838), (Hereinafter: PENNSYLVANIA MINUTES). See also 1 Tebbel, *supra* note 405, at 39-40.

[419] See Lehmann-Haupt, *supra* note 405, at 42.

"leave to print."[420] The licensing regime in that colony apparently dissolved only in 1721. In that year governor Shute informed the legislature of "*Factious* and *Scandalous* Papers, Printed and publicly sold in Boston highly reflecting upon the Government, and tending to disquiet the minds of His Majesties good subjects," and asked for a general law requiring the governor's license prior to each publication.[421] The legislature expressed due concern about "Seditious and Scandalous Papers," but refused to enact the law and reminded the governor that the best way to handle such cases is post-publication punishment of the author. It concluded: "Should an Act be made to prevent the printing any Book or Paper *without* Licensing first obtained from the Governour for the time being, no one can foresee the innumerable inconveniencies and dangerous Circumstances this People might Labour under in a little time."[422] This episode, which formed yet another chapter in the story of the rise of the colonial assemblies, appeared to have been the end of the strict prior licensing system in Massachusetts, although later incidents involving suppression of publications are known.[423] In 1722 Andrew Bradford was summoned to appear before the governor and council of Pennsylvania after publishing a pamphlet about the "Sunk Credit" of the colony. After blaming his journeyman and asking pardon he was ordered "that he must not for the future presume to publish anything relating to or concerning affairs of this Government, or the government of any of the other oh His Majestys Colonies, without the permission of the Governor or Secretary of this province."[424] In 1753 the New York assembly ordered Hugh Gaine to be jailed, fined and warned for publishing its proceedings without authorization.[425] In short, traces of prior restraint existed in some colonies even in the second half of the eighteenth century. The general trend during the century, however, was the demise of licensing and the transfer of

[420] *Id.*, at 40-41. The writer mentions a 1719 book entitled *Some Reasons for the setting up of Markets in Boston* published by James Franklin as still displaying the official license. See also: Thomas, *supra* note 405, at 16.

[421] 2 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1718-1720 359 (1980), (Hereinafter: MASSACHUSETTS HOUSE JOURNALS).

[422] *Id.* at 369.

[423] See Thomas, *supra* note 405, at 16.

[424] 3 PENNSYLVANIA MINUTES 143, 145. See also: Thomas, *supra* note 405, at 235-236.

[425] See LOUIS E. INGELHART, PRESS AND SPEECH FREEDOMS IN AMERICA 1619-1995 A CHRONOLOGY 22 (1997); 2 Thomas, *supra* note 405, at 109-110.

suppression and of the controversy regarding it to post-publication methods such as seditious libel prosecution.[426]

What, if any, was the place of exclusive rights in texts within this colonial framework of regulating the press? Throughout the entire period there appeared no form of authors' copyright. Furthermore, there was also no practice of standard and large-scale protection of exclusive publishing rights similar to the stationer's copyright. A few factors combined to insure this situation. First, and most obvious, are the different patterns of economic activity of the book trade in America and the different levels of organization and sophistication of both the trade and its governmental regulation. In the colonies there was simply no equivalent of the Stationers' Company. There was no concentrated organization incorporating the entire trade that could create trade-wide arrangements, enforce them and lobby government for backup and support. Nor was there any real possibility or reason for such an organization to appear.

Second, governmental need for an intermediary or an accessory in enforcing its censorship policy was limited and so was its willingness to bestow special privileges or powers for this purpose. In a colony where there were just a handful of printers and presses (often just one),[427] even if the number of potential writers and publishers was larger, there were easily traceable and accessible "bottlenecks" for government to regulate without any need to resort to intermediaries.

Third, the need for protection of publishers and printers, though not non-existent, was much less acute than that of the English stationers who were members of a crowded and highly competitive trade. Again the size of the trade played a role here. Although in some places like late seventeenth century Boston there was a number of potential publishers greater than the mere handful of printers,[428] the likelihood of unauthorized reproduction was still relatively low. As for inter-colony reproduction, the barriers on a large practice of this sort were not only physical and economic, characteristic of the relatively secluded and local markets of the time, but also cultural. Much of what was published in one colony was of little relevance to another. This

[426] Levy, *supra* note 200, at 32.

[427] In 1775, a period that already saw considerable growth of the trade, there were fifty printing houses in the colonies which were about to become the United States. Thomas, *supra* note 405, at 17.

[428] See 1 Tebbel, *supra* note 405, at 21-30.

was the case not only with such items as collections of laws and other governmental publications which constituted a majority in many places, but often also with other materials like religious sermons, or local histories.[429]

All of this does not mean that there was no economic pressure at all on printers and publishers to try to minimize their risk and protect their investment by avoiding unauthorized reproduction and achieving exclusivity. A few alternative rudimentary mechanisms played a part in specific cases where the need for such protection was especially acute. Two such mechanisms are often mentioned by literary historians of the period: social norms against unauthorized reproduction among the members of the trade[430] and private contractual arrangements to this effect.[431] Current evidence is sketchy, and more research will be needed before the importance and scale of these methods can be assessed, but one a-priori reasonable conjecture is that in most cases the conditions in the colonial book trade were especially suitable for the effective operation of such mechanisms. In a small secluded market with a few potential competitors simple contractual arrangements among a limited number of parties were likely to be useful in reducing the risk on the investment. Similarly, among a small group of practitioners where infringers of the norm were likely to be identified, social norms had high probability of being effective. Such circumstances could have given rise to the possibility of social sanction, retaliation tactics and close interdependence, all of which are conditions that are likely to contribute to an effective operation of a social norm.

A third, less speculative, mechanism for protection that was employed in specific cases was the exclusive right to publish, bestowed by the colonial legislature. This was in fact a brand of the "patents" or exclusive privileges granted by colonial legislatures in order to encourage other arts and projects useful to the public good. The most known example is the often quoted legislative protection granted to John Usher by the Massachusetts General Court in 1672. Usher was chosen as the publisher of a new revised edition of the laws of the colony. He petitioned the General Court asking for protection, probably due to mistrust of his printer- Samuel Green. The Court issued the following order:

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[429] Lehmann-Haupt, *supra* note 405, at 85; 1 Tebbel, *supra* note 405, at 30.

[430] *Id.* at 46. Lehmann-Haupt described it as "a sense of mutual obligation" and as "common decency and enlightened self-interest." Lehmann-Haupt, *supra* note 405, at 84-85.

[431] 1 Tebbel, *supra* note 405, at 42. Lehmann-Haupt, *supra* note 405, at 85.

> "In ansr to the petition of John Vsher, the Court judgeth it meete to order, & be it by this Court ordered & enacted, that no printer shall print any more copies then are agreed & pajd for by the ouuner of the sajd coppie or coppies, nor shall he nor any other reprint or make sale of any of the same, wthout the sajd ouners consent, vpon the forfeiture an poenalty of treble the whole charges of printing, & paper, &c, of the whole quantity payd for by the ouner of the coppie, to the sajd ouner or his assignees"[432]

The order's phrasing betrays the fact that it was pointed mainly at Samuel Green, but it goes on to put the matter in general terms.

A later petition by Usher triggered a 1673 reaffirmation of the order that explicitly limited the exclusive right to a period of seven years (as well as to the quantity of one edition):

> "Mr John Vsher hauing binn at the sole chardge of the impression of the the booke of lawes… the Court judgeth it meete to order, that for at least seven yeares, vunless he shall haue sold them all before that tjme, there shallbe no other or further impression made by any person thereof in this jurisdiction."[433]

Usher's protection was an ad-hoc response to a specific problem and opportunity. He performed a function that beforehand was handled by the colony at its own expense- the publication of the laws. The exclusive rights of printing and sale were an easy way to reward and create an incentive for Usher. It was not different from the privileges that were commonly bestowed by colonial legislatures on the entrepreneur who undertook the performance of important public projects such as the erection of a mill or the building of a bridge.

Many historians argue that the 1673 Massachusetts' protection granted to Usher was the only one known during the colonial period.[434] It seems, however, that different variations on that arrangement were

[432] 4 MASSACHUSETTS RECORDS 527.

[433] *Id.* at 559.

[434] Bugbee, *supra* note 1, at 106; Lehmann-Haupt, *supra* note 405, at 84; 1 Tebbel, *supra* note 405, at 46.

occasionally used in other colonies. Government protection and patronage to a printer or a publisher was a common phenomenon. This usually included official titles such as the "colony's printer," the streaming of government related print jobs and even land grants or convenient leases.[435] Occasionally it was also accompanied by some form of exclusive printing rights. Thus, when in 1747 the North Carolina legislature, under the active encouragement of Governor Gabriel Johnston, finally decided to rectify a "shameful condition" and publish a revised compilation of the colony's laws, it enacted a statute which appointed four persons to be "Commissioners, to Revise and Print the several Acts of Assembly in Force in this Province."[436] In addition for a payment ordered to the "Commissioners" for complying and printing the laws it was ordered that they shall have "the Benefit and Advantage of the sole Printing and Vending the Books of the said Laws, for and during the Space or Term of Five Years."[437] The Act also provided for punishment to any person vending or importing the Law Books without a license from the Commissioners, "their Heirs or Assigns" during the term of protection and set a maximum price of fifteen Shillings for their sale.[438] Thus, the North Carolina act made the "Commissioners" the publishers of the Law Book with exclusive publishing and sale rights for five years, much in the same pattern as Usher's Massachusetts protection.[439]

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[435] In 1641 the General Court of Massachusetts granted Stephen Day, the first printer of the colony, three hundred acres of land. Similarly, in 1658, in response to a petition of Samuel Green, the successor of Day in the position, the General Court granted him three hundred acres of land "for his Encouragement." Thomas, *supra* note 405, at 43, 52.

[436] *An Act for appointing Commissioners to Revise and Print the Laws of this Province, and for granting to his Majesty, for defraying the Charge thereof, a Duty of Wine, Rum and distilled Liquors, and Rice imported into this Province*, §II, in A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE 242-245 (1751). [This seems to be the very collection of laws that the commissioners were charged to compile and publish and which was printed by James Davis].

[437] *Id.* §IV.

[438] *Id.* §§IV-V.

[439] In order to accomplish the project, James Davis from Virginia was persuaded to come to North Carolina and was appointed as printer for the colony. See GEORGE WASHINGTON PASCHAL, A HISTORY OF PRINTING IN NORTH CAROLINA 4-5 (1946).

The dynamics in Maryland half a century earlier demonstrates why outright exclusive publishing privileges of the sort of Massachusetts and North Carolina were relatively rare. In 1696 William Bladen petitioned to receive leave to bring at his own expense a press that "would be of great advantage to this province for printing the Laws made every session &c."[440] The request was approved. In 1700 he further petitioned the council for "encouragement" which resulted in a recommendation affirmed by the house that all writs, "Bayle bonds, Letters Testamentry, Letters of Adminstration, Citacons summonses & ca"[441] used shall be printed ones. Prices were set as "one penny or one li Tobo per peece" for some of the documents and "Two pence or two pounds of tobbo" for others.[442] In the same year Bladen proposed to publish a compilation of Maryland laws. This was accepted by the legislature which provided that:

> "Mr. Bladen according to his proposall have liberty to printe the body of the Law of this province if so his Excy shall seem meet And it is likewise unanimously resolved by this house that upon Mr. Bladen's of one Printed body of the said Laws to each respective County Court within this province for his encouragement Shall have allowed him Two Thousand pounds of tobo in each respective county as aforesaid."[443]

In other words, Bladen had little reason to worry about explicit exclusivity rights. He received a license to print a particular publication- forbidden to be printed by anyone else in the absence of such a license, and a guarantee that the most likely customers of the publication would be compelled to purchase it from him in a preset price. The same pattern of "encouragement" repeated in Maryland in future occurrences and in other colonies.[444] Thus, explicit

[440] Wroth, *supra* note 409, at 18.

[441] *Id.* at 21.

[442] *Id.*

[443] *Id.* at 23.

[444] *Id.* at 28-29; 33-34; 49-50. New York in its 1750 law for compiling and printing the colony's laws adopted a similar approach. It licensed particular persons to compile the laws and others to print them (employing the background assumption that such actions were forbidden in the absence of the license). It also mandated the purchase from the printer of copies for a set price by several officials. See: *An Act to revise, digest & Print the Laws of this Colony* [1750], in 3 THE COLONIAL LAWS OF NEW YORK 1739-55 832-

exclusive publishing and sale rights were only one mechanism employed in the governmental encouragement of printing and publishing. It was not necessarily the most important or lucrative method and it was indiscriminately employed alongside an arsenal of other specific measures that sometime made it redundant.

Exclusive publishing, printing and sale rights were hardly the rule. They were very sporadic and much less ubiquitous than the royal printing patent in England. Colonial legislatures used them sometimes in an ad-hoc fashion to reward specific publishers or printers and secure their investment in a few cases where the project was of special interest to the colony. To the extent, then, that there was any governmental protection it consisted of ad-hoc policy decisions by the legislature that granted limited time privileges of exclusivity to a certain publisher or printer vis-à-vis the printing or sale of a particular text or texts. Even protection of this sort was quite rare. No concept or practice of standardization emerged around it, and none of the practical and conceptual issues, that in England gave rise to seeds of future development in copyright, had appeared.

Finally, it should be mentioned that the eighteenth century brought no change in the mechanisms of protection within the American book trade. The Statute of Anne did not apply to the colonies and there were no known attempts to promote and secure similar local legislative measures. Similarly, throughout the century there was no parallel to the English common law copyright struggle. No one in the colonies raised any claim of that sort.[445] The different economic and political conditions of the American book trade

835 (1894); *An Act to revise, digest & Print the Laws of this Colony* [1772], in 5 THE COLONIAL LAWS OF NEW YORK 1769-75 355-357 (1894).

[445] Tebbel writes that "it was theoretically possible to obtain English common law copyright in the colonies." 1 Tebbel, *supra* note 405, at 46, 138. This is somewhat inaccurate. As we saw in England itself ,rather than being a settled issue, the common law copyright argument was a new invention of the eighteenth century, one that attracted substantial opposition and conflict. Only for a very short period between the decision of *Milar v. Taylor* in 1769 and the 1774 decision of the House of Lords in *Donaldson v. Becket* there existed a firm precedent upholding the validity of common law copyright. Francine Crawford's argument that American publishers "were protected by English common law copyright and later by the British Copyright Act of 1710" is even less accurate. The Statute of Anne never applied directly to the American colonies. See Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 Bull. Copyright Soc. 11 (1975).

may account in part for this situation, but the stark contrast with the explosion of agitation for protection and the receptiveness towards it very early after independence seems to indicate that another additional force was at work. The lack of any American parallel indicates that the Statute of Anne, with all the new rhetoric of authorship behind it and its formal vesting of the rights in authors, to the extent it was known in the colonies, was conceived of as a trade-specific measure of the London book trade designed to protect booksellers, rather than as based on a general princ iple of the protection of authorship. The latter idea together with the ideology of original authorship gathered force only slowly and gradually throughout the century both in England and America. Only at the very end of the colonial period it showed first signs of penetrating colonial America and pushed some to demand protection of authors. When this rising trend met other changing circumstances with independence, the ground was ripe for the rise of widespread protection of literary works in the name of original authorship.

B. State Copyright

1. The Rise of Authors' Copyright

a. Individual Author's Copyright

The late eighteenth century brought an important transformation in the protection given to literary works in America. The focus had shifted from sporadic tactics of encouragement given to printers or publishers, to a growing demand for exclusive rights of authors based on the principle of original authorship. The first known indication of change occurred at the very end of the colonial era. In 1770 William Billings petitioned the Massachusetts legislature and asked for protection to his newly written New England Psalm-Singer. The legislature agreed and in 1772 it passed a law entitled *An Act for granting to William Billings of Boston the Sole Privilege of printing and vending a Book by him compos'd, consisting of a great variety of Psalm Tunes, Anthems and Cannons, in two Volumes*.[446] The exclusive right of printing and selling was granted for seven years. The law,

[446] 49 MASSACHUSETTS HOUSE JOURNALS (1772) 121, 124, 134. The text of the Act is available in LVIII MASSACHUSETTS ARCHIVES 600. It was reproduced in Rollo G. Silver, *Prologue to Copyright in America: 1772*, 11 Papers of the Bibliographical Society of the University of Virginia 259,261-262 (1958).

however, never came into effect, since Governor Hutchinson refused to sign it.[447]

Billings was perusing a familiar pattern practiced in the colonies for more than a century in the context of patents for invention and other economic initiatives. His petition was equivalent to that of the entrepreneur or the inventor who proposed to perform some economic project or service in furtherance of the colony's public good and approached the legislature in order to receive reward or encouragement of various forms, including limited term exclusivity. The novelty was that for the first time the petitioner was an author and the "project" regarding which protection of exclusivity was sought was a book written by him. Thus, a rising consciousness of authorship as the basis of copyright protection erupted through the traditional channel of particularistic legislative privileges.

After independence there appeared a trickle of authors who followed in Billings footsteps. In 1781 Andrew Law petitioned the Connecticut legislature for five years exclusive right of "imprinting and vending" his recently published book of tunes. The legislature responded by passing a law that protected the second edition of the book for five years.[448] In 1783 John Ledyard, after returning to Connecticut, petitioned the legislature for exclusive right to publish a book describing his journeys with Captain Cook for a term it saw fit.[449] A committee appointed to review the petition recommended that "as it appears that several Gentlemen of Genius & reputation are also about to make similar Applications for the exclusive right [to] publish Works of their respective Composition, your Committee are of opinion that it is expedient to pass a general bill for that purpose."[450] This resulted in the first state general copyright act enacted that year in Connecticut. Noah Webster, who is known in the traditional narrative of American copyright for his relentless lobbying for general copyright protection before many state legislatures and the Federal Congress, spent most of his lobbying efforts trying to obtain specific legislative protection of

[447] 49 MASSACHUSETTS HOUSE JOURNALS (1772) 134-135.

[448] 3 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 537-538 (Charles J. Hoadly ed. 1895), (Hereinafter: CONNECTICUT RECORDS). See also Lenhamm-Haupt, *supra* note 405, at 87-88.

[449] 1 Tebbel, *supra* note 405, at 139; Lenhamm-Haupt, *supra* note 405, at 88-91.

[450] Cited in Lenhamm-Haupt, *supra* note 405, at 90.

his own work in the pattern just described.[451] In his 1783 Connecticut trip Webster tried to petition the legislature "for a law to secure to me the copy-right of my proposed book," without mentioning a general law.[452] In 1784 he wrote a letter to Madison urging him to act for passing a general copyright act in Virginia or at least present the legislature with Webster's private petition for twenty one years protection of his book.[453]

The petitions and the grants of such private exclusive publishing rights to authors continued even after in the 1780s twelve of the states enacted general copyright laws. Like in later contexts in which particularistic legislative created privileges were supplanted by regimes of general rights, for a while a dual track for protection existed.[454] Authors who sought protection regularly petitioned the legislature directly, either in hope of receiving better conditions or because they failed to fulfill one of the requirements of the general law. Thus for example, in 1784 Joel Barlow received seven years protection from the Connecticut legislature.[455] In 1788 and 1789 William Blodgett received in the same state fourteen years protection for two maps by private acts.[456] In 1792, South Carolina legislated an act awarding twenty years exclusive publication right to Joseph Purcell for a map of the state he was to produce.[457] Individual legislative copyright protection survived the general regime- the state regimes, and in some places even the federal one. It only gradually died out and fell out of use as the practical benefits of the federal regime became apparent.

The private copyright acts were close relatives of the traditional colonial and state patents and of their more distant cousin- the English

[451] See Bugbee, *supra* note 1, at 123.

[452] *Id.* at 107.

[453] Noah Webster to James Madison, July 5th 1784, in LETTERS OF NOAH WEBSTER 8-9 (Harry R. Warfel ed. 1953).

[454] The prominent example is corporate law where the mid-nineteenth century transformation from particular legislative charters to general incorporation laws, included in many states a period of a dual track for incorporation.

[455] 5 CONNECTICUT RECORDS 458-459.

[456] 6 CONNECTICUT RECORDS 490; 7 CONNECTICUT RECORDS 87.

[457] 5 STATUTE AT LARGE OF SOUTH CAROLINA 219-220 (Thomas Cooper ed. 1837-1868). The act resembled more traditional patterns of protecting publishers. It bundled the protection with the appointment of Purcell to the position of a State Geographer.

printing patent. It was an ad-hoc policy decision of the sovereign granting tailored limited time privileges to a particular person in order to promote the public good. The main difference from the colonial individual patents legislation was that authors emerged as a special category of grantees, in whose case the grant was justified on the basis of a unique set of reasons typical of the category. Thus it is interesting to examine the conventional reasons for protection offered by petitioners and legislatures.

b. Reasons for Protection

Since individual copyright petitions were framed as particularistic "deals"- the grant of tailored terms of protection in return for a specifically defined useful project- petitioners tended to focus on the merits and benefits to the community of their specific work, rather than offer general rationales. Ledyard's 1783 petition to the Connecticut legislature was an extreme case of this sort. It is phrased solely in the traditional general terms of petitions for exclusive privilege to practice a useful economic activity and fails to make an argument based on original authorship as a special category. After a long description of his adventures and a request for governmental employment Ledyard mentioned his book which "he thinks will not only be meritorious in himself but may be essentially usefull to America in general but particularly to the northern States by opening a most valuable trade across the north pacific Ocean to China & the east Indies."[458] Ledyard, then, did not resort to general arguments about the utility and justice in rewarding authors. Instead he was offering a specific project, presumably one of immediate tangible economic benefits to the commonwealth, and asking for reward in the form of exclusive publication rights.

While other individual petitions showed the same tendency, signs of conceptualizing works of authorship as a special category with general unique reasons for protection started creeping in. When in 1772 Billings petitioned the Massachusetts legislature that he "might have a patent granted to him for the sole Liberty of printing a Book by him compos'd," he started by describing the specific benefits offered to the community by his work. He presented his book of tunes as being found "to be to general Acceptance; & which Composition is made much Use of in many of our Churches, & is

[458] Lenhamm-Haupt, *supra* note 405, at 89.

more & more used every Day."[459] Yet he also offered a rudimentary version of the labor-desert argument warning that "an unfair advantage is about to be taken against him, & that others are endeavoring to reap the Fruits of his great Labor & Cost."[460] Furthermore, the whole proceedings were fraught with concerns about authorship: the petition was delayed when suspicious arose that Billings was not the real author of the book, causing him to declare that "he is the sole Author, & should have been asham'd, to have expos'd himself by publishing any Tunes, Anthems or Canons; compos'd by Another."[461] When the legislature was finally convinced it granted Billings seven years exclusive publishing rights "in Order… to promote such a laudable performance"[462] (only in order for the bill to be terminated by Governor Hutchinson).

Similarly, when in 1783 Robert Ross petitioned the Connecticut legislature he claimed that his book was "of great Utility to the Publick," and warned that "he is Liable to loose the Benefit of his Learned Labours to which he is Justly entituled."[463] In short, within the genre of individual copyright petitions with its characteristic reference to specific public benefits offered by particular works, there appeared gradually and somewhat equivocally two conventional principled arguments for the protection of works of authorship. The first was the just result of the author's enjoyment of the profits and fruit of his labor. The second was the general social benefit in encouraging works of authorship.

Parallel to and sometimes intertwined with the individual petitions there appeared during the 1780s agitation for general copyright statutes. Not surprisingly, in this genre the principled arguments for copyright protection were elaborated on a more conscious and explicit level. Again, the two main brands of arguments repeated. First, copyright protection was justified on the basis of authors' rights- often referred to as natural or property rights- to enjoy the fruit of the product created through their labor and genius. Second, it was argued that such protection would encourage "useful learning" and hence would contribute to the benefit of society as a whole. Injected into

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[459] The petition is available in LVIII MASSACHUSETTS ARCHIVES 600. It was reprinted in Silver, *supra* note 446, at 260-261.

[460] *Id.* at 260.

[461] *Id.* at 260-261.

[462] The bill was reprinted in *id.* at 261.

[463] 5 CONNECTICUT RECORDS 245.

these two main arguments was a third ancillary one. This was a general patriotic tone, characteristic of the period, according to which the newly born nation had to join the exclusive group of civilized and enlightened nations and even surpass them by proving it possessed a lively literary and intellectual sphere of its own.[464] The way to achieve such national status, it was argued, was to encourage authors to write and to insure them their just reward for their labors through copyright protection.

These three kinds of arguments were frequently intertwined. Thus, in one of the earliest examples of the agitation for general copyright laws, Thomas Paine wrote in 1782:

> "It may, with propriety, be remarked, that in all countries where literature is (protected, and it never can flourish where it is not,) the works of an author are his legal property; and to treat letters in ay other light than this, is to banish them from the country, or strangle them in the birth."[465]

In 1782 Samuel Stanhope Smith from Princeton College provided Webster with a letter of recommendation for his copyright campaign. Smith combined all three typical strands of argument by explaining that:

> "Men of industry or of talents in any way, have a right to the property of their production; and it encourages invention and improvement to secure it to them by certain Laws, as has been practiced in European countries with advantage and success."[466]

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[464] In 1779 Hugh Henry Brackenridge founded the *United States Magazine* declaring that he intended to prove that the people of his nation were not "Ouran-Outans of the wood" but rather were "able to cultivate the belles letters, even disconnected with Great Britain." BENJAMIN T. SPENCER, THE QUEST FOR NATIONALITY: AN AMERICAN LITERARY CAMPAIGN 12 (1957).

[465] Thomas Paine, *Letter to Abbe Raynal, on the Affairs of North America; in which the Mistakes in the Abbes Account of the Revolution in America are Corrected and Cleared up* (1782), in 1 POLITICAL WORKS OF THOMAS PAINE iv-v (1817).

[466] Reprinted in NOAH WEBSTER, A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 173-174 (1843).

In his 1783 letter to the Continental Congress urging copyright legislation Joel Barlow repeated the same arguments. First, he appealed to the natural-justice/labor argument: "There is certainly no kind of property, in the nature of things, so much his own as the works which a person originates from his own creative imagination."[467] He went on to the utilitarian argument explaining that "we are not to expect to see any works of considerable magnitude… offered to the Public till such security is given."[468] Both arguments were supported by an American patriotic spirit. As Barlow explained the new nation had already demonstrated its worth to the world, but "[a] literary reputation is necessary in order to complete her national character." Furthermore, he argued, "it is more necessary, in this country than in any other, that the rights of authors should be secured by law," because "we have few Gentlemen of fortune sufficient to enable them to spend a whole life in study, or enduce others to do it by their patronage."[469]

The combination of arguments that was employed in petitions for individual protection and elaborated more fully in lobbying for general laws is an interesting one. The encouragement of learning argument was the traditional one used in support of the English statute of Anne since the rhetorical transformation of the stationers' case at the beginning of the eighteenth century. Its use in the American context differed slightly only in two respects. First, in the United States it was usually authors themselves or those who saw themselves as representing the author's interests who used the encouragement argument on their own behalf. In contrast, in eighteenth century England it was commonly the booksellers who sought to secure their interests through the employment of such arguments and use of the image of the author. Second, the strong patriotic undertones of the new nation seeking to establish its place in the pantheon of literature were somewhat unique to the American post-independence context.

Things were more complex with the natural property-right/labor argument. In England, this trope was developed and employed mainly in the context of the literary property debate, in order to justify protection more ambitious and expansive than the one offered by the statute of Anne. In that context, the natural right argument supported the position that authors had a perpetual right in their works, irrespective of governmental decision to award specific or general patronage. In the eighteenth century United States,

[467] IV PAPERS OF THE CONTINENTAL CONGRESS 369-373 (No. 78).

[468] *Id.*

[469] *Id.*

however, the same argument based on original authorship and property in one's own labor was used to promote exactly the kind of protection the English users were trying to go beyond. For Americans in the eighteenth century, saying that authors had a property in the product of their mental labor merely entailed the conclusion that government should supply some kind of limited protection either in the pattern of the Statute of Anne or in the more traditional form of individual legislative protection. Although the ideological justification was identical to the one employed in England, at this point, the legal-practical conclusion deduced from it was significantly different. The same dynamics was replicated in the state copyright laws themselves.

2. The States' General Copyright Laws

In 1783 after intense lobbying by a few authors a committee of the Continental Congress (which lacked power to legislate on the subject[470]) reported that it was:

> "… persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce."[471]

Accordingly the Congress issued a recommendation to the states to secure to authors or publishers of new books "the copyright of such books for a certain time, not less than fourteen years from the first publication" renewable for another term if the author survived.[472] By that time three states- Connecticut,

[470] For an elaboration of the Continental Congress powers, or rather lack of powers under the Articles of Confederation, in the context of intellectual property see: Edward C. Walterscheid, *To Promote The Progress Of Science And Useful Arts: The Background And Origin Of The Intellectual Property Clause Of The United States Constitution*, 2 J. of Intellectual Property Law 1, 4-9 (1994).

[471] 24 JOURNALS OF THE CONTINENTAL CONGRESS 326.

[472] *Id.* at 326-327.

Massachusetts and Maryland- already legislated general copyright laws, and in the following years all remaining states except Delaware followed suit.[473]

The states' copyright laws were diverse in terms of their exact details, but they all shared a strong family resemblance. The two dominant sources of influence on such laws were the colonial and state patent practice and the English Statute of Anne. The legislative patent practice was a traditional familiar framework within which the protection of authors could be understood and deployed. The influential preexisting framework was not necessarily legislative protection of exclusive rights for book publishing, that was rather sporadic in the colonial period. More likely it was the general practice of legislative grants and especially patents for invention. Many of the state copyright statutes were enacted, at least in part, as a reaction to petitions asking for specific individual privileges in the traditional pattern. The copyright acts were, to a large extent, generalization and standardization of the specific copyright grants (which as we saw continued to exist for a while).

Still, however smooth, un-dramatic and maybe even unnoticeable was the practical move from individual to general copyright, the implied structural change in the conceptual framework of copyright was significant. From a specific privilege granted as a matter of particular policy decision it became a general right covering standard entitlements and applicable to any person who met a general set of criteria. This change is especially salient when contrasted with state patents for invention that continued to follow the traditional pattern of individual grants.

What can account for this difference? There was no fundamental ideological discrepancy between patents for invention and copyright. The same ideological arguments that appeared in the context of authors- natural rights in the fruits of one's labor and the encouragement of useful social activity- were deployed in the context of patents for invention with no less force and intensity.[474] No one seems to have made any conscious attempt to distinguish the two or explain why copyright became a general regime and

[473] The exact chronological order was: Connecticut, January 1783; Massachusetts, March 1783; Maryland, April 1783; New Jersey, May 1783; New Hampshire, November 1783; Rhode Island, December 1783; Pennsylvania, March 1784; South Carolina, March 1784; Virginia, October 1785; North Carolina, November 1785; Georgia, February 1786; New York, April 1786.

[474] See *supra* Chapter 1., sec. II.

patents remained individual grants. The (potentially) dramatic divergence between the two regimes went almost unnoticed. Part of the explanation may be that the transformation of copyright into a general regime was merely an administrative quirk- a local response to a perceived practical need. This might have been the case if state legislatures found themselves bombarded within a short period of time by numerous petitions for individual copyright protection. Such a situation would have demonstrated the inefficiency and maybe impracticability of a regime of specific legislative copyright under conditions of soaring demand for protection. The frequent pattern of petitions for specific copyright responded to by general laws- sometimes with the legislators mentioning the concentration of similar petitions- may offer some support to this explanation.

Nevertheless, it is far from clear that the number and intensity of petitions for individual copyright surpassed those for patents for invention. A second factor in the divergence of patents and copyright- probably more important than that of mere administrative convenience- was the existing of the English tradition of the Statute of Anne. The Statute of Anne supplied a precedent, an existing rich institutional framework to which to turn once the demand for authorial protection was unleashed. There was no English equivalent in the field of patents which, as a matter of formal law, were still granted in England as ad-hoc exercises of the royal prerogative. This was the outcome of the contingencies of the English history, the fact that copyright grew out of the practices of the Stationers' Company that created a framework of a standardized general entitlement and subsequently a strong lobby for it at the beginning of the eighteenth century; and the different trajectory of the development of patents. These contingencies of early English history exerted their power, at least for a while, until the move to a federal regime, on the late eighteenth century development in the United States where patents remained individual grants and copyright became a general right. One partial exception was South Carolina whose general copyright act contained a section which seems to have created a parallel general patent regime. As far as we know, however, this was more a matter of theory than practice. The later known patents in the state were all specific legislative grants.[475]

The heavy influence of the Statute of Anne on the state copyright statutes, beyond the mere move to a general regime, was apparent. The lobbying for

[475] COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783-1906 23 (Thorvald Solberg ed. 2nd ed. 1906), (Hereinafter: COPYRIGHT ENACTMENTS). See also *supra* Chapter 1, sec. II(B).

general laws often explicitly used the Statute of Anne as a role model.[476] Many of the state laws, especially in their titles and preambles, simply incorporated whole parts of the English statute, sometimes almost verbatim. The preamble of the Pennsylvania statute, for example, was lifted almost word by word from the Statute of Anne:

> "whereas printers booksellers and other persons have heretofore frequently taken the liberty of printing, reprinting and publishing, or causing to be reprinted and published books and other writings without the consent of the author or proprietors of such books and writings, to their very great detriment and damage of their families; for preventing therefore such practice for the future, and for the encouragement of learned men to compose and write useful books;"[477]

In regard to the policy arguments elaborated in the statutes, the relation to the Statute of Anne was more complex. Such arguments followed the pattern of the petitions for individual copyright and for general laws in offering two main justifications: the natural right of an author in the fruits of his labor; and the encouragement of learning for the benefit of the community. Connecticut's law summed it up succinctly:

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[476] Thus for example, when Joel Barlow petitioned the Continental Congress to recommend the states to legislate copyright laws he directly relied on the precedent of the Statute of Anne. He wrote that "in England, your Excellency is sensible that the copyright of any book or pamphlet is holden by the author and his assigns for the term of fourteen years from the time of its publication; and if he is then alive, for fourteen years longer." IV PAPERS OF THE CONTINENTAL CONGRESS 371 (No. 78).

[477] COPYRIGHT ENACTMENTS 20. See also the preamble of the copyright law of Maryland. *Id.* at 15. Compare to the preamble of the Statute of Anne:

"Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting and Publishing, or causing to be Printed, Reprinted and Published Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books"

> "Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind"[478]

The Massachusetts law preamble made the same points in a somewhat grander fashion:

> "Whereas the improvement of knowledge, the progress of civilization, the public weal of community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: as the principle encouragement such persons can have to make great and beneficial exertions of their nature must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men there being no property more peculiarly a man's mown than that which is produced by the labor of his mind:"[479]

All other statutes, repeated these two reasons in one form or another and with various emphasis on each of them.

The encouragement of learning reason was, more or less, identical to the official justification of the statute of Anne. The argument of author's natural property right in the fruit of their labor was, however, characteristic of the late eighteenth century- a period in which an elaborate version of the ideology of authorship which did not exist in 1710 had developed and exerted influence. Unlike the ambivalent status of the author in 1710, original authorship was the unquestioned center of the American statutes. Like in the petitions, however, the mobilization of the natural right argument in the context of the American state laws was a peculiar one. While in England that argument was used to justify and demand protection beyond the limited time "generalized patent" supplied by the statutory framework, in the United States it was incorporated into and justified exactly such a framework. From this perspective, then, the state statutes were the equivalent of the 1710 Statute of Anne supported by the 1770s English rhetoric of literary property.

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[478] COPYRIGHT ENACTMENTS 11.

[479] *Id.* at 14.

Most importantly, on the level of the actual doctrinal arrangements and the concept of copyright implied in them, the state statutes resembled the post Statute of Anne situation in England. Although some of the specific details differed the general pattern was identical.[480] Copyright under the state laws became a general right- a standard protection entitled to by any one who met a set of predefined criteria. The immediate subjects of the right- as was the case with all post-independence individual grants- became unequivocally individual authors. The actual entitlement, constituting the heart of the acts, expressed the fact that much like the statute of Anne they were not premised on a new concept of owning the work as a general control of an intangible entity. Instead the acts conferred on authors the traditional trade privilege of the printer to exclusively print and sell a certain book. The various acts had different phrasings of this right, defined by the Connecticut statute as "the sole liberty of printing, publishing and vending the same within the State."[481] Such privileges were granted for limited times with most of the states following the familiar (once renewable) fourteen years term, and others adopting more peculiar terms.[482]

Another component which expressed the character of the acts as a form of generalized and standardized individual copyright grants were price control mechanisms which appeared in five of the acts. Connecticut, New York, Georgia and South Carolina created a procedure of complaint before the state Supreme Court in cases of excessive prices or insufficient copies with authority to the court to order correction of the situation and to allow printing by the complainant.[483] North Carolina provided a similar mechanism only in the case of unreasonable prices backed up by a monetary penalty rather than a compulsory license.[484] Such mechanisms followed the English pattern and

[480] For a general survey of the structure and content of the state copyright statutes see: Crawford, *supra* note 445. The survey provides a good comparison of the doctrinal arrangements of the statutes, but it tends to be problematic inasmuch as it attempts to provide more general interpretations of such details or speculate regarding the ideology and general concepts behind them.

[481] COPYRIGHT ENACTMENTS 12.

[482] For a survey of terms in the various statutes see: Crawford, *supra* note 445, at 21-23.

[483] COPYRIGHT ENACTMENTS, at 12-13, 23, 28 ,30.

[484] *Id.* at 26.

expressed the traditional fear of monopolies as the cause of exorbitant prices and insufficient supply.

In terms of subject matter the states' copyright acts resembled the English state of affairs of the time under which copyright protection was limited to traditional works of the press. All the acts protected rights in books or in similar categories of printed[485] writings such as pamphlets and papers. Probably the broadest definition was that of the New Hampshire statute which extended its protection to "all Books, Treatises, and other literary Works."[486] Connecticut, Georgia and North Carolina, knowingly or not, followed the English practice of the time and explicitly extended protection to maps and charts.[487] This was significant, but did not constitute a break with the traditional pattern of protecting the product of the press. Thus, although authors were the immediate focus of the acts and the ideology of original authorship was declared to be the basis of protection both in the acts and in surrounding discourse; authorship and creativity did not yet develop into an abstract and generalized principle which extended into other fields. The protection remained limited to the broadly defined domain of the book trade and there appeared no general practice of protecting creative original authorship as such.

In 1786, except for the practical problems of federalism, the American formal law of copyright stood as a simplified version of the situation in England. Copyright became a general right of authors in their works. Yet it was still a sort of a generalized grant to the printer-publisher bestowed on authors. The entitlement was limited to the traditional exclusive trade privilege to print and vend copies with no concept of general control or a bundle of rights. Such an entitlement, as far as could be said in the absence

[485] The statutes of Connecticut, Georgia and New York were unique in protecting also unpublished manuscripts. The protection of unpublished manuscripts, though not a logical necessity, was a needed ancillary-mechanism to insure efficient protection of exclusive rights of authors in printed works. In England this was achieved not by the Statute of Anne but through judge made law in the 1741 *Pope v. Curll*. See *supra* text accompanying notes 231-232. Whether the other American states would have developed similar case law to match the statutory protection of those three remains a speculative question, since the statutes functioned in practice for only a short period and no real case law evolved around them.

[486] COPYRIGHT ENACTMENTS 18.

[487] *Id.* at 12, 25, 27.

of case law, was limited to verbatim or close to verbatim copying, and at any rate the later expansion of the scope of the "work" did not appear at this stage. Finally, the protection was limited to the product of the press, and the concept of original authorship was not yet abstracted into a general cross-subject-matter principle of protection. On the ideological-rhetorical level copyright was supported by the two arguments of encouragement of learning and of a natural property right. Unlike the English context, however, the latter argument of one's property in the fruit of his intellectual labor was still exclusively mobilized for justifying the statutory regime of a generalized patent. The attempt to use such arguments in the service of more ambitious ends, as happened in the English literary property struggle was still a thing of the future in America. Thus, at the eve of the Constitution American copyright had traveled a long way from its early origins, but even more than in England it was still very different in many significant respects from its modern form.