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The emergence & evolution of the concepts of “the author”, “the work” and “literary property” with specific reference to enlightenment england 1450-1769: The role and influence of John Locke in the case of Millar v Taylor (1769)

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THE EMERGENCE & EVOLUTION OF THE CONCEPTS
OF “THE AUTHOR”, “THE WORK” AND “LITERARY
PROPERTY” WITH SPECIFIC REFERENCE TO
ENLIGHTENMENT ENGLAND 1450-1769

THE ROLE AND INFLUENCE OF JOHN LOCKE IN THE
CASE OF *MILLAR V TAYLOR* (1769)

Mark Thomas Doepel

A thesis submitted in partial fulfilment of the requirements of
the degree of Master of Philosophy

The School of Philosophy & Theology
The University of Notre Dame Australia

2018

Declaration of Authorship

This thesis is the candidate's own work and contains no material which has been accepted for the award of any degree or diploma in any other institution.

To the best of the candidate's knowledge, the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

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Mark Thomas Doepel

Date:

17 June 2019

For LES, with love

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Abstract

This thesis argues that the political philosophy of John Locke, as mostly contained in his *Two Treatises of Government*, but also in a number of other of his works, and especially in relation to his theory on how property rights might be acquired, had a direct influence on the emergence of the modern notions of the author, the literary work and copyright as witnessed through a series of legal cases brought before the courts of England and Scotland over the period of 1700 to 1780. It is specifically shown that Locke's philosophy had a direct influence on the acknowledgment of the English courts of not only property rights existing within authors in relation to their literary rights but also a subtle recognition that literary creativity also afforded authors moral rights over their works. The thesis does this by examining the emergence of the paper and printing industry over time and then following an historical arc which shows the emergence of the three notions under consideration. Having reviewed philosophical and political theories of property and property rights over the ages, the thesis then dissects a number of key legal cases to establish the direct influence that John Locke's writings had in relation to an acknowledgment of intellectual property right acquired through mental labour. The thesis contributes to work in this area as it identifies Locke's influence in establishing not only legal property rights over creative works but also certain moral rights.

Chapter One

Introduction: overview of thesis

This thesis examines how John Locke's work on political theory, *The Two Treatises of Government*, played a central role in the history of ideas in respect of the emergence, development and acceptance of three interlocking concepts.

These concepts concern literary property as private property and an author's interest in literary property as both a legal and a moral right, being a legal right as recognised by the legal institutions of society and as a moral right, being an author's right to attribution, reputation and control of the work, beyond mere economic rights. As will be considered, moral rights may exist beyond legal rights, sourced from natural rights and reason.

The three concepts concerned are "the author", "the literary work" and the right to commercially exploit that work through "copyright". Locke's writings concerning how private property rights are acquired and given legitimacy, especially within the *Two Treatises of Government*¹, were essential in how English courts came to terms with the emerging notions under current consideration., that being "the author", "literary property" and copyright held over such works, together with the "right"¹ of the author to commercially exploit the work that he had created.

These notions, fully formed in contemporary society, only came to be considered and argued into existence after the necessary pre-conditions of the printing industry were established and the rights and interests of authors were expressly considered.

Technological developments challenged the old notions of the role played by the creative person in the process of writing, and the rights and interests, if any, that should be afforded to that person. The new economy of the book-trade caused an

¹ See Peter Laslett, *Locke: Two Treatises of Government*, (Cambridge University Press, Cambridge, 1988).

evolution in the history of ideas. The world would change profoundly, as knowledge and ideas came to be exchanged not by handwritten manuscripts but through mass production, achieved through the revolutionary process of moveable type and mechanical duplication.

Existing laws provided no precedent on what rules applied to these new notions. It would be Locke's theory that would greatly assist the English Courts in examining what was meant by "literary property" and what rights might be afforded to such property.

Locke's property theory would provide the legitimacy required to acknowledge "literary property" as an author's claim-right capable of legal recognition. The Courts would expand Locke's theory that property rights over tangible goods could be acquired through physical labour to an acceptance that property rights might be acquired over intangible goods through intellectual labour. Locke's labour-mixing theory would be a suitable fit for the notion of "literary property" rights vesting in "the author". The process would take 300 to 400 years to percolate through society and, ultimately, to come before the courts. Things would change dramatically over this period.

At the time of the introduction of printing in 1476, the notion of "the author" as the individual most closely associated with the text, and the one who had property rights in the work, had little place as a legal or moral concept, with the author having at best very bare economic rights in the created work.

Little regard was also afforded to the notion of the "text", with the book-trade controlled by the printer-publishers who regarded text as a bare commodity, with limited concern for issues of textual accuracy and authorial attribution.

By 1769 the "author" was acknowledged as playing a central role in the process, with ownership of the "literary work" vesting in the author, due to his creative labour. Literary property would be accepted as a new type of property, one held as a legal right and, in a primitive form, as a moral or human right. This acceptance of "literary property", and its commercial exploitation through the institution of copyright, as a

new form of property right by the Courts was such a departure from long-standing ideas of what could be accepted as a property right that it would require as to how property rights could be acquired to provide it with justification and legitimacy. This acceptance of literary property as legal property would also give legitimacy, substance and context to the three evolving concepts under consideration.

Various historical forces and tensions would play out in this process, with early bare economic rights held by authors over their simple copy - and lost completely upon any sale or transfer - evolving into clearly developed legal, equitable, ongoing economic and, moreover, moral rights.

Although the concepts of “author”, the “literary work” and “literary property” carry contemporary notions of creativity, rights and general commerciality and commoditisation, this thesis explores the philosophical bases for these concepts, which grounds them as things of value and identification and which provides an overarching justification for their emergence within the history of ideas. This will require an examination of the emergence and evolution of these ideas over a period of nearly 400 years, from approximately 1400 to 1770, with a focus over the period of 1689 to 1770, with specific reference to one legal decision of 1769², when for the first time the three interlocking concepts were given consideration within an institutional setting: the legal environment of the Court of King’s Bench, under the leadership of the Chief Justice, Lord Mansfield.³

² There are a number of published versions of the judgment; this thesis will use *Millar v Taylor* (1765)

⁴ Burr 2302 as the preferred citation.

³ Generally from now on Lord Mansfield will be referred to as “Mansfield” – he was born William Murray.

Before a consideration of historical issues, it is appropriate to consider the status of the three notions today and to reflect upon how far these concepts have evolved in the history of ideas. Putting matters in this context highlights how profound the emergence of the concepts was. Notions of the author, the work and copyright are well accepted today. Any conversation in which general reference is made to such concepts requires no detailed explaining or prior agreed definition. They are generally accepted notions, with a shared commonly understood meaning.

The signs, values and ideas for which the concepts stand are comprehended and frequently used. We know what it means when one refers to the author of “such-and-such work” and are not challenged when one hears that an author is seeking to maintain their copyright over a particular work that they have written or is annoyed that a cheap edition of a work has been published without the author’s permission. We readily accept that it is the author who has property in the work that they have written. Moreover, we accept that creativity gives rise to inalienable property rights. Despite this contemporary recognition, closer reflection upon the notions under examination brings up a number of critical and challenging issues. Thus, let us consider the object that is at the heart of the matters under consideration: the simple book.

Take any present-day book off a shelf in any library. A number of indicators, signs, and markers are immediately apparent on the cover of the item. First, almost always given prominence on the cover, there is an individual’s name. One immediately assumes that this is the author, the person that brought about the creation of the work and seeks to be closely, if not fundamentally, associated with the work. The written work, the expression, the sentiment, opinion and view, the story within, is their offspring, a work that is associated as much with the creator as with the actual contents of the work itself, as much as a tune belongs to a particular composer or an image to a particular artist. Any unauthorised appropriation of the work by another is always instantly recognised and condemned. The author readily permeates the work at hand.

Next, the title of the work is also identifiable from the cover. The title is a unique identifier that sets the piece apart from all other written works - there could only ever be one *To Kill A Mockingbird* or one *Hamlet* for example used as an identifier of a

unique and singular work. The title sets up a marker for the work's contents, which as a whole constitutes the "literary work". The cover will also identify the publisher of the work, someone who today we associate as being in a secondary role to that of the author and to the work but one who is intrinsically necessary to the overall process. The publisher's identity, however, seems to have limited relevance: nowadays they are usually only identified on the work's spine or even relegated to the back-cover.

If we open the work, before we consider any preface, and well before we begin reading any story the work sets out to tell, we can reflect upon the usual legal and formal details in respect of the work, found next to the frontispiece. These details set out the date and place of publication, the publishing history, and give details of printing and typeface employed in the work. Examination of this section, however, also reveals information in respect of two very important matters, relating not to simply matters of style and date of production but something much more important and intrinsic to the three concepts under review. The first is the ubiquitous statement that "copyright" in the work 'vests' in the author. The second⁴ is a pronouncement that simply states words along the line that "... the moral right of the author has been asserted ...". Both of these notions are of fundamental importance to the matters under consideration.

Copyright, though a legal right, is from a philosophical point of view the very paradigm that affirms the identity of the author *qua* author.⁵ Moral rights also have a strong philosophical connotation, in that they include the claim-right of attribution, the right to have a work published anonymously or pseudonymously, and the right to ensure the integrity of the work.⁶ This indicates that rights in literary works are somewhat transcendental in nature, with underlying ethical principles, existing beyond legislation and posited law, based on natural law and reason and grounded in creative individualism.⁷

⁴ Subject to the jurisdiction in which the work is published, the language or form of the assertion as to moral rights of the author in respect of the work may change.

⁵ See for example, Mark Rose, "*The Author As Proprietor: Donaldson v Becket and the Genealogy of Modern Authorship*" in Brad Sherman, and Alain Strowel, *Of Authors and Origins: Essays on Copyright Law* (Clarendon Press, 1994).

⁶ Simon Stokes, *Art and Copyright* (Hart Publishing, 2006).

⁷ Mark Rose, *Op cit*, at page 64.

Having considered the book off the shelf, a number of issues arise. While we are today quite accepting of the concepts under consideration, it is of benefit to consider from where and at what time did these ideas emerge, in what context and due to what causes.

The first notion, that of the literary creator, the author *qua* author, has been the subject of past commentary. In 1966, Michel Foucault gave a lecture at the Sorbonne Paris, where he postulated the question “what is an author?”⁸ In his lecture, Foucault recognised the author as an unnatural historical construct that had been given mythological status. Foucault went on to consider the relationship between author, text and reader. Before addressing the question ‘what is an author?’, Foucault commented:

The coming in to being of the notion of ‘author’ constitutes the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy and the sciences. Even today, when we reconstruct the history of a concept, literary genre, or school of philosophy, such categories seem relatively weak, secondary and superimposed scissions in comparison with the solid and fundamental unit of the author and the work.

I shall not offer here a socio-historical analysis of the author’s persona. Certainly it would be worth examining how the author became individualized in a culture like ours, what status he has been given, at what moment studies of authenticity and attribution began, in what kind of system valorisation the author was involved, at what point we began to recount the lives of authors rather than heroes, and how this fundamental category of “man-and-his-work criticism” began.⁹

It is a process worth examining. It will be seen that the emergence of the individualization of the author occurred not at a single moment in time but was part of

⁸ Michel Foucault, “*What is an Author?*” in Paul Rainbow (ed), *The Foucault Reader: An Introduction to Foucault’s Thought* (Penguin, 1986), 101-119.

⁹ Foucault, *Op cit*, at page 101.

a process extending over 400 years. But it is not just the concept of the author that is relevant. The concepts of “the author”, the “work” and “literary property” are all closely and inextricably bound up together. Before dealing in detail with issues concerning initial formulation, evolution and final emergence, a consideration of just how amorphous the three key notions can be and how difficult it can be to isolate and identify them can be seen when one reflects upon the following.

First, the notion of what or who is “the author”.

It is readily accepted that any person who sits down and composes their own work, in their own terms and expression, based upon their ideas, sentiments and thoughts, can be said to be the author of the work. But what of the person who, for example, simply draws together information or material readily available in the general domain – are they the author of the work they produce? If I were to take all the time and effort to note the comings and goings of public buses at the bus stop at my front door and compile that information into a book comprised solely of the bus timetable, can I be said to be the author of that work?

Similarly, if I arrange an anthology of oral histories that I collect as an anthropologist and set them down in writing for the first time, am I the author of these tales? To be an author, does one need a particular type of work to be the product of a certain type of effort? Is ‘imagination’ an integral ingredient of a literary work? What philosophical issues are at play to find, locate and define “the author” *qua* the author, the creator of the piece, the one to whom the resulting work can be attributed?

Consider similar issues associated with the literary work itself. Again, we readily acknowledge Shakespeare as the author of *The Tempest*. If, however, I translate that work into another language, is my translation a separate and distinguishable work from the original version created by Shakespeare? Am I the author of the translation, with sole right over that particular work? If I prepared a summary in compendium form of the lengthy *The Iliad* and *The Odyssey* so that they may be more accessible, am I the author of the compendium to the exclusion of Homer? Because I choose what should and should not be included in the compendium that I produce, does that make me the author of that summary work? And suppose I produce a volume of the

poetry of TS Eliot which I annotate and footnote to indicate the meaning of certain phrases, keys to language and relevant references to events in Eliot's life that are mirrored in the poetry, am I the author of the whole of that work – both the poetry and the annotations and footnotes? In short, are we able to differentiate such notions of creation and, potentially more importantly, ownership over works?

Furthermore, for how long and to what degree does an author have control over their creation? Is the right to control the work in whatever form without limitation as to time, or does the publishing of the manuscript cause the author's control of the work to cease? Consider too any letter that I might pen. It is easy to conceive that I am the author of that letter at the time I write it but if I should mail it to my friend, who subsequently wishes to publish it in a collection of correspondence she has received over time, does her receipt of my letter as addressed and intended for her become a work over which she has assumed control? Can she publish all letters that she has received over time in a collection that identifies her as the author of that collection – even without the sender's permission?

Finally, consider the “literary work” itself. Is it something that can stand-alone from the author? Is the author necessary to give the work substance and legitimacy? Must the author be identifiable to give the work veracity? Do we need to know who the author of any work is to be able to engage with the work itself? Is the notion of the author critical to the very existence of the work itself? Is the author, to invoke Foucault, the real hero of the process? On one view perhaps; books are frequently arranged or accessed through the classification of the author's surname but no one would state that an anonymous work could be incapable of functioning as a literary work because one did not know the author. Indeed, in certain circumstances an author may prefer to remain anonymous.¹⁰

Even without the author, how can it be said that a collection of words, an expression of sentiment or opinion, is a literary work? What is it that makes a collection of words, an expression of mere ideas amount to a literary work? What is the process by which the original written manuscript becomes the printed multiple published work?

¹⁰ One thinks of Locke's own anonymous publication of several of his key works.

What is lost and what is gained in this metamorphosis from manuscript to mass-market paperback?

And what of the rights bestowed on the author in relation to the work created? Can an author be said to own the work, and all commercial benefits that flow from the commercial exploitation of the work, outright? Where do these rights stand in comparison with other proximate players? If a work is written in dedication to me, what rights do I have in respect of the work? More critically perhaps, if I am the one who bears the financial cost and economic risk of having the original manuscript edited, published, printed and distributed for sale, should not my rights equal or outrank those of the original author? Are these rights ones that are inalienable and exist in perpetuity or are they merely a type of limited personal right, similar to a licence or privilege?

These very issues as will be considered below were fundamental to the emergence, development and ultimate acceptance into seventeenth-century society of our key concepts of the “author”, the “work” and “literary property”. They were questions that challenged and troubled society. These interlocking concepts had their first coherent public formulation in a series of cases heard in the English courts commencing in the early eighteenth century, culminating in one particular case heard before the Court of King’s Bench in 1769. That decision of *Millar v Taylor*¹¹ was comprised of four separate judgments.

The arguments before the Court and the judgments will be closely examined to reveal the deep influences Locke had on the matters argued before the Court and on the findings ultimately made by the judges. These findings focussed not only on the concepts of the author and the literary work but, critically, on the subject of what legal rights might exist over literary property. These influences, upon the lawyers involved in the key cases, came not only from Locke’s political philosophy, but also from a number of his other important writings, dealing with epistemology, human knowledge, religious toleration and matters concerning trade and commerce. This body of disparate writings provided a compelling and overarching theoretical justification for these new concepts, within an immediate legal framework but

¹¹ Now referred to for ease of reference as “*Millar*”.

ultimately proved to have wide acceptance throughout society. The scope of the influence that Locke had in this regard appears not to have been previously fully appreciated. This will be explored in detail after a consideration of the initial emergence and evolution of the three concepts, with a particular focus in the concluding chapters on the judgments in *Millar*.

It was during the hearing of *Millar* and, more importantly, in its ultimate findings, that many previously unconsidered notions were argued before the Court and were given judicial legitimacy for the first time. The case involved many of the leading legal minds of the day, both as judge and as opposing counsel. The case and its genesis also transfixed the press and gripped the imagination of commentators of the day. It was, indeed, a *cause celebre* - known as “the Battle of the Booksellers”¹², essentially a piece of commercial litigation between the competing economic interests of the London and the Edinburgh book trades.

Locke’s theory of political philosophy as set out in *The Two Treatises on Government* and, within it, its revolutionary new way of looking at how property rights could be acquired, provided the fundamental legal bedrock and intellectual and philosophical justification in *Millar* that allowed for the emergence of the concept of the literary property and the acknowledgement that such property could be acquired through the author’s intellectual labour. Locke’s theory would be critical in *Millar* because the ideas and concepts under review before the Court had never previously been fully considered within a legal context; there was no prior legal authority on which the Court could call for guidance.

At the heart of all three notions under consideration by the Court was the important legal *and* economic view that an author as the owner of the work maintained in perpetuity his right to the copy in the literary work, and the author as owner of the literary property maintained the sole and unfettered right to the printing, publishing, attribution and correction of the work, rights more moral than merely legal. These various forces, legal, economic, and moral, set up a tension within the businesses of

¹² Mark Rose, *Authors and Owners, The Invention of Copyright* (Harvard University Press, 1993); Gwyn Walters, ‘The Booksellers in 1759 and 1774: The Battle for Literary Property’ (1974) 5th series, 29 *The Library* 287.

authorship, printing and publication. Society grappled with the notion of whether authors had a common law right to an enduring monopoly over their works, or whether society was best served by the dissemination of ideas with ownership being restricted to a fixed period of time - or even lost in to the public domain at the time of publication.

The question arose: should the law protect such rights or could society only progress if such matters and information were freely available and accessible to the whole of society. Could these two competing interests be resolved? For Mansfield in particular, such literary property rights also conferred certain important moral rights on the author. This new form of property brought with it not only important new ways of looking at ownership and how property rights might be acquired but also gave rise to inchoate moral rights that the author could have over the work that had been created, rights that could exist outside of normative posited law, based more on matters of natural law, natural rights and reason. The act of written expression brought with it rights of reputation, attribution and association. An author had a right over textual issues beyond mere economic rights, to control matters of accuracy in the text, to demand correction in the work, to prevent cheap publication, and to ensure proper attribution and ongoing respect for the work and its reputation. These ideas also have their origins in Locke's writings.

For the times, this acknowledgement of an author's moral rights over the written work, was very forward-looking, and this right has only relatively recently been fully accepted in legal systems around the world. Most importantly, the ideas as examined, identified, and accepted in *Millar* were new ideas. If they were going to be accepted in to legal, economic and mainstream social thought, they would require a robust theoretical basis to give them substance, credibility and justification.

From the late seventeenth century to the end of the eighteenth century, thinkers and commentators began to grapple with the idea of how one could control and corral the mere expression of intangible ideas. It was the beginning of the notion of intellectual property, not only for copyright, but also patent and trademark. The whole notion of what could amount to property and what property rights were was under review. To the emerging gentry and the new class of capital, these were important matters.

Financial investment in the emerging technologies of paper production, printing, publishing and commodity distribution required protection at law. Old notions of property acquired simply through occupation or Crown grant had little application to the emerging technologies. The longstanding definition of property under English law would require expansion to deal with the emerging technologies. Property rights could no longer exist simply due to the old indicia of possession and occupation.

It would be copyright that first came to the fore for consideration by the formal institutions of the courts and Parliament. Such a notion of itself threw up difficult questions, especially for those that had controlled the process of printing, publication and commercial exploitation: not the author, but those who controlled the machinery of the trade: the publishers, printers and stationers. It was this group who had made the significant financial investment in the printing and publishing industries. Prior to *Millar* the focus on control over written works was upon those who controlled the means of production. Those who created the work were subordinate to the powerful organisations that regulated, controlled and allowed for the exploitation of the 'product'. The whole industry, publishing, printing, distribution in the book-trade was also more controlled by private parties than by Parliament or the courts.

As authors gradually sought to establish and exert their rights over their 'creations', publishers and printers dealt with ever-increasingly difficult questions: could simple expression amount to a property right? And what exactly was the nature of the work – and, critically, who had a right to intangible rights in that physical form such as the right to copy and economically exploit the copy of the original manuscript and financially benefit from this process? The public was alive to these issues. Tensions between the publishing centres, London and Edinburgh, attracted much attention as cases, pamphlets, newspapers, and editorials expressed widely divergent views on the main issues at play. Commentators and celebrities were all anxious to put forward their views. Well known figures of the day spoke out on and played an influential role in the debate: Milton, Defoe, Pope, and Boswell to name a few.

Parliament had also been alive to the issue for some time and in 1709 had introduced legislation that sought to move regulation of the press and publication from the private sphere to control by government and courts. In 1709 Parliament introduced the

*Statute of Anne*¹³, a watershed piece of legislation that marked the beginnings of an acknowledgement that the author played a central role in the book-trade. Being new legislation, however, there remained uncertainty and doubt over what rights and obligations existed prior to the statute and which if any of these rights had been negated or rendered otiose by the legislation. It was not until 1769 that the matter came to a head in *Millar*, where the main issues were addressed for the first time in any substantive way. With no direct support to be found in any previous legal case as to what were the rights of authors and how property in a literary work could be acquired, support was found by the court from another source – primarily from a comprehensive theory of property rights set out within a theory of political philosophy first published anonymously in 1689. This theory of political philosophy provided the foundation for the emergence of these very modern concepts which went beyond the law and influenced greatly matters of trade, commerce, government, notions of self and individual personality and the notion of ownership rights over intangible and abstract. But the influence and role of Locke in the emergence of the notions of the “author”, the “literary work” and “literary property” went beyond the writings in the *Second Treatise on Government*.¹⁴

In examining the history and development of the notions of the “author”, “the work”, and “literary property”¹⁵, almost all commentators have acknowledged Locke’s role and direct influence in providing a philosophical justification for the revolutionary concept of intellectual property. A number of critical points can be made in this regard. Most examinations of the emergence of literary property and the role Locke’s philosophy played in providing a justification for the new theory, deal almost in the whole with his main political theory, contained in the *Two Treatises*, especially Chapter V of *The Second Treatise*.¹⁶ That theory set out an argument on how property rights might be acquired as specifically ‘catalogued’ by Locke. However, when the matter of intellectual property came before the Courts for definitive review¹⁷, the

¹³ *Copyright Act 1710, The Statute of Anne*, 8 Ann. c 21; 8 Ann. c. 19. Also known as the *Copyright Act*.

¹⁴ John Locke, *The Second Treatise on Government*, for the purposes of this paper and henceforth, “*the Second Treatise*”. (I have used the version of *the Second Treatise* as contained within John Locke, *Two Treatises of Government*, Peter Laslett editor, Cambridge University Press, Cambridge, second edition, 2013 printing, unless otherwise noted).

¹⁵ Collectively, and for the purposes of short hand in this thesis “copyright issues”.

¹⁶ John Locke, *The Second Treatise*, at pages 285 to 301.

¹⁷ *Millar v Taylor* (1765) 4 Burr 2303; C 33 426/60.

Court ultimately applied not a theory directly detailed by Locke but more a theory of property rights that could be described as “Lockean” in nature.

Secondly, despite the extent to which the whole or otherwise of Locke’s writing on how property rights might be acquired was utilised by the Court, we shall see that the theory was of itself wholly suited to the notion of literary property, especially in relation to the key provisions within the theory and how they apply to literary activity.¹⁸

Thirdly, while most other explorations of this topic are silent on the issue, Locke’s other key writings had a role to play in the development of the notions of the “author”, the “work”, and “literary property”. In this regard, key sections of *the Essay*¹⁹ and *The Letter Concerning Toleration*²⁰ played a role.

Other commentators²¹ appear not to have appreciated the influence and role that a large number of Locke’s other writings had to play in this area. The full extent of Locke’s influence will be seen within an examination of each of the judgments.

To answer Foucault’s question, in many ways it was Locke who provided the moment for the individualization of the author and allowed for his new stature in society. Prior to *Millar*, the person who had actually brought about the work, brought it in to existence, created it, written the very words that made up the piece, was seen as someone subservient to the whole process. The law and society’s focus was on matters of control of the press, fear of sedition, and on a delegated responsibility by

¹⁸ Those provisions being that:

- a) man had ownership not only in his own body but in and over his own mind;
- b) property and title over things could be acquired by labour – and not only by mere physical labour but by intellectual labour;
- c) the taking by an individual from a commons of resources open to all could be a commons comprised of simply mere ideas;
- d) the taking did not require the consent of others;
- e) such a taking did not cut across Locke’s two important provisos on how property was to be removed from the commons, because:
- f) the commodity taken from the commons was non-rivalrous, in that ideas were infinite and as good and as enough would always be left for others, and
- g) ideas or the expression or sentiment of ideas in writing did not spoil.

¹⁹ John Locke, *An Essay Concerning Human Understanding*, Penguin Books, London, edition 2004.

²⁰ John Horton and Susan Mendus (eds), *John Locke: A Letter Concerning Toleration in Focus* (Routledge, 2004), 12-56.

²¹ As reviewed in the closing chapters below.

the Crown to the printer-publishers, who were to ensure that any work printed did not offend against the Crown or Church.

In relation to matters of authenticity and attribution, again, prior to *Millar* the author was more likely identified as the individual who had simply written the piece, typically under some great patron. The patron prevailed over the mere writer, who was often unknown or anonymous, and who wrote not for their own expression but to delight their master. As to matters of commercial exploitation and a right to be financially rewarded for the work, many in society were of the view that high praise for the work was enough and writers should not write for income. This would quickly change, as society witnessed the rise of the professional writer. The notion of the work also changed as the book as a stand-alone construct came to the fore. The literary work in its own right took on its own identity, as works came to be acknowledged in their own form and acquired a prominence in society never before seen. In a telling way, works that had a focus on personality and the individual became phenomenally popular, such as *Tristram Shandy*, *Pamela*, *Tom Jones*, *Robinson Crusoe*, *Clarissa*, and *Gulliver's Travels*. Society had no hesitation in accepting the 'fictional reality' of the characters within these works, which were enjoyed, discussed, exchanged and eagerly sought out as reading took on a new dimension of pleasure and entertainment.

The late sixteenth and early seventeenth centuries were a period of extraordinary activity. The world changed in a many fundamental ways. Within this setting, in our own story, we see a particular arc of history. Printing presses were well established in England (and the whole of Europe) by the mid 1600's.

In England, both the Crown and the Church closely monitored the printing and publishing industry, and both institutions had overlapping concerns in relation to the control of the presses. Those concerns focussed on matters of sedition and heresy.

The printing press could be used to produce works critical of and harmful to both the sovereign and the Church. Nerves were particularly frayed in a time of civil war, regicide, restoration and reformation. The law in the early seventeenth century had no concern as to author's rights of acknowledgment, author's control of the work or his

entitlement to economically benefit from the work. The law simply afforded an avenue of delegation to the printing and publishing industry to guard against civil and religious discontent.

For the Crown and Church it was simply ancillary to this that the printing industry operated as a financial concern for the benefit of its own. By 1769 these structures would be fundamentally altered. The world in this regard was tipped on its head when the normally slow-moving and conservative courts of England recognised the fundamental role of the author in the process of literary creation, accepted the singularity of the literary work, as something capable of economic exploitation, and allowed for the emergence of property rights over intangible incorporeal issues such as the right to copy a manuscript work.

The arc of progress from a world of print and publishing where there was no parliamentary and judicial regulation to one of legislation and case law, where interests were at one time restricted mainly to those who controlled the presses and publication to a world which placed at its centre the author, the work and a connecting right of ownership, was a development which could only have occurred in England, which saw a more benevolent form of enlightenment but certainly one which required the enormous influence of that giant of seventeenth century England - John Locke. It would be Locke's theory of property that would underpin the finding in *Millar* - that an author had a perpetual right to his work, due to his ownership of the work, as acquired through mental labour.

In a significant step in the history of ideas, two critical matters occurred in *Millar*. The law acknowledged that a new legal right of private property over intangible and incorporeal objects existed, with such property acquired due to intellectual labour. The case recognised not only a legal right to such property. One judge, Mansfield, also recognised a moral right to such property, a right of attribution, textual protection and accuracy. This was a new world and an important step in natural rights theory.

Chapter Two

Before Emergence: 1200 to 1450

By 1770, by relying on Locke's writings, the Courts had determined that under common law an author had unrestricted legal property in their literary creation. This entitlement to legal property gave the author the right to commercially exploit the literary composition, through the mechanical reproduction of the text by use of the printing press.

These exploitation rights were secured through the legal notion of 'copyright', which protected this new form of intellectual property. A tripartite relationship, a nexus of law, philosophy and aesthetics, had been established between the printed work, being the expression in writing of the author's own ideas and sentiment, the creative author as owner and exploiter, and the property rights at play, in both a legal and also a moral sense.

The author owned the work at law but also had certain moral rights secured in the relationship between subject and object, in matters concerning control of the work, its appearance, proper attribution to the original author and accuracy of content. This tripartite arrangement would develop over the period of 1450 to 1770, but some preliminary matters require initial review to provide an appropriate context within the history of ideas with respect to the matters under current consideration.

These concern the early use of paper and the development of the printing press. They go not only to matters of history but show the incremental developments in the history of the idea of what could amount to property and how property might be acquired.

They are also relevant because in the growing use of paper we see the move away from an oral tradition to one of literary expression; a world where ideas and knowledge were set down in permanent form; and the dramatic rise in use of the printing press, where a single manuscript work could be transferred into movable typeface and be reproduced in large and uniform quantities. The concept of the

‘author’, in the sense associated with legal and moral rights, could not have come into being without the printing press.

The emergence of the concepts under consideration¹ required two technological developments that were essential for their evolution. These were the introduction of paper, which rapidly replaced parchment as the medium to carry written information, and the development of the ability to mechanically duplicate handwritten works by the use of moveable type, with the invention of the printing press. The development of paper and the advent of printing had important implications in the history of ideas, especially in relation to the dissemination of knowledge, changing Europe from an oral to a literary tradition. The emergence of printed works would see an expansion of scholarly activity in relation to textual interpretation, especially of the newly discovered writers of antiquity, and an attempt by philosophers to achieve a harmonization between Classical writings and Christian thought.²

In relation to “literary property”, without the printing press (and the necessary paper to feed the machine) there could be no philosophical concept of “the author”. Printing of the work is a necessary prerequisite for the author’s identification – multiple copies of the same manuscript mechanically produced in a standard uniform edition, safe from the corruption found when a work is copied by hand, and the distribution of these printed copies to a wider public, are key elements of what makes the author “the author”.

This dissemination of the printed work, under the author’s name, adds to the nature of reputation and an ever-increasing awareness of the author’s own creative consciousness, an awareness of their reputation and possessive individualism in their creation of the published work, now at large in the world in numerous identical copies. Within this paradigm, the author is potentially known to many, and is a person who is aware of the wide reputation in their own-self, as author/creator of a single uniform work. Before print, there was little acknowledgment of the author *qua* author. Manuscripts were produced anonymously, without reference to the role of the author

¹ The “author”, the “literary work” and “literary property”.

² Majid Fakhri, *Averroes Ibn Rusd: His Life, Works and Influence* (Oneworld Publications, 2008), 129-164.

in production. Manuscript writers were seen more as copyists than authors, due to the large number of works produced within the religious orders (if only due to the fact that copyists were doing exactly that: copying existing works, not producing new works) but also in relation to the notion of what it meant to be a writer.³

Inherent in this is the role that commercialization would play in the emergence of the “author”. Printing allows for the commercial exploitation of a work through sale to a dispersed audience. There are economic reasons as to why the original creator of the work would want to secure proprietorship over the work. These commercial rights, however, were subordinate to those of the printers, who had spent considerable financial outlay on their business and saw the text as a minor part of the process. Early commercial rights were secured over the means of production rather than tied to the creator of the commodity.

Technological developments in paper production were important but the impact of the press was extraordinary. Printing was more than a mechanical reformatting of a handwritten manuscript. It was a revolutionary move from a world of manual copying into a sphere of “error-correction”, a consistency of work that gave a heightened claim of truth and authenticity to the work, now set out in a permanently fixed form.⁴ The author must be recognised as being integral to this process, from creation, through publishing, printing, dissemination and acknowledgement by the reading public. It would require several centuries for this recognition to come about.

Printing of a work brought to the fore the author’s inherent identity as an individual who has a right to property and control over the created work. It took time for such recognition of the author to be fully accepted. With the advent of printing, the notion of literary property as a right vested in the original creator was not known. Property was traditionally secured over tangible ‘things’ through occupation. One of the challenges that would be faced was a necessary opening up of the set of things that could be “property”, requiring acceptance of intangible incorporeal objects. Literary property would require a new theory of property rights to give it legitimacy.

³ To which see below, but in essence it was part of Medieval thought that writers were more commentators of the ancients rather than individual creators in their own regard.

⁴ Niklas Luhmann, *Gesellschaftsstruktur und Semantik, Band 4*, (Suhrkamp Taschenbuch Wissenschaft, 1995).

The impact of the printing press has been acknowledged in the history of ideas:

It brought about the most radical transformation in the conditions of intellectual life in the history of western civilization .. its effects were .. felt in every department of human life.⁵

Printing would lead to a fundamental change to the way in which information was obtained, distributed, stored, conveyed, utilised and exchanged.⁶ But it was more than a system that allowed for uniformity of information and the securing of text in permanent form. Printing allowed for the dissemination of opinions, reviews, essays, a consideration of matters observed at that time. Printing allowed for a widespread discussion of matters captured forever in one printed document, observed within a non-physical, non-proximate paradigm. Knowledge, ideas, opinions on matters could be discussed between people spread over a wide area, with discourse not within a physical public forum but a forum of pamphlets and essays.⁷ The Reformation could not have occurred without the medium of the printed word.⁸

A key philosophical change was the move from an oral accounting of knowledge to written narrative. Ideas and discourse could now be captured in permanent form. This required the skill of reading to be able to access material. Printing led to an increase in literacy. Printing also impacted upon the dissemination of ideas, upon the aggregation of knowledge, which became standardized and fixed. Hand-copied manuscripts were open to corruption through constant recopying; errors and deviations from the original text could accumulate. Printing would ameliorate such issues and see the issuing of standard uniform single editions, which would fundamentally change European consciousness. The printing of uniform maps and grammars, for example, changed peoples' thinking in providing for the first time a distinct sense of national borders

⁵ Myron Pier Gilmore, *The World of Humanism: 1453 – 1517* (Harper, 1962), 186.

⁶ Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Harvill Secker, 2014), Part Three: The Unification of Humankind, 163.

⁷ Walter J. Ong SJ, *Orality and Literacy* (Routledge, 2012), 92-100.

⁸ Andrew Pettegree, *Brand Luther: 1517, Printing, and the Making of the Reformation* (Penguin, 2016), 267.

and place-names. Information and beliefs became fixed, as Europe moved from an oral folk culture to a print culture.⁹

A necessary precondition for the invention of printing was the introduction of paper, which quickly replaced parchment, papyrus and vellum as the medium for the recording of information. Its affordability and durability saw it rapidly taken up as the preferred medium. The demands of an increasing reading public saw a need for a technological response to be able to mass produce and duplicate copies for a public with a growing desire for reading material¹⁰. The earliest paper¹¹, made with wood fibres, was developed into a product made from rags, pressed and dried into reams.¹² This was more durable and economic than the fibre-based product.¹³

Production of fibre paper (that is rag paper production) had been based in Cairo. Through Mediterranean trade, paper found its way into Europe¹⁴, replacing the once dominant Egyptian papyrus market.¹⁵ Early centres of paper production were located in Spain, with Italy soon becoming a centre for paper production.¹⁶ Production soon spread, with France and Germany developing significant paper mills.¹⁷

Paper had a significant impact upon the monasteries and religious works being produced there, and then impacted upon the secular world.¹⁸ Paper quickly replaced parchment in the scriptoria of the monasteries for the copying of holy works and books of devotion, as paper became significantly cheaper and more readily available over the 1350s.¹⁹

⁹ Walter J. Ong SJ, *Ramus, Method and the Decay of Dialogue: From the Art of Discourse to the Art of Reason* (University of Chicago Press, 2004), 313-314.

¹⁰ Mark Kurlansky, *Paper: Paging Through History* (W R Norton & Co, 2016), 77.

¹¹ Invented around 105 AD in China. See Nicholas A Basbanes, *On Paper: The Everything of Its Two Thousand Year History* (Vintage, first published 2013, 2014), 28-47.

¹² Kurlansky, *Op Cit*, at 35.

¹³ Basbanes, *Op Cit*, Chapter 4, pages 73 to 95.

¹⁴ Henry Kamen, *Spain's Road to Empire: The Making of a World Power, 1492 – 1763* (Penguin, 2002), 4.

¹⁵ See David Abulfa, *The Great Sea: A Human History of the Mediterranean*, Allen Lane, London, 2011, at page 156 to 157.

¹⁶ Lothar Muller, *White Magic: The Age of Paper* (Polity Press, 2014), 22.

¹⁷ Fernand Braudel, *The Wheels of Commerce: Civilization and Commerce: the 15th to 18th Century* (University of California Press, 1992), 318-321.

¹⁸ Michael T Clanchy, "Parchment and Paper: Manuscript Culture 1100 to 1500", in Simon Eliot and Jonathan Rose, *A Companion to the History of the Book* (Wiley-Blackwell, 2009), 194.

¹⁹ See Febvre & Martin, *Op Cit*, at pages 29 to 76.

Previously, animal hides had been the medium upon which scribes had hand-copied out religious texts. Parchment was expensive, the need for thrift in its use was often evident in the typically very crowded parchment texts that were produced in the scriptoria of the time.²⁰ Paper was, however, soon in ready supply. Its relative abundance allowed for the production of texts where words were less crowded on the paper and pages. Texts were easier to read and, therefore, more accessible. The affordability of paper allowed for uninhibited use of the material. This greater legibility and clarity of text was of real benefit to readers. Public literacy began to increase notably as people engaged with the written word.²¹

The universities quickly took to use of the new material in preference to parchment as the medium upon which to copy classics and academic texts. The demand grew for secular books not only for use by academics but also by students.²² The copyists working in the universities saw an immediate financial opportunity and one that had a major impact on the affordability of works and the growth of a literate class. Most texts in use at the universities at this time (around 1300 to 1400) were substantial.²³

The cost of producing one of these works by hand would have been prohibitive and most of the contents were superfluous to the students' needs. However, copyists working at universities took to producing limited hand-written paper excerpts of the most relevant material – these excerpts known as the *pecia* system. These were affordable for students and became widely used amongst the student body.²⁴

Copyists were now able to earn a living outside of the monasteries; universities established their own paper mills. Paris University established its mill and press in 1354. Students quickly took to buying these *pecia*²⁵ and copyists made a considerable income from the emerging student trade.²⁶

²⁰ See Muller, *Op Cit*, at page 26.

²¹ Albert Manguel, *A History of Reading* (Flamingo, 1997), 8, 116 and 279-281 (on European literacy rates).

²² Jacques Le Goff, "The Town as an Agent of Civilization" in Carlo M Cipolla (ed), *The Fontana Economic History of Europe: The Middle Ages: Vol 1* (Fontana Collins, 1979), 85.

²³ One thinks of St Augustine's *City of God* or St Thomas Aquinas's *Summa Theologica*.

²⁴ Muller, *Op Cit*, at page 32.

²⁵ The paper pieces of relevant extracts.

²⁶ Muller, *Op Cit*, at page 27.

By the late 1400s monasteries were no longer the sole producers of handwritten books.²⁷ The book-trade had begun in earnest.

These developments were important from a philosophical point of view because they meant that an increasing number of people were being exposed to and becoming familiar with the written word. Reading led to a greater exposure to and understanding of knowledge and ideas. There was a dramatic impact upon communications and increase in the transposing and storing of ever-increasingly large amounts of information.

The demand for material quickly increased and paper production sped up in the late 1400s.²⁸ The availability of written material also saw ever-increasing access to the works of classical antiquity. This allowed for the development of a scholarly culture based on textual interpretation and a search for harmonization between such early thinkers as Plato and Socrates with the teachings of the Church. Contemporary philosophers and scholars, for example, looked to reconcile the teachings of the Church with that of the early Greek and Roman philosophers, whose works were becoming available through the recovery and rediscovery of their writings.²⁹ The ideas of Classical thinkers began to be known and many writers issued commentaries on the recovered works.³⁰

The demand for paper went beyond a demand for works from scriptoria and university copyists. Paper was a versatile product, allowing for packaging, wrapping and similar uses. It was, however, in playing cards that there was significant demand.³¹ Paper was ideally suited to the production of cards and gambling drove demand.

The images on the earliest decks in the mid to late fourteenth century were by way of pictures. The copyists did not draw the pictures, but instead used an early form of

²⁷ Lucien Febvre, and Henri-Jean Martin, *The Coming of the Book: The Impact of Printing: 1450 to 1800* (Verso, 2010), 5.

²⁸ Basbanes, *Op Cit*, at page 96 and on.

²⁹ Anthony Gottlieb, *The Dream of Reason: A History of Philosophy from the Greeks to the Renaissance* (Penguin, 2016), 358-450; John Shand, *Philosophy and Philosophers: An Introduction to Western Philosophy* (Acumen, 2002), 47-69.

³⁰ Josef Pieper, *A Guide to Thomas Aquinas* (Ignatius Press, 1991), 136-137.

³¹ Muller, *Op Cit*, at page 37.

mechanised print, where dyed woodblocks transposed carved-out images onto the blank paper. There was such a demand for playing cards that soon the items were being mass-produced, albeit in a primitive way – woodblocks were unsuitable for mass production as they quickly wore out.³² This method of production in an attempt to meet the growing demand for these paper products was an important step towards the development of printing technology and the view that an answer was needed to the time-consuming process of hand-copying.

The use of paper found particular application within state bureaucracies, in trade and commerce and the law. The use of paper was driven by a sense of economic rationality with functional significance in its use as a storage medium for the new information of trade and commerce. Paper allowed for the preparation of bills of exchange – hard currency no longer had to be carried about; trade was more easily facilitated.³³ Transactions could be recorded in books of account and a supply of cheap paper meant complex methods of recording transactions, such as double entry bookkeeping, could be developed.³⁴

While the period of the 1300s and 1400s witnessed a significant increase in the number of books being produced, books were still hand-copied, there was little multiple production and negligible focus on the actual author of the piece. Muller states:

Medieval manuscripts were often a collection of writings from different authors and sources, with only a loose association between name and texts. [it would be] the printing press that led to the emergence of the modern author and to a legal and symbolic bond of ownership between texts and individual writer.³⁵

The idea of the author as an independent creator of literary work appears anathema to the medieval mind. Saint Bonaventura that to his mind there were only four ways in which a book was made:

³² Febvre & Martin, *Op Cit*, page 32.

³³ Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Phillip II – Volume II* (University of California Press, 1995), 693.

³⁴ Jane Gleeson-White, *Double Entry: How the Merchants of Venice Created Double Entry Bookkeeping* (W R Norton & Co, 2012), 91.

³⁵ Muller, *Op Cit*, page 83.

A man might write the works of others, by adding and changing nothing, in which case he is simply called a “scribe”. Another writes the work of others with additions which are not his own; and he is called a “compiler”. Another writes both others’ work and his own, but with others’ work in principal place, adding his own for purposes of explanation; and he is called a “commentator”; ... Another writes both his own work and others’ but with his own work in principal place adding others’ for purposes of confirmation; and such a man should be called an “author” ...³⁶

It is striking that in this series of definitions, that of the “author” is dependent not on a lone individual’s activity but on the author’s own work together with that of others. Authors appear to have had little concern or possibly ability in attaching their name to a work³⁷ and during the Middle Ages handwritten secular books were usually by long-passed classical writers, or the authors were simply not identified.³⁸

The comment made by St Bonaventura was very much in keeping with then current thinking as to the role of the writer. Writings of this time are mainly commentaries on classical works. It would appear to be unique to the modern concept of the author that they are capable of saying something in their own right.³⁹

By the early 1400s paper had made a significant impact. As paper books became cheaper and more readily available, demand continued to grow. This led to an increase in the size of the reading public, who continued to demand an increased output in reading matter. This demand and the business of the book-trade were greatly hampered by the current means of production. Books continued to be hand-copied, an intensive and lengthy process. A solution to this problem of supply to meet increased

³⁶ Bonaventura quote taken from John Burrow, ‘The Medieval Compendium’, *Times Literary Supplement* (London) 21 May 1976, 615, and as cited in Elizabeth L Eisenstein, *The Printing Press as an Agent of Change, Communications and Cultural Transformations in Early – Modern Europe* (Cambridge University Press, 1979), 43.

³⁷ Febvre and Martin, *Op Cit*, at page 261.

³⁸ Elizabeth L Eisenstein, *The Printing Revolution in Early Modern Europe* (Cambridge University Press, 2012), 75-101.

³⁹ The writer as the creative writer not as the mere commentator. See, for example, Anthony Kenny, *A New History of Western Philosophy*, Clarendon Press, Oxford, 2010, at pages 257 to 261 and on: Part II Medieval Philosophy.

reader demand would have to be found. The solution was the invention of the printing press. The invention of print would have a dramatic impact on society and would continue the information revolution which paper had begun. Printing would allow for the emergence of the concept of the “author” in a critical regard. Mechanical duplication of a manuscript work appears to be intrinsic to the establishment of the notion of “the author”.

The invention of printing in Europe⁴⁰ was due to three people: Johannes Gutenberg, Johan Fust and Peter Schoeffer. Gutenberg carried out the initial technological work and produced the first modern version of the printing press around 1439. By 1451 he was in full production of his major project – the printing of the Gutenberg Bible.⁴¹

Fust acted as banker to Gutenberg’s project by providing the capital for what was an expensive undertaking.⁴² Schoeffer assisted Gutenberg in early book production. Fust and Schoeffer would eventually part ways with Gutenberg⁴³, but there was little doubting the impact Gutenberg had on printing and book production. Gutenberg continued to improve on his press and the technology quickly developed. By 1465 the printing press was in a form that would remain relatively unchanged for 200 years. Almost immediately, book production took off as presses spread across Europe. William Caxton introduced printing in England in about 1476. In the period of incunabula⁴⁴, over 1450 -1501, about 20 million books were printed.⁴⁵

With respect of the place of the book in the history of ideas, and of relevance to issues such as identity of the author, the acceptance of the book as an object capable of ownership, and an emerging consciousness of the creative individualism of the author

⁴⁰ Printing required three elements: the use of movable type – being letter blanks which had been cast in metal and used to impress paper; a fatty or oil-based ink – which could take purchase on the type and then the paper to which the type was applied; and the press itself – which required a degree of improvement on current technology, such as that used in viticulture and wine production and indeed the earlier forms of paper production where the press was a simply screw system which revolved down – this was problematic in printing as the rotating movement would displace and skew the paper surface to which the type was to be affixed, in that the press had to not rotate down on to the moveable type but stay with a constant uniform pressure across the paper on which the type was to be printed. See Febvre and Martin, *Op Cit*, at page 54 to 55.

⁴¹ Lotte Hellinga, “*The Gutenberg Revolutions*” in Eliot & Rose (editors), *Op Cit*, at page 208 to 209.

⁴² Febvre, *Op Cit*; at page 55.

⁴³ Peter Watson, *Ideas: A History from Fire to Freud* (Phoenix, London, 2006), 519-520.

⁴⁴ Incunabula: an early printed book, and especially one printed before 1501.

⁴⁵ See Febvre and Martin, *Op Cit*, at page 248.

as owner of that property, printing had a profound effect. Printing led to the standardization of texts. The invariable errors that would creep into books as they were hand-copied did not occur in printing. Print meant a uniformity of type, font and style. The printed work as it was disseminated in its multiple copies would be uniform and consistent, for example, each and every map of the continent would have the same boundaries and borders, and could be viewed by very many.⁴⁶ One person's idea of a national boundary would now become the same as another person's, although they were many miles apart. This fact that widely scattered readers could view the same words and images simultaneously was a communications revolution.⁴⁷

Prior to printing, many maps were not produced for reasons of geography or cartography, but were produced as a result of property disputes or of major landowners delineating their property.⁴⁸ Maps began to be published and printed for reasons of uniform geography, critical to navigation and to show national borders – which in turn lead to an emerging sense of national identity. The printed map provided a subliminal sense of legitimacy – critical at a time when European nation-states were emerging.

Printing also allowed for those involved in book production to start to place their names within the finished product. It was very rare that a copyist was identified on the handwritten work, but almost immediately printers started to identify themselves on the printed work – usually on the very first page, a position of prominence. There were also the first beginnings of the recognition of the author, not necessarily from the point of view as the creator and owner of the work at hand – that would take more time, but more along a reputational line. One of the more powerful impacts of the very many editions of the works of Martin Luther that were printed during the early Reformation was that people became familiar with his image as it appeared on the frontispiece of his works.⁴⁹

⁴⁶ John Brian Harley, *The New Nature of Maps, Essays in the History of Cartography* (Johns Hopkins University Press, 2002), 147.

⁴⁷ Eisenstein, *The Printing Revolution in Early Modern Europe*, at page 24.

⁴⁸ Michael Swift, *Historical Maps of Europe* (PRC Publishing, 2000), at page 23.

⁴⁹ Eisenstein, *The Printing Press As An Agent of Change*, at page 234, and at pages 303 to 313.

Eisenstein notes this reproduction of the author's image could have had an enormous impact, because when influential figures are given faces and features, they acquire a more distinctive personality – through the medium of the printed work.⁵⁰

Printing also led to a revolution in the cataloguing of information. As more information became set down in recorded form, it was necessary for it to be accessible. Publishers and librarians set about designing systems that would allow for access through the development of cataloguing systems.⁵¹

One important way in which printing was a significant agent of change was that for the first time in the history of ideas, notions, concepts, ideas, processes, rules and so on became fixed as to time and expression. Handwritten texts were always open to corruption and were not durable. Versions of hand-copied texts could differ due to error or self-editing. Manuscripts also quickly deteriorated through use and due to their relative scarcity, were often scraped clean and reused: the palimpsest process.

Printing on paper set ideas down with a marked degree of permanence. Ideas on a particular notion could be set down in one single uniform standard expression and work to bring together a large number of variables of the notion under consideration that may exist. The notion of, for example, “French” cooking, standard recipes, did not take on a single coherent form until the early 1500s, due in large part to the introduction of printing.⁵² The recipe then became fixed in time.

Print had had a preservative power as to a single point in time. Printing both preserved and codified.

Printing also made things irrevocable. For example, with the advent of printing, there was no need for the Crown to keep reproclaiming the Magna Carta or various

⁵⁰ *Ibid, Op Cit*, at page 234 in particular.

⁵¹ Roger Darton, “From Printing Shop to Bookshelves: How Books Began the Journey to Enlightenment Libraries”, in Alice Crawford (ed), *The Meaning of the Library: A Cultural History* (Princeton University Press, 2015), 91-92.

⁵² Barbara Ketcham Wheaton, *Savouring the Past: The French Kitchen & Table From 1300 to 1789* (Chatto & Windus, 1983), 27.

iterations of it.⁵³ Printing of statutes on paper allowed for their widespread distribution and acceptance as the law of the land at that time and it to the future. In England, where the law developed around notions of prior judgment and precedent, printed case law was especially significant in fixing law in time and expression.⁵⁴

Finally, in a way similar to this notion of fixing, printing also allowed for the emergence of the reputation of the writer. Printing saw the first steps in recognition of the full creative and highly individual role of the author in the creation of the text, a work produced due to the author's own unique creative skills and extension or manifestation of the author's own creative abilities and individualism.

Writers realised that they could achieve a kind of 'immortality' by means of print. Print bestowed personal celebrity. Print allowed for a new mode of identity – and one expressed in conjunction with the work in question. Consider the fame and status conferred on writers such as Rabelais and Montaigne. Print provided multiple versions of the fruits of the author's creativity to be disseminated to the many. The printed work captured the creative skills of the author.

Notions of plagiarism and copying others work began to emerge. More importantly⁵⁵, with printing it now became possible to distinguish between composing a poem and reciting one; to distinguish between writing a book and copying one.⁵⁶ Books could now be classified as something other than hand-markings on parchment, as a stand-alone work but one capable of widespread distribution. This was the duplicative power of print.

The businesses of publishing, printing and bookselling soon established themselves as major economic activities. Notions of investment and profit drove the industry as the book was quickly seen as a commodity to buy and sell like other commodities. By

⁵³ John Hamilton Baker, *An Introduction to English Legal History* (Butterworths LexisNexis, 4th ed, 2002), 181-182.

⁵⁴ *Ibid, Op Cit*: "the printed [law book}... had the apparent advantage of providing...reports of an accepted authenticity and ... a standard method of citation.": an example of **both** fixing **and** cataloging now available through print.

⁵⁵ See Eisenstein, *The Printing Revolution in Early Modern Europe*, at page 95.

⁵⁶ *Ibid, Op Cit*. at page 94 and 95.

1500 the printed book had established itself as an item in demand. The shift from the copyist's desk to the printer's workshop was complete.

It was in this new world that the concept of "the author" was to emerge and develop. This would require a sophisticated market in book-production and sales. Demand for product would be integral to this process. It would not be too long until disputes arose as to what rights existed in relation to the product and what, if any, property could be said to exist in the work.

For the next 300 years, the economic rights of those who controlled the means of production would be primary to those who had created the work. It was the control of the machinery of production not the creation of the product that would dominate and be central to the early trade. Printing was an expensive business, and printers required a return on capital before any other interests were recompensed or acknowledged. Tensions though would eventually develop between economic, legal and creative rights as these competing forces drove the emergence of the three matters under current consideration

In the early period of the commercial exploitation of the book as a commodity, the printer and publisher held the dominant rights and control over the works in issue. It would take some 300 years for the balance to swing away from the printing trade and for the rights found to exist in literary property to be secured in the author. This recognition that an author had legal rights secured in the text would require a new form of property theory, as the law was that property was based on occupation over a corporeal tangible object. The notion that incorporeal rights over intangible objects such as 'ideas' could amount to property would greatly challenge the legal courts and infuse the philosophical debates that would ensue over the next 300 years.

Chapter Three

The emergence of “the author”: 1450 to 1600

While the introduction of paper and the invention of the press were essential prerequisites that allowed for the emergence of our three concepts, the commercial exploitation of the text and the ever-increasing demand for the book as a commodity during the period considered in this chapter brought to the fore the notion of the “author”.

This emergence of the author was an incremental process that would begin with little acknowledgement of the role that “the author” played in the production of the book, only to culminate in the full legal and philosophical realisation of what it meant to be “an author” - to have imprinted one’s personality on the work; to have legal title and property in the literary work created by the author; and also to have rights of attribution, control and textual correctness over the work vest in the author .

The reason for this slow development was that to lay a claim to ownership and the commercial benefits that flowed from the sale of the product required an acknowledgment that property rights existed in the text.

At the time of the emergence of the printing industry, property rights *per se* were secured through long-held limited concepts of the occupation of tangible, corporeal goods. With the emergence of the text and the involvement of the author in the creative process, there existed no satisfactory theory of how creativity could provide a legal property right over an incorporeal intangible item, such as the expression in the text.

How an author might acquire property rights at law over a text was an issue that would receive no explicit determination until 300 years later. Over the period 1450 to 1600 as this chapter explores, any concept of ownership over the work was secured through a process of registration, with ‘ownership’ of the text not by way of title or a

substantive property right at law but by licence or privilege granted to the printer-publisher.

Government regulation of texts existed due mainly to concerns over sedition and censorship, not based simply on the economic rights of printers or publisher, let alone the legal or moral rights of the creative author. A grant of limited ownership by the Crown to the printer-publisher meant that the presses could be controlled. There was no concern as to how authorship with its intellectual labour might give exclusive ownership over the text. That an author might acquire property rights over his work through the application of mental labour was a matter that would not be considered until the mid-1750s, and would require a new theory of private property, obtained from the writings of Grotius, Pufendorf and, most importantly, Locke.

In the period under current consideration, there was no existing theory of property rights that recognised property over something as amorphous as the literary text. Incremental change was necessary to move the balance of dominance from those who controlled the means of production, backed by the State for political reasons, to those whose intellectual labour had produced the literary work.

The period over which this evolution took place would see a change of emphasis within the book-trade from marketplace economics to a world centred on a liberal culture of possessive and creative individualism, as commercial interests gave way to individual-creator rights. By the 1790s, Europe would see a world in which the manufacturers were secondary players in the process, and one where the author had reached a status close to ‘consecration’.¹ It would also be a period in which the meaning of the ‘copyright’ would change.

Early notions of ‘copyright’ carried an idea akin to a grant of a limited licence to publish and print a work. As authors’ rights came to the fore there began a legal and philosophical change in the underlying notion of what ‘copyright’ meant: not simply the right to publish the work – but, importantly, the right to own the work in issue, as a piece of literary property: to have a legal title to the property in the work, to control

¹ Vincenzo Ferrone, *The Enlightenment: A History of An Idea* (Princeton University Press, 2015), 112.

that work and ensure its integrity. This was a significant change, as rights and law moved from a focus on regulation to ownership.

The new structures that were embodied in the eighteenth-century notion of what copyright meant, being a specifically modern institution, were born out of the tensions and imbalances between manufacturers' economic interests and authors' rights, historical forces at play in the early period of the book-trade, from 1500 on.

Critically, it was due to this process that notions of the individualisation of the author and authorial creativity started to emerge from the shadows of the dominant economic interests: a coming into consciousness of what and who an author was, what their 'identity' was comprised of², together with an acknowledgement of what role and rights they had appurtenant to their product and how they stood within the world of the printed book and book-trade. The book would become an example or extension of the author's own creative personality and individualism.

This evolutionary process occurred over the period 1500 to 1644, when economic rights and financial interests had prominence to the detriment of other rights and interests. This process would eventually culminate in the case that will be considered in later chapters, *Millar v Taylor*, with the Court's acknowledgment of the importance of copyright as the fundamental institutional embodiment of the author-work relation.³ Copyright would come to affirm the author as owner.

Copyright would also change its original meaning to relate not simply to a right to print and publish but to raise the author as creator above the interests of the manufacturers and sellers. By the end of the 1700s, copyright would become a notion rooted in the English legal and economic system. It would also become a notion rooted in our conception of ourselves as individuals with singularity and personality.⁴

² Isaiah Berlin, *The Power of Ideas* (Princeton University Press, 2000), 47 (especially discussing Locke on the notion of 'identity').

³ Mark Rose, *Authors And Owners: The Invention of Copyright*, Harvard University Press, Cambridge, 1993, 1.

⁴ L Ray Patterson, 'Free Speech, Copyright, and Fair Use' (1987) 40(1) *Vanderbilt Law Review* 1; see also Rose, *Op Cit*, *ibid* and on.

One main reason for the emergence of the concept of the author over the period of 1500 to 1640 was the ever-increasing demand for new copy to meet the demand from a growing number of readers. Publishers ran out of product. They could no longer publish only classical works⁵ and religious and devotional texts (works over which no one claimed ownership); these comprised a limited number of titles. Demand for material increased, as the reading public demanded not only the classics, religious texts, legal books but also atlases, maps, cookbooks, manuals of instruction and so on.⁶

But there were also other factors at play. The demand for books and the growth of the publishing industry⁷ over the 1500s was due to three main reasons: the rapid establishment of the book-trade as an economic activity; the emergence and dramatic increase of the literate class; and, the constant search for new material to publish.

The book-trade was well established by the 1500s. Fifty years after Gutenberg had produced his first works in 1451, the printing trade had quickly spread.⁸ Caxton had printed the first work in English in 1473 while in Europe, where he learnt the new trade. By 1476 he had established the first printing press in London⁹, publishing the *Canterbury Tales* in 1477. Caxton produced works mainly for the English Crown, particularly legal and government texts. He relied upon the financial support of patronage from the nobility.¹⁰ Printing quickly expanded beyond London to other major cities throughout England and Scotland, notably Edinburgh, with presses established at the universities of Oxford and Cambridge. The printing industry was, however, predominately based in London, where booksellers also thrived.¹¹

⁵ Paul Johnson, *A History of Christianity* (Penguin Books, 1990), 269. By 1515 not a single major Greek classic writer remained unpublished.

⁶ Deirdre Nansen McCloskey, *Bourgeois Equality: How Ideas Not Capital or Institutions Enriched the World* (University of Chicago Press, 2016), 388-400.

⁷ Ferrone, *Op Cit*, at page 167 to 168.

⁸ Frederic Barbier, *Gutenberg's Europe: The Book and the Invention of Western Modernity* (Polity Press, 2017), 139.

⁹ Richard Deacon, *William Caxton: The First English Editor, Printer, Merchant, and Translator* (Frederick Muller Limited, 1976), 35.

¹⁰ John Rigby Hale, *Renaissance Europe: 1480 to 1520* (Collins Fontana, 1971), 127.

¹¹ See above, Bucholz & Ward, *Op Cit, Ibid*.

As the new industry established itself, the number of readers quickly increased: printing encouraged literacy.¹² The combined use of paper and of mechanical duplication meant that books became affordable for most classes, a fact recognised by Parliament in 1544 when reviewing items for sale throughout England.¹³

Book-ownership became increasingly common, first with the possession of religious and devotional works but then with a developing appetite for all manner of titles. Reading was no longer the preserve of the monastic orders¹⁴ - there began an ever-increasing demand for books more secular in nature.¹⁵

Another consequence of the book-trade meant that reading habits changed. With a scarcity of works when produced by hand, reading was intensive and reflective: the same work was repeatedly reread and considered over and over again. With the wide range of material available due to printing, reading became extensive; people read more widely and broadly.¹⁶ Printed books were also more durable, and could withstand numerous readings. Parchment had been precious and needed to be locked away. With the new technology, borrowing libraries began to thrive.¹⁷ Mechanical duplication fundamentally changed access to information, knowledge and ideas.

Within this economic activity, consumer demand drove trade and, with economic-circuitry, supply drove demand. Publishing and printing became a major economic activity, with the book-trade a significant part of the European economy by 1525 as economic historians such as Sella and Cipolla have noted.¹⁸ Financial interests would dominate the early industry.

¹² Steven Roger Fischer, *A History of Reading: Globalities* (Reaktion Books, 2003), 99-107.

¹³ Joyce Youings, *Sixteenth-Century England* (Penguin Books, 1984), 97-98.

¹⁴ Stephen Greenblatt, *The Swerve: How the World Became Modern* (W M Norton & Co, 2011), 24-29.

¹⁵ Lynette Hunter, "Books for Daily Life: Household, Husbandry, Behaviour" in John Barnard & D F McKenzie (eds), *The Cambridge History of the Book in Britain: Vol IV: 1557 – 1695* (Cambridge University Press, 2014), 514-532.

¹⁶ Robert Chartier, "Reading Matter and 'Popular' Reading: From the Renaissance to the Seventeenth Century", in Guglielmo Cavallo and Roger Chartier, *A History of Reading in the West* (Polity Press, Cambridge, 1999), 269.

¹⁷ James MacGregor Burns, *Fire and Light: How the Enlightenment Transformed Our World* (St. Martin's Press, 2013), 47-48.

¹⁸ Domenico Sella, "European Industries 1500 to 1700" in Carlo M Cipolla, *The Fontana Economic History of Europe: The Sixteenth and Seventeenth Centuries: Vol 2* (Fontana Collins, 1974), 380-382.

The nascent book-trade required substantial capital to establish the printing-publishing process, and to produce and distribute the new commodity. Significant capital was required to develop the moveable typefaces, construct the presses, assemble paper and ink, and pay the workers, engravers and printers. Capital was also required to ensure distribution to lucrative markets.

The process of getting the product from the presses and to the fairs, markets and newly established bookshops¹⁹ required significant investment.²⁰ From the industry's earliest years, the focus of the manufacturers and financiers was a return on investment. Printers and booksellers worked for the sole purpose of profit.²¹ Their significant expenditure and the resultant economic interests to their mind required government and legislative protection.

It was unclear, however, what actual rights and direct interests the manufacturers and booksellers had in the commodity they had produced. The focus of the early grants issued by Crown and Parliament were not in respect of notions of property or ownership of and over the text but based on more limited rights of privilege, grant, permission or limited licence to print and sell the text in issue. This was reflected in the early laws introduced concerning the printing industry.

Legislatures did not confer property or ownership rights over the texts upon the early manufacturers and sellers, but instead granted the more limited right of the privilege to print the relevant work for a limited period of time. One probable reason for this limited grant was that the bestowing of an exclusive licence on the printer gave the printer the necessary protection and opportunity to ensure a profitable commercial exploitation of the text. Regulation sought to ensure an economic return on the publishers' investment.

Another reason why such grants were limited to licences and were not direct property rights, was because the law did not accept the notion of there being ownership over

¹⁹ The first mention of a bookshop appears it would seem to have been in about 1500 in a poem, *des dance macabres* as per Barbier, *Op Cit*.

²⁰ Peter Watson, *Ideas: A History from Fire to Freud* (Phoenix, London, 2006), 518-519.

²¹ Lucien Febvre, and Henri-Jean Martin, *The Coming of the Book: The Impact of Printing: 1450 to 1800* (Verso, 2010), 249.

something as intangible as the expression contained in a written text and the subsequent right to copy that original work.²²

The first printing privilege was granted around 1469 by the Venetian Senate to Johannes de Speyer. Speyer was granted the right to print the works of Cicero for five years to enable him to recoup his investment in producing the works.²³

The privilege gave Speyer no ownership over the works; the monopoly simply provided him with an opportunity to recover his costs. Over the next decade, governments across Europe and England became aware that printing was a costly exercise that required some form of regulation and protectionism to allow the industry to flourish.²⁴

The free flow and distribution of printed material were of significant concern to the authorities where the material was seditious or heretical. There were economic and political benefits to the state in regulating the printing/publishing industry.²⁵ Caxton introduced printing into England around 1476. The book-trade quickly became established and England soon reflected the early form of regulation seen in Europe.²⁶ Grants of privileges and indulgences, from the Crown, the Church and courts protected the earliest rights of printer-publishers²⁷ but this system also meant that the Crown had direct control over what could and could not be printed and who was undertaking the printing.

From about 1518 English monarchs granted limited printing privileges to printer-publishers exercising the long-standing right of the Crown: the Royal Prerogative. The monarch granted printers, publishers and the early booksellers either a particular

²² Brad Sherman, and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760 to 1911* (Cambridge University Press, Cambridge, 1999), 9-43.

²³ Febvre & Martin, *Op Cit*, at page 262.

²⁴ Rose, *Op Cit*, at page 10.

²⁵ Andrew Pettegree, *The Invention of the News: How the World Came to Know Itself* (Yale University Press, 2015), 41.

²⁶ Frederic Barbier, *Gutenberg's Europe: The Book and the Invention of Western Modernity* (Polity Press, 2017), page 87, and also throughout that work.

²⁷ John H Langbein, Renee Lettow Lerner and Bruce P Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions*, Wolters Kluwer (Aspen Publishers, 2009), 248 (concerning emerging powers of the English courts such as the King's Bench).

patent, being an exclusive right to publish a particular work for a limited time, or a general patent, being a right over a class of works.

As had been the case in Venice and other European cities, such rights did not amount to a form of corporeal property but functioned as a more limited licence or a restricted grant for a limited use. Again, the focus was upon the printer-publisher as the subject integral to the commodity. Little regard was paid to the author's role in the industry, let alone to the creation of the commodity. No regard was paid by the early regulators to any notion of the author's ownership over or property in the work.

As noted, Crown regulation from 1518 was not only an acknowledgement that economic investment in the book-trade required protection. It was also the means by which the Crown could control what was printed, published and distributed. This was the Crown's primary concern: surveillance and censorship, not economic interests.

These were difficult times, with the early years of Elizabeth's reign marked with a heightened degree of anxiety over possible invasion and religious discontent. Control of information was paramount.²⁸ Accordingly, while protection of their significant investments was of primary concern to the early printers and publishers, of more immediate concern to the Crown was the issue of censorship and effective control of the press.

Economic and political interests converged. The earliest form of printing patent in England was granted to Richard Pyson. Pyson established one of the earliest publishing houses. In 1521 he would publish and distribute Henry VIII's attack on the Reformation.²⁹ The Crown was also concerned with the speed with which printed material could be produced and distributed. It was critical for the Crown to be sure that it had control over what material was being produced. These were unstable times for the Crown, with the country alive with political and religious dissent.³⁰

²⁸ Stephen Alford, *The Watchers: A Secret History of the Reign of Elizabeth I*, (Penguin, 2013), introductory section.

²⁹ "*Assertio septem sacramentorum adversus Martinum Lutherum* (1521)", which resulted in Henry VIII being granted the title of "Defensor Fidei", Defender of the Faith.

³⁰ David Loades, *The Tudors: A History of a Dynasty* (Continuum Press, 2012), 86-88 and 164-166, for example, dealing with the Rebellion in the North.

The Crown continued to protect the industry through early legislation. An important step was taken to safeguard the book-trade by excluding foreign copy and preventing it from entering the kingdom with the introduction of the first piece of legislation in this regard the *Printers and Binders Act 1534*.³¹ The Crown and the book-trade soon began to work in a symbiotic way, with the Crown ultimately handing control of the presses over to the publishing trade, but in return for a policing role to be undertaken by the printer-publishers. The Crown saw the direct advantages in controlling not what was being printed but controlling those who did the printing.

As the system of privileges, patents and licences developed over the period of 1518 to 1557, driven by the Crown, with its focus on censorship and sedition, the book-trade took on a more organised and unified identity. Over this period, London saw the rise of the guild system in the printing industry.

Guilds had long been in existence in respect of the variety of trades. Each guild operated as a monopoly.³² For example, the Worshipful Company of Goldsmiths controlled the goldsmith trade. One could not work as a goldsmith without being a member of that guild. All other guilds operated the same way.³³

The early printers soon saw that an exclusive right to the copying and distribution of books was fundamental to the success of the book-trade.³⁴ The guilds which had been involved in the earliest period of the book industry, the enamellers, the weavers, the binders and paper makers, came together and formed a guild specific to publishing and printing – the Worshipful Company of Stationers.³⁵

The Stationers' Company was founded in 1403, as a guild focussing on the crafts of illuminating, copying, bookbinding and bookselling.³⁶ With the emergence of print in

³¹ Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (University of Chicago Press, 2010), 65.

³² Liza Picard, *Elizabeth's London: Everyday Life in Elizabethan London* (Weidenfeld & Nicholson, 2003), 232-233 (for a lively review of the city's guild network in the 1500s).

³³ Steven A Epstein, *Wage Labor and Guilds in Medieval Europe* (University of North Carolina Press, 1991), 87-89.

³⁴ A J K Robinson, 'The Evolution of Copyright, 1476 to 1776' (1991) 22 *Cambrian Law Review* 55.

³⁵ Charles Robert Rivington, *The Records of the Worshipful Company of Stationers* (Trieste Publishing, 2017) (see throughout concerning history and structure of guild).

³⁶ Blayney, Peter, *The Stationers' Company Before the Charter, 1403-1557* (Worshipful Company of Stationers & Newspapermakers, 2003) <[52634009](#)>.

the early 1500s, the Company had become a guild focused on printing³⁷ drawing together all trades associated with mechanical book production. It came to dominate the book-trade and established a monopoly over printing and publishing, in the same way that the other guilds controlled their trades. The Stationers' Company only allowed for the printing of material that had been registered with the Company. It was registration of the work not its creation that facilitated commercial exploitation of the work.

The Company was focussed on securing the investments and the economic interests of its members rather than providing any acknowledgement or giving consideration to the interests or rights of the author. Any notion of copyright, as acquired through registration with the Stationers' Company, amounted to a right to print. Entry in the register did not protect the work of and in itself. Registration simply protected the printer's right to publish. The Company actually kept a written register (comprised of numerous volumes) in which was recorded in writing all works and their respective 'owners' – those who asserted a right to print and publish the work in issue. The early right to copy and commercially exploit the work was secured through this process of registration.

The Company operated on the basis that it was the right to control the copying of the text that was fundamental to the new wholesale trade³⁸, not the direct ownership or original creation of the material.

A critical development occurred in 1557, with the granting of a Royal Charter to the Stationers' Company by Queen Mary. The charter provided a Crown sanctioned legal monopoly on printing and publishing. The Company now oversaw a formal cartel and controlled all printed works.

Elizabeth I renewed the charter in 1558, as she was deeply concerned with control of the press and censorship issues.³⁹ The arrangement with the Company served these purposes.

³⁷ Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, 1968), 28.

³⁸ See Robinson, *Op Cit, ibid* and on.

³⁹ Cyndia Susan Clegg, *Press Censorship in Elizabethan England* (Cambridge University Press, 2003), at page 3.

In 1586 a decree by Court of Star Chamber concerning printing extended the powers of the Company. By 1600 the Stationers' Company had total control over the publishing and printing industry, due to the combined effect of the Royal Charter and the Star Chamber decree⁴⁰. This control by the industry meant that it was the trade and not the creator that fashioned early notions of copyright.⁴¹ Importantly, this control was self-governed and was in practice more economic than political⁴², let alone legal, in nature.

This private cartel was of direct benefit to the Crown. It allowed the Crown to delegate surveillance of the press directly to the Stationers' Company. The 1557 charter that established the Company expressly stated that the reason for the granting of the charter was not to secure the printers' rights over the material that they copied but to allow for a more effective system of government surveillance through the Company.⁴³ The grant of monopoly to the Company was the *quid pro quo* for the surveillance and censorship work the guild carried out for the Crown.

By 1600 the Stationers' Company had complete dominance over the book-trade. It was a dominance that was to continue for the ensuing century, but it would come under attack from 1640, due to two significant events.

In 1641 Parliament, in an attempt to curtail the power that Charles I was exerting through the judges and privy councillors, abolished the Court of Star Chamber. Star Chamber had had jurisdiction over printing and publishing disputes, dealing with early matters of right to print and copy. This court had protected the book-trade in many ways.⁴⁴ In 1637, Star Chamber declared that all printers were forbidden from printing any work that had not been entered in the registry maintained by the Stationers' Company. With the abolition of the Star Chamber an important restriction

⁴⁰ Howard B Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright* (1983) 29(3) Wayne Law Review 1119, 1134.

⁴¹ See Robinson, *Op Cit, ibid*.

⁴² See L Ray Patterson, *"Free Speech, Copyright and Fair Use"*, *ibid* and on.

⁴³ See M Rose, *Authors and Owners*, *supra*, at page 12.

⁴⁴ John Hamilton Baker, *An Introduction to English Legal History* (Butterworths LexisNexis, 4th ed, 2002), 98, 117 and 474.

and policing on what could and could not be printed was removed⁴⁵; now anything could be printed without restriction or oversight by the court system.⁴⁶

Then, in 1642, for the first time, Parliament (not the Crown) acknowledged that the economic exploitation of a work through printing should reference the author. It is unclear as to why this happened at this particular moment. It would seem to be connected to the fact that with the abolition of Star Chamber a significant number of anonymous pamphlets and tracts were being published which were critical of both the Crown and the Parliament.⁴⁷ It may be the case that Parliament's central concern was imposing mandatory attribution so as to be able to take action against the author of any offending material. The consequence was, however, a formal step towards recognition of the author and his connection with the text.

In January 1642 Parliament issued an edict stating that the Stationers' Company was now ordered that:

the printers do nether print nor reprint any thing without the Name and consent of the Author.⁴⁸

This marked a fundamental change. The edict marked the beginning of an emphasis on proprietorship and the emergence of the ideology of authorial creative individualism, as the Company began to change from a regime of regulation to a regime of ownership.

The dominance of the Stationers' Company over 1500 to 1642 in the book-trade did not mean that no consideration had ever been given to the rights of authors or that there was no understanding of the role and right they played in the book-trade over this time. What was important was that the early dominant economic rights focussed on the right to print due to registration and not on ownership of the original text as secured through creation. At this time, economic rights trumped creative rights.

⁴⁵ Mark Rose, *Authors and Owners*, at page 15.

⁴⁶ Rose, *Op cit; ibid.*

⁴⁷ Mark Rose, *Authors and Owners*, at page 22.

⁴⁸ Rose, *Op cit, ibid.*

These issues of authors and authors' rights and roles had to be worked out in the shadows of the market forces then at play. Authors' rights were secondary rights, subservient to the economic interests at issue. There would, however, be an emerging idea of creative individualism and developing possessive individualism, the idea of an individual having ownership and property over their own-selves and their skills, skills which allowed for certain creativity and creations which were by implication an extension of the individual..

Possessive individualism refers to that notion that the world is a thing owned by individual people *qua* the individual and that each individual is an owner of him or herself. The individual is the sole proprietor of their own skills and owes nothing to society for these and such skills, like creative writing, can be used as a free form of commodity and traded in a market place.⁴⁹ In essence, the individual is free in his own right to have exclusive control of his own person and capacities and in this same way is the proprietor of his own person and capacities and anything that might result from these capacities or skills, such as creative writing and authorship. Notions of possessive individualism only started to take hold in the late sixteenth century.⁵⁰ While market forces were at play, equity and fairness were also important issues. While the concept of possessive individualism has been subject to some criticism⁵¹, it is of value in its focus on a system that ensures dignity and rights to all members of society and is according some value and recognition still.⁵²

It is incorrect to say that during this period no regard was given to the role and interests of the author of a work. The sheer cost of time and money in producing a manuscript work by hand, however, and the fact that most copyists worked in monasteries or religious orders meant that the majority of works in existence over 1200 to 1450 were religious works, with no ascribed author, and were mainly copies

⁴⁹ Crawford Brough Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press, 1979), 263-270.

⁵⁰ Macpherson, *Op cit, ibid.*

⁵¹ See especially Christopher Hill, "Possessive Individualism" in *Past & Present*, Volume 24, Issue 1, April 1963 at pages 86 to 89.

⁵² See, for example, John Finnis, *Justice As Fairness, A Reinstatement*, (Belknap Press, 2001).

of the Bible.⁵³ Even with the advent of the printing press, most of the very early printed books were religious, just as had been the case with manuscript production.⁵⁴

It has been estimated that of all works produced over 1450 to 1520, three-quarters production were religious texts.⁵⁵ Very few of the early devotional works had any identified author. It was more likely than not that the mark of the printer and publisher would always be noted at the very front of the work – and it was not uncommon for the identity of the attributed author to have been made up⁵⁶, if indicated at all.

As the price of books fell and the reading population increased, people sought material other than works of devotion⁵⁷ – this was the time of the Reformation with an ever-increasing demand for secular works. This was particularly so in England⁵⁸ where printers were given some liberties as to what they could publish and print in addition to the main religious works. Faced with this increasing demand for secular works, printers first found a ready source of material in the classics, from Greek and Latin texts through to works such as the *Decameron*.⁵⁹ This was a finite supply, however, and reading habits quickly changed, as the new literate classes sought works on politics, anatomy, medical texts, and works detailing the discoveries of the age.⁶⁰

Even by 1500, the earliest forms of travel guidebooks were in demand, which detailed the pilgrimage routes of Europe⁶¹. The extent of armed conflict also appears to have fuelled a huge demand for works dealing with warfare and conflict.⁶² In response to this clamour for ‘new product’, printers and publishers and began to seek ‘fresh copy’

⁵³ Edward Dolnick, *The Clockwork Universe: Isaac Newton, The Royal Society, and the Birth of the Modern World* (Harper, 2011), 63-64.

⁵⁴ Raymond Clemens, and Timothy Graham, *Introduction to Manuscript Studies* (Cornell University Press, 2007), 181 (see Part 3).

⁵⁵ Robert Fossier, “The Reconquest of Man” in Robert Fossier (ed) and Sarah Hanbury Tension (trans), *The Cambridge Illustrated History of the Middle Ages: Vol III – 1250 to 1520* (Guild Publishing, 1986), 495-496.

⁵⁶ See Barbier, *Op Cit*, at page 214 and also Febvre, *Op Cit*, at page 261.

⁵⁷ Darmaid MacCulloch, *The Reformation: A History* (Viking, 2004), 72.

⁵⁸ MacCulloch, *Op Cit*, at pages 69 to 70.

⁵⁹ By the Italian Giovanni Boccaccio, written about 1353, and actually a series of novellas.

⁶⁰ See Febvre et al, *Op Cit*, at page 280 and on.

⁶¹ Jonathan Sumption, *The Age of Pilgrimage: The Medieval Journey to God* (Hidden Spring, 2003), 376-377.

⁶² Geoffrey Parker, *Global Crisis: War, Climate Change & Catastrophe in the Seventeenth Century*, Yale University Press, New Haven, 2013, at page 26.

from authors⁶³. This search for material witnessed the first steps in the acknowledgement of authors and their role in the process of book production.

The advent of the press and the explosion in printing were essential for the emergence of the new concept of the author.

As Barbier claims:

the last profession associated with printing, one that was born because of it, was the profession of the author.⁶⁴

In the early stages of printing, authors often assumed a role in the process of production as much as did the papermakers and printers, in that they would be present at the presses to ensure correct type and to address any errors.⁶⁵ This involvement was recognised as affording the author a certain dignity in respect of both his role and the work.⁶⁶ This was, however, an involvement in mere production.

In relation to property and profit, the author ranked last. Any publisher or bookseller had a recognised right to print and sell any work that they had managed to procure and register without any consultation with the author⁶⁷, and over 1450 to 1550 it was the usual practice for authors to sell their work and manuscript outright to a publisher for a one-off sum. There was little regard for the author as one who wrote for income or profit. Reward was usually through a system of patronage, where one would dedicate one's work to a wealthy patron or member of the nobility, who may in return make some form of payment or provide a limited income.⁶⁸ Many thought that sheer acclamation for the work produced should be enough.

Printing was to change this, as profits notably increased and the book-trade became a significant part of the economy. Authors became aware not only of the economic

⁶³ David Shaw, "The Book-trade Comes of Age: The Sixteenth Century", in Simon Elliot and Jonathan Rose (eds), *A Companion to the History of the Book* (Wiley-Blackwell, 2009), 220.

⁶⁴ Febvre et al, *Op Cit*, at page 159.

⁶⁵ See Barbier.

⁶⁶ Barbier, *Op Cit*, at page 138.

⁶⁷ Febvre et al, *Op Cit*, at page 162.

⁶⁸ Febvre, *Op Cit; Ibid.*

value of their creation, but something much more subtle was occurring with the process of mechanical duplication and the circulation of large numbers of the author's work. The writer became aware that with sometimes hundreds if not thousands of copies of their work in circulation, they became aware of their individual reputation and their ability to claim ownership over their own skills and talents and the products that resulted from an application of these skills.⁶⁹ Similar issues were occurring with respect to painters and sculptors who began to stress attribution and began to seek recognition and reputation throughout society.⁷⁰ Created works came to be seen as the personification, the embodiment of the original creator.

Where once honour and reputation had been reward enough, and many thought that genuine authors should not write for profit, the next one hundred years saw the individualization of the author, borne of a notion of original genius and creativity, where the author would start to receive almost cult status⁷¹ - the valorisation to which Foucault refers.⁷²

It would be a period in which society recognised the author as someone quite separate from mere mechanical invention and one caught up in the originality and individuality of creation, where one's works were one's own to both control and to exploit, and also works imprinted with the very personality of the author.⁷³ An important development would occur in 1642 when through a parliamentary Edict considered in detail below, for the first time Parliament recognised the role and importance of the author in the book-trade.

It would be an era too when political and religious censorship began to wane. From the mid-seventeenth century the scales were tipping away for the dominance of the book manufacturers towards the author – and the notion of literary property. The next century would be critical – especially in relation to the development of the concept of the author and also for the emergence of the notion of the literary work and literary property. It would be a period where state control over the book-trade moved from the

⁶⁹ Febvre, *Op Cit*, at page 261.

⁷⁰ Consider Vasari's *The Lives of the Artists*.

⁷¹ This is certainly what happened to the likes of Shakespeare and to a certain extent Christopher Marlowe.

⁷² See Michel Foucault, "What Is An Author?", in *The Foucault Reader*, supra, at page 101.

⁷³ Febvre, *Op Cit*, at pages 214 and on.

sovereign to the Parliament⁷⁴, where the balance started to shift from the dominance of rights through registration to rights acquired through creativity. The shift from the printer to the author as the dominant rights-holder was to begin.

⁷⁴ Peter DeGabriele, *Sovereign Power and the Enlightenment: Eighteenth Century Literature and the Problem of the Political* (Bucknell University Press, 2017).

Chapter Four

First steps: “literary property” as something belonging to “the author”; the beginnings of the assertion of a “right”: 1600 to 1644

The notion of the author is an early-modern concept, borne of the press, the mechanical duplication of the same work distributed under the author's name to a large audience. It is also reflective of the unique emergence over the period under current consideration of the notion of human rights, rights inherent in the individual, with a line of authority traced through a long corpus of writings on natural law.

As we have seen, it was not always so. The author was often not in contemplation¹, with little consideration of any legal ownership or property rights that the author might have over the work. Critically, an understanding of “rights” at this time was considerably different to today's understanding and classifications as will be considered below.

This was due to a limited consideration over the course of preceding centuries of what individual “rights” were and how they were protected. The law and philosophical thinking would need to evolve in this regard. Before this occurred, there were issues that needed to play out in respect of the author and how the text was secured to that person. Politically, there would also be a change in the control of the book-trade from the Crown to Parliament.

As has been considered, at the beginning of the 1500s, as an occupation a writer could fill any number of roles in the basic processes of book-production: copying, abridging, correcting, translating, or composing², in keeping with the then current

¹ Nicola Miller (ed), *What is an Author?* (Manchester University Press, 1993).

² David Finkelstein, and Alistair McCleery, *An Introduction to Book History* (Routledge, 2013), 70.

views on the secondary relationship of the author to the text.³ Little attempt was made to assert the identity of the author as *the* person intrinsic to the text.⁴

The economic right to publish a text based on ownership of the manuscript at that time carried more weight than any claim to ownership due to creation of the text. Attribution carried little value and appears to have frequently not been demanded.⁵ As Pettegree notes, authorial attribution⁶ was frequently missing from earliest incubala and, if attribution did appear, it was often inaccurate or identities were ‘made up’.⁷

In manuscript production, attribution to famous writers, names such as Ovid and Plutarch, was used not to ascribe veracity to the author but to assign authority to the truth of the text.⁸ As Wogan-Browne notes:

... well into the early modern period, it was age, authenticity, and conformity to truth, not industrial genius that was thought to confer authority on texts⁹

The author, their identity and creative role, were separate and well-removed from the text.¹⁰

Over 1500 to 1600 there had been little room for authorial integrity or dignity, as earlier chapters have seen. This would change over the course of the next century, as this chapter will now consider. The period would see a shift from texts being tied to printers to texts being tied to authors. Fundamental to this process would be a change in control of the process of production, away from an *ad hoc* grant of the Crown to rule through Parliament, overseen by a developing and professional legal system. This

³ Nigel J Morgan, and Rodney M Thompson (eds), *The Cambridge History of the Book in Britain: Vol 2: 1100 – 1400* (Cambridge University Press, 2008).

⁴ Margaret Connolly, “Compiling the Book”, in Alexandra Gillespie and David Wakelin (eds), *The Production of Books in England: 1350 to 1500* (Cambridge University Press, 2011), 138 and 141.

⁵ David McKitterick, *Print, Manuscript and the Search for Social Order: 1450 to 1830* (Cambridge University Press, 2003), 52.

⁶ Noting who the author of the text was.

⁷ Andrew Pettegree, *The Book in the Renaissance* (Yale University Press, 2010), 65-90.

⁸ Finkelstein and McCleery, *Op Cit, ibid.*

⁹ Jocelyn Wogan-Browne, et al. (eds), *The Idea of the Vernacular: An Anthology of Middle English Literary Theory: 1280 to 1520* (University of Exeter Press, 1999), 6.

¹⁰ Alastair Minnis, *Mediaeval Theory of Authorship: Scholastic Literary Attitudes in the Later Middle Ages* (The Scholar Press, 1988), 10.

change was essential to allow for the emergence of literary property rights and an acknowledgement of the author as the creative force in the production of the text. Also fundamental to this evolution would be the ongoing development of natural law theory and the emergence of the relatively new concept of natural rights.

The period would see a dramatic development in the concept of what natural rights were, how they were formulated, and how certain claim-rights might entail in individuals in particular ways. By the time of the English Civil War, society would see the beginnings of the acknowledgement of certain inherent natural rights that individuals possessed, together with a view that certain of these rights, such as life and liberty, were inalienable and could not be removed or assigned.

This examination by jurists, philosophers, politicians and religious movements had a direct bearing on the acknowledgement of the individual as a unique entity, which, in turn, would have an impact on the emergence of the author and an acknowledgement of the natural rights that were entrenched in the author, embedded in the literary work.

Prior to this period, which marked the first consideration of modern notions of natural and human rights¹¹, literary property rights came not through notions of legal property secured over the text and tethered to the author as creator but through a system of patronage.¹² It is of benefit to briefly review the prior system of patronage before embarking on a review of natural law and the emergence in the seventeenth century of natural rights theory.

Patronage took on two main forms.

Firstly, it related to how the author might be acknowledged by the State, with privilege and patent bestowed through Crown grants and letters patent.

Secondly, it also related to how the author might derive some indirect financial reward, working within a noble household. In this regard, authors were not seen as

¹¹ Joseph Boyle, "Natural Law and the Ethics of Traditions", in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992), 3-30.

¹² Adrian Johns, *The Nature of the Book: Print and Knowledge in the Making*, (University of Chicago Press, 1998), 56.

belonging to a profession who were provided with direct payment for their work. Writing was seen as a leisurely pursuit. What the author might receive some reward or support for was for dedicating works to his patron. Support was not based on a sale of the text from creator to any patron¹³ or for undertaking intellectual labour.

There was also no consideration that authors might have a moral claim over their work, independent from any legal claim. Such an assertion of moral rights over literary works, rights which secured matters to the author such as attribution, protected against plagiarism, afforded reputation and ensured textual accuracy, would come later in the early 1700s.

In the period prior to the seventeenth century, it was common for authors¹⁴ to act for benefactors who might provide sustenance and accommodation.¹⁵ There was no market place exchange of goods within the relationship.

The relationship did not amount to any sale of property.¹⁶ It was one of ‘paternalistic’ support.¹⁷ It meant that the author could become subordinate to the interests of the patron, losing any intellectual independence and often control over the text.

Authors were often compromised when they were required to write in a way that reflected their patron’s interests¹⁸, especially so during the Civil War.¹⁹ There was little room for any individualism or claim for individual creativity, with any singularity of the author being attributed to his relationship to the patron, not to the dedicated work. Patronage also took on another form, in the way in which the Crown and the state regulated the book-trade.

¹³ See A Taylor, “*Authors, Scribes, Patrons and Books*”, in Wogan-Browne et al, *Op Cit*, 1999.

¹⁴ And, of course, in this regard also poets, playwrights, painters and so on in the creative arts (see Straznicky below).

¹⁵ See Finkelstein and McCleery, *Op Cit*, at page 73.

¹⁶ Marta Straznicky, “Plays, Books and the Public Sphere” in M Straznicky (ed), *The Book of the Play: Playwrights, Stationers and Readers in Early Modern England* (University of Massachusetts Press, 2006), 15.

¹⁷ Finkelstein and McCleery, *Op cit, ibid.*

¹⁸ Cynthia Jane Brown, *Poets, Patrons, and Printers: Crisis of Authority in Late Medieval France* (Icatha, Cornell University Press, 1995), 106.

¹⁹ John Brewer, *The Pleasures of the Imagination: English Culture in the Eighteenth Century* (Farrar, Straus and Giroux, 1997), 163.

Over the Tudor and Stuart periods, any economic rights that were contained within a written work were protected by way of a privilege granted by the Crown in direct respect of the printing/publishing of that work.²⁰ Written works and their control were tied to printing rights more than to ownership rights. The right to copy a work amounted more to a permit to print a work than ownership of the text.²¹

The earliest printing privileges were tied to the publisher and not to the text or its author/creator. The privilege was a gift of the Crown by way of the Royal Prerogative, not of the Parliament.

A critical printing privilege was bestowed by Mary I in 1557, by the ‘Royal Charter to the Worshipful Company of Stationers’. Through this monopoly, the Stationers’ Company assumed extraordinary powers, not only in relation to ownership but also in search-and-seizure and bringing legal actions against those who were in breach of the system.²² As we have seen, Elizabeth renewed the charter²³, cementing a private system of copyright that protected the Company’s right to publish with no acknowledgement of authors’ rights.

The Charter operated so that the right to copy registered works amounted to a private legal right rather than a public law copyright.²⁴ The Company was self-regulated and self-governed: it brought its own actions for any infringement of its rights in its own courts. The Charter also provided a perpetual term of control and economic exploitation. As long as a work remained registered with the Company, it remained in the control of the registered name. Perpetuity suited the Crown’s focus on censorship and so too the economic interests of the Company.²⁵

The powers of Stationers’ Company granted under the two charters were enhanced by a declaration of the Court of Star Chamber in 1586.²⁶ The declaration increased the

²⁰ Not through an acknowledgement of an existing property right at law.

²¹ Trevor Ross, ‘Copyright and the Invention of Tradition’ (1992) 26(1) *Eighteenth Century Studies* 1.

²² See for example, Mark Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press, Cambridge, 1993, at page 12 and on.

²³ In 1559, having ascended to the throne in November 1558.

²⁴ L Ray Patterson, ‘Copyright and “the Exclusive Right” of Authors’ (1993) 1(1) *Journal of Intellectual Property Law* 1, 9-12.

²⁵ L Ray Patterson, *Op Cit*, at page 11.

²⁶ A declaration of the Court of Star Chamber made 22 June 1586.

policing-powers of the Company²⁷ and consolidated the private monopoly over the printing and publishing industries.²⁸ It entrenched the notion of private law copyright, with ownership again being based on registration, not on creation. By the beginning of the 1600s the structures in place that afforded protection and control over printed materials were not conducted through public institutions. No legislation existed concerning these arrangements. Rights were bestowed under arbitrary Crown privilege, with no direct Parliamentary involvement. Crown privileges amounted more to a private licence to print than to a direct notion of a legal property right in the work. The author was absent from this paradigm.

This ‘loose’ arrangement, not sanctioned by Parliament, suited the parties to the arrangement. For the Crown, it brought the benefits of revenue and press censorship at a critical time.²⁹ For the Company, it provided a perpetual private monopoly. Through the system of pre-publication registration, the text was tied not to the author, the creator, but to the printer/publisher. Crown privilege focused on the investor. Much would change over the course of the next century.

In 1553 Richard Tottel received a royal patent in relation to all published law books.³⁰ This was a right that had no connection with the original authors of the texts. It was a right more economic in nature and not in any way grounded in the act of creativity by the individual author. At this time, the notion of individual rights was far-removed from modern understandings of rights that individuals might have under posited³¹ law or a moral or natural law system.

As Finnis and others note³², the period of the seventeenth century saw a dramatic change in the notion of rights and the beginnings of the modern concept of “natural

²⁷ Again, of direct benefit to the Crown; Stephen Alford, *The Watchers: A Secret History of the Reign of Elizabeth I*, (Penguin, 2013).

²⁸ See Cyndia Susan Clegg, ‘The 1586 Decree for Order in Printing and the Practice of Censorship’ (1995) 2(1) *Ben Jonson Journal* 9.

²⁹ D F McKenzie, “*Printing and Publishing 1557-1700: Constraints on the London Book-trade*”, in John Barnard, Donald Francis McKenzie, and Maureen Bell (eds), *The Cambridge History of the Book in Britain: Vol 4: 1557 – 1695* (Cambridge University Press, 2002), 553-562.

³⁰ Christopher A Knott, “Richard Tottel: The British Book-trade 1475 – 1700” in James K Bracken and Joel Silver (eds), *The Dictionary of Literary Biography: Vol 170* (Gale Research, 1996).

³¹ Posited law is law set out in statute as ‘created’ by man.

³² See, for example, John Finnis, “*Natural Law and Legal Reasoning*”, in George, supra, at pages 134 to 157; Lloyd L Weinreb, “*Natural Law and Rights*”, in George, supra, at pages 278 to 305; Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of*

rights”³³, an acknowledgement that certain rights were inalienable to the individual. Moral claims over certain issues were also becoming identified as rights.

Natural rights theory emerged and evolved over the course of the seventeenth century, emanating out of a long-standing body of writing on matters concerning natural law. The two concepts of natural law and natural rights were closely related but critically different. Natural law related to those laws or precepts which were an expression of the laws of the Creator, the order of nature and the demands of reason. Importantly, they were external to the individual. The unique development of natural rights at this time was concerned with rights which emanated from the individual and was in many key ways a new way of looking at such issues.

The reasons for the emergence at this time of a particular understanding of what natural rights were and how they might be founded are complex. Natural law theory had long been examined but, importantly, at this time there was a considered return to a fresh examination of natural law theory, led by Hugo Grotius.³⁴ It was an examination that John Locke would also take up.

It is important at this point to examine natural law theory for the purposes of this ongoing discussion.

Natural law theory is difficult to define. However, for the purposes of this thesis it is necessary to elaborate some of its key features.

Natural law theory comprises both moral and legal theories. It is moral in part, as it considers that moral standards are objectively derived from human nature, identified through right reason, existing *a priori*, with such laws often being described as precepts. It is also legal, holding that the authority of legal standards are derived from the identified objective natural law and moral standards that support these natural laws, separate and distinct from man-made laws.

Ideas (Continuum, 2005); Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford University Press and Clarendon Press, 1991); and, especially, Thomas Mautner, “*Natural Law and Natural Rights*”, in Peter R Anstey, *The Oxford Handbook of British Philosophy in the Seventeenth Century*, (Oxford University Press, 2013), at pages 472 to 497.

³³ Especially claim-rights entailed within individuals.

³⁴ Hugo Grotius, Dutch humanist and jurist ,1583 to 1645.

Issues bound-up in natural law theory had long been considered by philosophers, jurists and political players.

Aristotle had identified a natural moral order, which provided universal criteria for evaluating the legitimacy of positive law; natural justice was a universal system that had validity for all people and for all time.³⁵

The Roman Stoics³⁶ had a similar view, believing there was a universal moral code that originated in God's rational will.³⁷ For the Roman jurists natural law ensured the world's harmonious order. Cicero had written:

True law is right reason in agreement with nature. It is valid for all nations and all times. Human legislation cannot repeal it. We know it by looking inside ourselves. God is the author. If we disobey him, we deny our own human nature, and the penalties will be dire.³⁸

Early Christian writers followed a similar argument, with Aquinas writing in the *Summa Theologiae* that under *lex naturalis* a moral law existed, whose principles were timeless and universal.³⁹ For Aquinas, natural law was an incarnation of God's eternal law, perceived through our own faculties, apart and independent from revelation.⁴⁰

Subsequent philosophers continued this discourse. The writings focused on issues of *ius* and *dominium* – considerations of rights under natural law and posited law, and of ownership and control of objects. Central to these considerations, especially to the earliest Franciscans, were the questions of what entitlements and obligations existed in a moral universe, beyond man-made law, discoverable through right reason and what rights existed in pre-civil society.

³⁵ Charles M Young, "Justice", in Georgios Anagnostopoulos (ed), *A Companion to Aristotle* (Blackwell, 2009), 457-470.

³⁶ Especially Marcus Tullius Cicero.

³⁷ Paul J Du Plessis, *Cicero's Law: Rethinking Roman Law of the Late Republic* (Edinburgh University Press, 2018), introduction.

³⁸ See Mautner, *Op cit* at page 473, from Cicero, *The Republic*, 3.22, 33.

³⁹ Peter S Eardley, and Carl N Still, *Aquinas: A Guide for the Perplexed* (Continuum, 2010), 74-86.

⁴⁰ Mautner, *Op cit, ibid.*

Matters of natural law theory were considered in Reformation England. Richard Hooker wrote his influential work *Of the Laws of Ecclesiastical Polity* around 1594. For Hooker, natural law was an expression of God's eternal law, where divine decree directs everything according to its proper purpose. For Hooker, the eternal law was:

that Order, which God before all ages has set down to do all things by.⁴¹

Within natural law theory, the relevant precepts are known independently of revelation, through reason, the 'candle of the Lord' and 'the intellectual lamp in the soul'.

Natural law and its contents for the early English philosophers of the late sixteenth century, such as Samuel Parker and Robert Sharrock, could be determined empirically (hangovers serve a proof that excessive drinking is wrong⁴²), through common sense or through empirical evidence. Regardless, natural law was obligatory, and represented the will of God.

As Tuck and others note⁴³, the ongoing consideration of natural law began to decline during the late Renaissance, due in large part to the upheaval in trade and the number of conflicts that occurred.⁴⁴ Thinkers, especially jurists, early canon lawyers and philosophers moved from a consideration of universal moral codes and natural law theory to an emerging humanist view: that it was for mankind to proclaim what laws existed for the running of the state and these laws did not have to accord with any universal moral precept.⁴⁵

⁴¹ From *Of the Laws of Ecclesiastical Polity*, 1. 16. 1:120-121; and see Mautner, *Op cit*, at page 474

⁴² See Mautner, *Op cit*, at page 477.

⁴³ Richard Tuck, *Natural Rights Theories: Their Origins and Development* (Cambridge University Press, 1981).

⁴⁴ See, for example, J R Hale, *War and Society in Renaissance Europe*, Fontana, London, 1985, see pages 40 to 41.

⁴⁵ Hanna Gray, "Renaissance Humanism: The Pursuit of Eloquence" in Robert Black (ed), *Renaissance Thought: A Reader* (Routledge, 2001), 60-67.

Grotius took a different view, arguing in *De Iure* and *De Iure Belli ac Pacis* for a view of justice that was potentially a return to the world of Aristotle, holding that what God has shown to be his will, is law.⁴⁶

Grotius was, however, of his time. His writings in many ways provided a justification for Dutch economic and colonial expansion. To establish legitimacy for the new world order, Grotius returned to a consideration of what matters existed before civil society. Critically, he considered what the things were which man had to abandon as he moved from a state of nature to civil government. Grotius looked at whether a moral order existed that preceded existing social conditions. One of the main issues examined in this consideration of natural law were concepts of “freedom” and “liberty” – whether man could voluntarily give up liberty and freedom (an important consideration in a time when Europe was fast becoming involved in the slave trade) and, if not, what an individual’s rights were as to liberty.

Grotius’s writings took hold in England. One of the first to consider the matters was John Selden⁴⁷. Selden seized on many of the points that Grotius had considered in his writings.⁴⁸

Of concern to Selden, in distinguishing between ‘true’ and ‘conventional’ moral principles, was the issue of an individual being true to all bargains he made. Selden reflected upon “obligation”, “liberty” and “agency”. As a lawyer, Selden believed that English law was a thing of constant change and must be capable of accepting new constructs and relationships.⁴⁹ Selden started a philosophical conversation that was to last through the 1600s, involving many thinkers of the day, such as Vaughan, Parker and Hobbes.

This was a period of upheaval, with the overthrow and execution of Charles I and the start of the Civil War. Many sought a justification for the dramatic change in the political system and turned to a consideration of what pre-civil society had looked

⁴⁶ See Tuck, *Op cit*, at page 59.

⁴⁷ John Selden, jurist and legal scholar, 1584 to 1654.

⁴⁸ Ofir Haiivry, *John Selden and the Western Political Tradition* (Cambridge University Press, 2017), 194-201 (re Grotius).

⁴⁹ See Tuck, *supra*, page 87.

like, how the transition to a political community had occurred. Discussion also touched upon what were things of ‘value’, what claims and interests might have been assigned away during it and to allow for the transition from a state of nature to an ordered civil society. For the new voices in society, the emerging religious and political movements, one thing that no man could give away was his liberty.⁵⁰

From this time, the concept of individual rights, such as a right to liberty, and duties, such as a requirement to keep all covenants, began to emerge. The period also saw the beginnings of a consideration of certain rights being inalienable and protected under natural law. It would take another half century for natural law rights to be fully explored and sourced through a natural law theory outlined in Locke’s work on property rights, the *Two Treatises*⁵¹ and also addressed in other works, such as the *Essay*.

Locke’s significant influence on the emergence of natural rights will be discussed in detail in later chapters. He did also write extensively on matters of natural law. He considered natural law and its precepts capable of being found through empirical reason:

The idea of a Supreme Being, infinite in Power, Goodness, and Wisdom, whose Workmanship we are, and on whom we depend; and the *Idea* of our selves, as understanding, rational Beings, ... would ... afford such Foundations of our Duty and Rules of Action, as might place *Morality amongst the Sciences capable of Demonstration*.⁵²

As Locke expressed in the *Two Treatises*⁵³, some precepts were capable of determination only through revelation, some independently of revelation, and some through both means, and Locke saw no disharmony in this view.

⁵⁰ See Tuck, *Op cit*, at pages 157 and on, in relation to the Quakers and Calvinists and the Diggers, Ranters and Levelers.

⁵¹ Considered in depth below in later chapters.

⁵² See the *Essay*, at IV.iii.18 and Mautner, *Op cit* at page 478.

⁵³ See at I.63, II.31 and II 52; see also Mautner *Op cit, ibid*.

Howsoever determined, for Locke the precepts had their origin in the authoritative will of God, which was just and benevolent and mankind was obligated to God out of such gratitude for His works. God has a right of such dominion and a right to set such precepts, as a Creator's authority over his productions, as he describes in the *Essay*:

He has a Right to do it We are His Creatures; He has Goodness and Wisdom ...; and He has power to enforce it by Rewards and Punishments, of infinite weight and duration, in another Life: for nobody can take us out of His hands.⁵⁴

Locke touched again upon natural law theory again in the *Two Treatises*. It is within that work, as will be considered in detail below, that Locke turned his thoughts to issues not only of natural law but, significantly to natural rights: rights that emanated from the will of the individual not from the will of God. This was a consideration of internal rights unique to the individual *qua* individual, possessed of their own sovereign realm with a right and liberty to the individual's own actions.

This consideration of human rights and their content, distinct and discrete from long existing considerations of natural law was new and unique and would prove of significant import in relation to the emergence of authors' rights, not only legal but moral rights over works. As can begin to be appreciated, moral rights were unique and of and in themselves and marked the individualisation of the author's creative task.

It is important to deal first with some immediate issues before turning to a greater discussion on the emergence of natural rights.

Returning to the regulation of the printing industry, the system of Crown control continued to grow in the Stuart period.⁵⁵

Over 1600 to 1640 the Crown introduced measures that impacted on the economy, with restraint on imports and control of labour, in the absence of legislation and with

⁵⁴ See the *Essay* at II.xxviii.8; and Mautner Op cit at page 480.

⁵⁵ Graham E Seel and David Lawrence Smith, *Crown and Parliaments: 1558 – 1689* (Cambridge University Press, 2001), 38.

little regard for Parliament.⁵⁶ Previously, there had been an acceptance that the Royal Prerogative and a grant of Crown privilege were suitable ways of securing financial investment and protecting new inventions. As Elizabeth faced revenue difficulties, she resorted to granting patents as a way of raising revenue. While early patents dealt with technological developments, such as furnacing, mining and steel production, Elizabeth abused the prerogative, issuing unmeritorious monopolies.⁵⁷

This was unacceptable to Parliament and tensions developed. A paradigm shift occurred as a result of this. Whereas in the past, rights had been private and distributed under the monarch's discretion, public institutions now sought to intervene. This would lead to a more formal recognition of the underlying rights at play. It was an important development in the change from the text being tied to the printer/publisher to becoming tied to the author. It would see a beginning of the end of 'ownership' through registration.

In 1601, tired of "odious monopolies", Parliament debated reforming legislation.⁵⁸ The bill was withdrawn after criticism from Elizabeth.⁵⁹

In 1602, James I ascended the throne. He continued the abuse, with no regard for Parliament. Public outrage intensified and Parliament was forced to act. There was an extensive parliamentary review of the royal patents system, culminating in the passing of the *Statute of Monopolies*, passed in 1623.

The statute was an important step towards the recognition of the author and author's rights. It put an end to the *ad hoc* involvement of the monarch in intellectual property matters, began an erosion of the private rights of the Stationers' Company, and brought into being legislation to regulate such matters. Disputes were now determined before the Courts by way public actions. The personal and *ad hoc* nature of the informal system was coming to an end. There was now a statutory or a legislative dealing with monopoly rights.

⁵⁶ Barry Coward, *The Stuart Age: England, 1603 to 1714*, (Routledge, 5th ed, 2014), 38 and 121 (concerning the Stuart rule without recourse to parliament).

⁵⁷ Adam Mossoff, 'Rethinking the Development of Patents: An Intellectual History, 1550-1800' (2001) 52 *Hastings Law Journal* 1255, 1264.

⁵⁸ Being a draft of *An Act for the Explanation of the Common Law in Certain Cases of Letters Patent*.

⁵⁹ Michael Wogan, *Introduction to Patent Law* (Rutgers University, 2015), Chapter 2.

The statute marked a transition from an agrarian to a nascent capitalist economy, a move from custom to statute. Such a change would be critical to the move from texts being tied to printer-publishers to texts being tied to authors. The new world as regulated through the legislation and enforced by the Courts would allow for the acceptance of incorporeal property rights and examine how such rights are acquired. It would also allow for the evolution of the concept of a 'rights', as foreshadowed by Selden, in his view that the law could change to account for new constructs.

Despite the introduction of the statute and the increasing role of Parliament in nascent intellectual property issues, disputes were still heard by Star Chamber.⁶⁰ Any concerns that Stationers' Company had as to whether their monopoly was under threat due to the statute was put to rest by a decree of the Star Chamber, issued in July 1637.

Star Chamber had been a court that sought to protect the Crown interests. The Statute of Monopolies had undermined the monarch, curtailed the Royal Prerogative, and continued the ever-increasing tension between Crown and Parliament. The statute had sought to ensure that Parliament had control over the granting of rights for inventions and discoveries.

Matters were fraught under James I⁶¹ and affected his relationship with Parliament, which sought to limit royal power and formalise control. When Charles I took the throne in March 1625 matters deteriorated. In 1629 after attempts by Parliament to curb the Royal Prerogative, Charles prorogued Parliament and ruled in a dictatorship for 11 years by placing the country under his direct personal rule.⁶²

It was at this time that Star Chamber issued a "Decree Concerning Printing", with the King's blessing and support. The decree was important. It asserted the Crown's control over seditious material, making it an offence to publish or sell "any seditious,

⁶⁰ Not a truly public court, one still more concerned with protecting the monarch's interests.

⁶¹ S J Houston, *James I: Seminar Studies in History* (Routledge, 1995), 89-98, and generally throughout on James I's relationship with his Parliaments.

⁶² Richard Cust, *Charles I: A Political Life* (Routledge, 2007), 104-196 (on the years of personal rule) and chapter 4.

scismaticall, or offensive Bookes or Pamphlets”.⁶³ It reasserted the long-standing monopoly of the Stationers’ Company, specifying that no material could be published unless it had first been entered in the Company’s registry. Charles wanted to continue the policy of delegating control of the press and censorship to the Company in return for the granting of monopoly rights.

These moves to control the press through censorship and registration had a direct impact upon the emerging notion of “the author”. Authors had a developing relationship with society, the reading public and government. These relationships differed. Authors engaged with society through recognition of their role in the process of writing, as the individual whose skill brought the work into existence. For the authorities, under the decree, the relationship was predicated on control and manipulation of the work, the author was secondary. The decree entrenched the long-standing arrangement that placed registration and licensing at the centre of control, to the ongoing detriment of the author/creator.⁶⁴

The decree, however, was not as regressive as it may have first seemed. Indeed, it marked an important step in the emergence of the recognition of the author and his direct association with the literary work. This was because the decree, for the first time in a formal instrument, mandated that in every work the names of the printer *and* of the author must be shown. This was a significant development. For the first time author’s rights were formally elevated as to identity and the right to be associated with the work to something on par with the rights asserted by the printer-publisher.

Shortly after Star Chamber issued the 1637 decree, Charles came under significant financial pressure due to armed conflict and politicking. It became necessary to recall Parliament to allow for the passing of finance bills. Money was required for the wars with Scotland and the Bishops.⁶⁵

⁶³ *Historical Collections of Private Passages of State: Vol 3: 1639 to 1640*, D Browne, London, 1721, pages 306 to 316.

⁶⁴ John Brewer, “*Authors, Publishers and the Making of Literary Culture*”, in Finkelstein and McCleery, *Op Cit*, at page 320.

⁶⁵ Brian Quintrell, *Charles I: 1625 to 1640* (Routledge, 1993), 58-68.

The Short Parliament was convened in April 1640 and the necessary finance bills were passed. Charles then prorogued Parliament. It became necessary to recall Parliament and in November the Long Parliament assembled and considered appropriation bills.⁶⁶

Parliament became concerned with the Charles's ongoing abuse of Star Chamber, noting that the court had been used as a substitute for Parliament. Parliament noted that decisions made by the Court were favourable to Charles. Accordingly, in 1640 Parliament abolished Star Chamber, passing the *Habeas Corpus Act*, which ended the jurisdiction of the Court. As the Court was the authority behind the registration system and supported the monopoly arrangement of the Stationers' Company, its abolition had significant repercussions for the Company.

The Court's abolition removed the regulatory system, allowing for unrestricted and unregulated printing and publishing. Now almost anything could be published, without restriction or repercussion.⁶⁷ For a brief period regulation of the press was non-existent. The abolition of the Court was significant. Arber describes the abolition as:

the utter shattering and breaking up of the old order of things and the commencement of an increasing liberty of printing.⁶⁸

The Stationers' Company became concerned about its future and its control of the industry.⁶⁹ Parliament further asserted its authority over printing with the issuing of an edict in January 1642 that further regulated the trade. This edict was a critical step in the emergence of authors' rights.

⁶⁶ Angus Stroud, *Stuart England* (Routledge, 1999), 75-85; Barry Coward, *The Stuart Age: England: 1603 to 1714*, supra, 2014, see pages 170 to 232 for a comprehensive review of the Long Parliament.

⁶⁷ Mark Rose, *Authors and Owners*, supra, at page 15.

⁶⁸ A J K Robison, "The Evolution of Copyright, 1476 – 1776", citing Arber, in (1991) 22 *Cambrian Law Review* 55 at page 64. Edward Arber edited the work known as *A Transcript of the Registrar of the Worshipful Company of Stationers, 1554 – 1610* (1875).

⁶⁹ Marjorie Plant, *The English Book-trade: An Economic History of the Making and Sale of Books* (George Allen & Unwin, 1974), 35 and 122-146.

The edict mandated that the author must be identified in the printing of material but also stipulated “that ... Printers⁷⁰ do neither print nor reprint any thing without the Name and Consent of the Author”.⁷¹ Rose describes this edict as the first affirmation of the existence of an authorial interest in a literary work.⁷²

While Loewenstein and others have questioned the significance of the edict⁷³, it marked a subtle but important shift in government concerns. The edict was important to notions of “the author” and “author’s rights”, it was the first time within a public institution, the Parliament that the author’s right as to ownership was acknowledged and consent to publication required. This was a shift towards the tying of the text to the author. This requirement of ‘consent’ was the first time that a degree of dignity and significant recognition had been afforded to the author. The author now had a fundamental role to play in the mechanical reproduction of the text, more than just the creation of the manuscript, different from a world where authorial control and input ceased once the manuscript was handed over to the printer. A sense of “authorial” integrity and respect was emerging.

Commentators have questioned the importance of the edict to authors’ rights, because most legal disputes involved cases between printers and publishers on the one hand and third parties, with little involvement concerning authors. While cases might reference the author, the author’s position remained marginal in the proceedings. No case sought to establish a common law right of the author in the work.⁷⁴

With its monopoly being eroded, the Company realized it was necessary to act. It had lost support from the Crown. Industry control was now in the hands of Parliament. The Company petitioned Parliament⁷⁵, asked the House to restore powers to the Company to allow it to regulate the book-trade, reminding Parliament that this was essential to control the spread of seditious works; the increasing spread of “odious and

⁷⁰ ie the Company of Stationers.

⁷¹ Journal of the House of Commons, Minute Book, Volume 2, 29 January 1641, 402.

⁷² See Mark Rose, *Authors and Owners*, *supra*, at page 22.

⁷³ See especially Joseph Loewenstein, *The Author’s Due: Printing and the Prehistory of Copyright*, University of Chicago Press, Chicago, 2002, at page 162 and on.

⁷⁴ See Mark Rose, *Authors and Owners*, *supra*, at page 22 to 23.

⁷⁵ In 1643 in the form of a pamphlet, *The Humble Remonstrations of the Company of Stationers to the High Court of Parliament Concerning Star Chamber*.

opprobrious Pamphlets of incendiaries” was because the Company had lost its control.⁷⁶

The petition advocated the need for regulation of the press and protection of proprietary copies. The petition spoke in terms of “authorial rights”. This was important. While the message of the petition was motivated by concern over the monopoly and the Company remained focused on regulation through registration, it was now thinking in terms of direct ownership and rights.

The Company had realised that if it wished to maintain its control it must be seen to be concerned with authorial proprietary rights.⁷⁷ This was a disingenuous position for the Company to take, but it indicated that the Company had sensed a change in mood and accepted that any debate on regulation of the book-trade had to allow for the author. The Company was ready to champion the interests of the author, if only for its own ends.⁷⁸

The Company’s petition was well received by Parliament, who saw a benefit in renewed press control.⁷⁹ Accordingly, Parliament issued⁸⁰ an ordinance, the Licensing Order, 1643.⁸¹

The order re-established the old controls in favour of the Company: the requirement of pre-publication registration, the powers of search-and-seizure, and the destruction of seditious books. The Company was again given the censorship responsibility in return for monopoly rights.⁸²

As Robinson acknowledges, under the Licencing Order the state and trade system was completely reinstated⁸³, but now the Crown censorship system had been replaced with a state-controlled censorship regime. Overall control and delegated responsibility no

⁷⁶ See A J K Robinson, “*The Evolution of Copyright: 1476-1776*”, *supra*, at pages 56 to 57.

⁷⁷ See M Plant, *Op Cit*, at page 122, and that chapter.

⁷⁸ See Mark Rose, *Owners and Authors*, *supra*, at pages 16 to 17.

⁷⁹ Cicely Veronica Wedgwood, *The King’s War: 1641-1647 – The Great Rebellion* (Collins Fontana, 1958, 1977), 139 (concerning the winter of discontent).

⁸⁰ 14 June 1643.

⁸¹ Referred to in Parliament as *The Ordinance for the Regulating of Printing and for Redressing Disorders in Printing*.

⁸² See A J K Robinson, “*The Evolution of Copyright: 1476-1776*”, *supra*, at page 65.

⁸³ A J K Robinson, “*The Evolution of Copyright: 1476-1776*”, *supra*, *ibid*.

longer emanated from the Crown or Crown Courts but from Parliament⁸⁴, which had recently sought to overthrow the King.⁸⁵ The battle between the Crown and Parliament led to the ultimate climate of constitutional discord as the Civil War approached.⁸⁶ It seemed as if the old ways of ownership through registration and monopoly control centred in London had returned albeit with a different master, in the form of Parliament.

But these were different days, as the Reformation took hold. The European mind was changing⁸⁷ in relation to matters of religion and political consciousness.⁸⁸ Things were particularly acute in England, where Parliament would take the dramatic step of bringing a monarch to trial for crimes against his subjects in the pursuit of tyranny and high treason.⁸⁹

As Hill argues, notions of egalitarianism and independence, first seen in the Peasants Revolt of the 1500s⁹⁰, took hold during the Civil War, which was a period of considerable upheaval and deeply radical ideas.⁹¹ As old notions of politics, religion and the social order were challenged, an acceptance of the importance of tolerance emerged; tolerance not only concerning religious freedom but also freedom of the press, of expression, and from monopolies. There were arguments from religious, political and economic points of view that supported toleration⁹². Commentators acknowledged that religious toleration could equate to industrial or economic

⁸⁴ See Lowenstein, *Op Cit*, at page 170.

⁸⁵ Katherine Brice and Michael Lynch, *The Early Stuarts and the English Revolution: 1603 to 1660* (Hodder Education, 2nd ed, 2015), 106.

⁸⁶ Lacey Baldwin Smith, *The Elizabethan Epic* (Panther Books, first published 1966, 1969), 95 on the disintegration of Elizabeth's relationship with her government (due to finance issues in the main) and its impact on future monarchs.

⁸⁷ John Stoye, *Europe Unfolding: 1648 to 1688* (Fontana Collins, 1978), 226, and *Chapter 8: The European Mind: 1640 to 1670*.

⁸⁸ Peter Burke, *Popular Culture in Early Modern Europe* (New South Wales University Press: Temple Smith, 1979), 259.

⁸⁹ Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (Vintage, 2006), 14-15 and 16-18 (for the form and terms of the charge against Charles I).

⁹⁰ Norman Cohn, *The Pursuit of the Millennium: Revolutionary Millenarians and Mystical Anarchists of the Middle Ages* (Pimlico, 1993), 198; *Chapter 11 The Egalitarian Millennium*.

⁹¹ Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (Penguin Books, 1982), 13-18.

⁹² John Marshall, *John Locke, Toleration and Early Enlightenment Culture, Religious Intolerance and Arguments for Religious Toleration in Early Modern and 'Early Enlightenment' Europe* (Cambridge University Press, 2006), 536 (see especially Chapter 17).

freedom⁹³: toleration was good for trade. Into this world the Licensing Order was borne and a return to old notions of censorship and control was quickly put in place. But public protest about the regime was swift. One of the most vocal critics was John Milton.

Two prose works by Milton⁹⁴ would be critical to the emergence of the notions of “the author”, the “literary work” and the change in meaning of copyright as one more suited to the interests and the emerging rights of the author, as a moral claim over his work of creation. And while the writings of both works were more politically motivated, they served an important role in the history of the ideas under consideration. Milton’s works, *Areopagitica* and *Eikonoklastes*, began a debate on political subjects but would have a philosophical impact. *Areopagitica* was a polemic against the evils of press censorship but at its heart considered notions of what role and rights the oft-forgotten author had.

Milton was one of the first to begin debate on what it meant to be the author: a philosophical question within a political and economic debate. And while *Eikonoklastes* was an early form of state propaganda aimed at bringing down the cult of the late king, at its heart, it went beyond notions of authorial property and considered more nuanced issues of authorial attribution, integrity and dignity. These were issues in keeping with the emerging notions of individualism and the autonomous man, now seen in the early Enlightenment and emerging market capitalism of England. Philosophical considerations would come to form the bedrock of developing legal and economic paradigms and concepts. The concept of copyright that emerged would be underpinned by a consideration of issues of the individual’s autonomy, consciousness and creativity – and the bond that existed between the creator and the created works. We turn now to a consideration of Milton’s relevant works.

⁹³ A large number of pamphlets were written and circulated at this time that advocated religious toleration and dealt with the benefit this would have for trade and industry, see for example, William Walwyn, *The Compassionate Samaritan*, written in 1644 and Henry Robinson, *Liberty of Conscience*, written in 1643.

⁹⁴ *Areopagitica* written in 1644, and *Eikonoklastes*, written at the request of the Parliament in 1649.

Chapter Five

Towards Authorial Integrity & Dignity: 1644 to 1710

After a European tour, John Milton¹ returned to England in 1641. He began to write a number of pamphlets critical of the times.² The introduction of the Licensing Order in 1643, with its oppressive system and attack on press freedom, horrified Milton. In direct response, Milton wrote the essay *Areopagitica*, a “full-throated” denunciation of the new regime.³ *Areopagitica* was a call for unlicensed and unregulated printing and publishing and would have a profound effect upon the evolving notions of “the author”, the author’s “identity” and “reputation”, and the author’s “integrity” and “dignity”.

Areopagitica was written during the Civil War, and first issued in pamphlet form in November 1644. It was widely read. Public sentiment concerning religious toleration influenced the work⁴, which was itself influential. The essay was written in oratory style⁵, ostensibly a speech addressed to Parliament. It called for press freedom, but was also an assertion of authorial autonomy.

Areopagitica, while attacking the Licensing Order and the return of control to the Stationers’ Company⁶, portrayed the individual author as a source of authority and value in the publishing process. For Milton the author was the source of ‘truth’ of the work. The new legislation was an institutional prescription blocking the author’s pursuit of truth⁷, who must be afforded dignity and distinction in that task. In *Areopagitica*, Milton raised notions of authorial dignity and integrity, believing these

¹ John Milton, 1608 to 1674, English poet, polemicist, man of letters and civil servant to the Commonwealth of England during the reign of Oliver Cromwell.

² Martin Dzelzainis, “Milton’s Politics”, in Dennis Danielson (ed), *The Cambridge Guide to Milton* (Cambridge University Press, 2013), 70-83.

³ Loewenstein, *Op Cit*, at page 181.

⁴ Gordon Campbell and Thomas N Corns, *John Milton: Life, Work, and Thought* (Oxford University Press, first published 2008, 2010), 170. As to circulation of Milton’s works and reading audience, see Nicholas Von Maltzahn, “Milton’s Readers”, in Danielson, *Op Cit*, at page 237 and 239.

⁵ See Thomas N Corns, “Milton’s Prose”, in Danielson, *Op Cit*, at page 90.

⁶ David Norbrook, *Writing the English Republic: Poetry, Rhetoric and Politics: 1627 – 1660* (Cambridge University Press, 2000), 120.

⁷ Eunmi Park, ‘Areopagitica in the Licensing Controversy: Milton’s Rhetorical Strategies and Modes’ (2004) 10 *Journal of British and American Studies* 113, 128.

were more important than the author's economic interests. Milton praised the author as being worthy of recognition and accreditation as the work's creator, as deserving of this recognition and '*dignitas*'. The author's own labours grounded this desert.

This 'authorial integrity' recognised an unbreakable bond between author and text, with the author an integral part of the work, with full creative control. It also related to the author's "character", one whose "virtue" was tied up in the creative process and the result of those labours: the end expression of sentiment and ideas. The author had a moral right over the work, similar to that of a protector or guardian. It was the author who had the right to keep the book free from error, to protect its appearance and reputation, and to ensure proper attribution and guard against misappropriation or plagiarism. Here where rights that were grounded in the author as an individual. These were also rights beyond mere economic concerns or demands for financial returns.

Milton was more concerned in *Areopagitica* with "authorial dignity" than with "authorial property".⁸ Economic interests which may vest in authors were given scant consideration. Milton opposed licensing and censorship⁹, which he saw as sources of dishonour and a derogation of author's rights.

In acknowledging the role that authors played, Milton took another step forward by recognising the book as a work in itself, an entity that was tied to the author but also a thing in its own right:

For Books are not ... dead things, but doe contain a potencie of life in them to be as active as that soule was whose progeny they are; nay they do preserve as in a violl the purest efficacie and extraction of that living intellect that bred them.

... as good almost kill a Man as kill a good Book; who kills a Man kills a reasonable creature, God's Image; but hee who destroyes a ...

⁸ See Loewenstein, *Op Cit*, at pages 152 to 153.

⁹ Michael Wilding, "Milton's *Areopagitica*: Liberty for the Sects" in Thomas N Corns (ed), *The Literature of Controversy: Polemical Strategy from Milton to Junius* (Frank Cass & Co, 1987), 7-38.

Booke, kills reason itselfe, kills the Image of God, as it were in the eye.
Many a man lives a burden to the Earth; but a ... Booke is the pretious
life-blood of a master spirit, imbalm'd and treasur'd up on purpose to a
life beyond life.¹⁰ [sic]

The word *reason* is important. Later Milton states “reason is but choosing”. In the passage above, reason is more than that. It is similar to the way in which Milton uses the word in *Paradise Lost*. There, reason is the God-given capacity to make choice through obedience¹¹ in conformity with Christian values, adapting thought and action to some proper end, a process that makes man human, made in God’s image. It enables man’s relationship with God. “*Reason*” grounds dignity and integrity.

Areopagitica was the first direct assertion of authorial autonomy. It evidenced the emergence of the autonomous private man, giving rise to notions of individualization and possessive and creative individualism. It also acknowledged the possibility of literary ownership due to authorial labour. *Areopagitica* brought ideas to the brink of theory. It would continue the emerging authority of the author. Although political in nature, the essay was concerned about the social context of the creation and production of texts.¹²

Milton further consolidated the ideas put forward in *Areopagitica* in an essay published in 1649, and again written for political reasons. It also advocated authorial attribution and integrity.

Charles I was executed 1649. Many saw him as a martyr to constitutional monarchy. *Eikon Basilike*¹³ was published soon after. This work purported to be a collection of diary entries attributed to the King, and sought to provide a justification for his actions. John Gauden probably wrote it.¹⁴ The work was extremely popular arousing

¹⁰ John Milton, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing to the Parliament of England* (1644), Dartmouth Education
<http://www.dartmouth.edu/~milton/reading_room/areopagitica/text.shtml>.

¹¹ Obedience (and disobedience) is a central issue for Milton in relation to the story of the fall.

¹² See David Norbrook, *Op Cit*, at page 136.

¹³ “Icon of the King”.

¹⁴ See Geoffrey Robertson, *Op Cit*, at page 208.

sympathy for the late King.¹⁵ Parliament was concerned about the cult that was growing around Charles. It commissioned Milton to write a response to *Eikon Basilike*. Milton published *Eikonoklastes* (the “Icon Breaker”) in October. It set out to provide a justification for the execution of Charles. It vehemently attacked the King as a tyrant, seeking to destroy his post-mortem popularity. Milton dissected *Eikon Basilike*, criticising its every element.¹⁶ In addition to attacking Charles as a tyrant¹⁷, Milton took aim at the authorship of *Eikon Basilike* and the prayers and quotes attributed to Charles.¹⁸ *Eikonoklastes* focused on the necessity of true authorial attribution, a rage against plagiarism and appropriation of the true author’s work.

Milton developed his notions of authorial integrity and dignity, previously identified in *Areopagitica*. In addition to the author having a “worth”, attributable to his intellectual labours, Milton spoke of the need for attribution, the evils of false appropriation and the need to protect the author’s reputation. This added something new to the discussion: the acknowledgement that the author existed independent of their corporeal form and lived on through their work in incorporeal form. In this popular work¹⁹ Milton put “author” and “text” within the context of time:

it [is] a trespass ... more than usual against human right, which commands that every author should have the property of his own work reserved to him after death, as well as living.²⁰

Eikonoklastes focused on notions of authorial rights.²¹ It condemned plagiarism, misattribution and misappropriation of literary works as a slight against the work and the author.²² This ‘slight’ against the author carried connotations of honour, worthiness, reputation and dignity – matters closely associated with the individual *qua* individual.

¹⁵ Robertson, *Op Cit, ibid.*

¹⁶ See Stephen B Dobranski, “Milton’s Social Life”, in Dennis Danielson, *Op Cit*, at page 15.

¹⁷ See Martin Dzelzainis, *Op Cit*, at page 81 and also Norbrook, *Op Cit*, at pages 204 to 209.

¹⁸ See Campbell and Corns, *Op Cit*, at page 224.

¹⁹ See Von Maltzahn, *Op Cit*, at page 239.

²⁰ John Milton, *Eikonoklastes: In Answer to a Book Entitled Eikon Basilike, the Portraiture of His Sacred Majesty’s Sufferings* (Thomas Newcomb, 1650), Chapter 1 Passage 1.

²¹ See Mark Rose, *Authors and Owners, supra*, at page 30.

²² See Loewenstein, *Op Cit*, at page 220.

Areopagitica and *Eikonoklastes* marked an important step in the development of the notions of “the author”, the “literary work”, and the author’s integral connection to the work. In relation to “the author”, Milton stressed authenticity, showing a deep respect for the bond between the author and work. He suggested notions of authorial property acquired through intellectual labour, and saw authorial property as a natural property right. He portrayed plagiarism and misattribution not as a violation of any right borne under registration or license but as a trespass to property and, critically as to the emergence of notions of natural rights, to the personage of the author: misattribution of the text was misrepresentation of the person. Milton accordingly identified authorial dignity and integrity within the creative process.

Concerning “literary works”, in both essays Milton comes close to a theory of the independent identity of the text:

Who kills a man kills a reasonable creature, God's image; but he who destroys a ... book, kills reason itself, kills the image of God ... Many a man lives a burden to the earth; but a ... book is the precious lifeblood of a master spirit, embalmed and treasured up on purpose to a life beyond life.²³

For Milton a book *was* “reason” and the image of God. Central to the concept of the book were creation and creativity. Furthermore, “reason” concerned the capacity for choice, the capacity through human agency and intellect to choose one’s actions. Choice was at the heart of dignity. Milton acknowledged the creativity of writing. God is the Creator, who made man in his own image; he who destroys a book, kills the image of God. Man was made to create. The creative bond between author and text, like that between God and mankind, was superior to the economic bond between printer and text. The author as creator was subsumed within the text for its entire existence, with ownership of the work not based on registration but on the creation of the work itself. The act of writing allowed for natural authorial property. Ownership over the work was not a right that derived from Crown or state largesse²⁴; ownership

²³ *Areopagitica*, at 26.

²⁴ See Lowenstein, *Op Cit*, at page 220.

was due to the author's creativity. This was a seismic shift in the ideas under consideration.

Areopagitica and *Eikonoklastes* marked an important step away from old notions of limited authorial interests. Milton was against ownership based on licensing, believing that intellect and consciousness must be able to make a free choice of good over evil, of agency over inaction. The creative individual must not be prevented from creativity through unwanted regulation or censorship.²⁵ Despite Milton's and others' concerns about the Licensing Order, the arrangement served Parliament's purpose. Parliament continued to pass legislation that reinforced the order. Charles II ascended the throne in May 1660. He was also concerned with control of the press and seditious material.²⁶

Parliament introduced the Licencing Act of 1662 to address the King's concerns.²⁷ It was essentially a re-enactment of the 1637 Star Chamber decree, reflected the previous system of grant of privilege through the Royal Prerogative.²⁸ It restored censorship and the power of search-and-seizure, specifying that printing rights derived directly from Crown grant, and reaffirmed the Stationers' Company's monopoly.²⁹

Despite its resemblance to the old regime, the Licensing Act brought oversight of the press under the control of a public institution, the Secretary of State. The first secretary, Roger L'Estrange, exercised significant control over the Stationers' Company³⁰, allowing it to maintain its monopoly but reduced its numbers. Delegation of the control of the presses to the private institution of the Company was ending.

The Licensing Act expired in 1664 but was renewed for another year. It was again renewed and extended until 1679. In that year the legislation lapsed and was not

²⁵ William J Entwistle and Eric Gillett, *The Literature of England: AD 500 to 1960: A Survey of British Literature from the Beginnings to the Present Day* (Longmans, 1963), 68-69.

²⁶ Tim Harris, *Restoration: Charles II and His Kingdoms: 1660 to 1685* (Penguin, 2006), 59 and 142-143.

²⁷ Being "An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Books and Pamphlets and for the regulating of Printing and Printing Presses."

²⁸ Power of the control of the press was – potentially - back in the monarch's hands.

²⁹ John Feather, *A History of British Publishing* (Routledge, 2006), 46.

³⁰ Feather, *Op Cit, ibid.*

reviewed until 1685 when it was renewed for seven years, being used by James II to control the press.³¹

In 1692, serious consideration was given about the Act's future and the Company's monopoly. Parliamentary debate concerning the Act's future took place over 1692 - 1693.³² The debate caught the eye of John Locke, who wrote to his relative³³, Edward Clarke, Member of Parliament for Taunton.³⁴ Locke and Clarke were friends and, with John Freke, had formed "the College", a forum in which current issues, such as the future of the Licensing Act, could be discussed.³⁵ As Locke's letters show³⁶, Clarke often sought advice from Locke on parliamentary matters.

Locke wrote to Clarke, criticising the Licensing Act.³⁷ He believed that the act was contrary to freedom of expression. He was against the monopoly powers of the Stationers' Company and was concerned about the common practice of printers producing low quality and poor copies of work.³⁸ Locke expressed that the Act had been renewed in late 1692 and early 1693.³⁹ Locke continued to criticise the evils of the Licensing Act as the debate continued concerning the act's future. With the act due for renewal in 1695, Locke prepared a memorandum on the legislation for use by Clarke, who was a member of the committee reviewing the legislation.⁴⁰

In his *Memorandum*, expressly written for Clarke's use in the Parliamentary debates on the future of the Licencing Act, Locke set out his concerns over the Company's monopoly and how such an arrangement worked against the circulation of knowledge and ideas.⁴¹ The *Memorandum* also revealed Locke's thoughts on authorial property and rights. Locke acknowledged authors' ownership of the work that they created, but

³¹ Steve Pincus, *1688: The First Modern Revolution* (Yale University Press, 2009), 152.

³² After which debate the Licencing Act was again renewed for a period of two years.

³³ Alexander Moseley, *John Locke* (Bloomsbury, 2014), 46.

³⁴ A J Pyle, *Locke* (Polity Press, 2013), 14.

³⁵ Usually through correspondence.

³⁶ Roger Woolhouse, *Locke: A Biography* (Cambridge University Press, 2007), 303-307 and see footnote immediately infra.

³⁷ Mark Goldie (ed), *John Locke, Selected Correspondence* (Oxford University Press, 2007), 169.

³⁸ Clearly alive to the idea that the way a book looked and presented was important to the author and his reputation.

³⁹ See Letter 1586, Locke to Clarke, 2 January 1693, in Mark Goldie, *Op Cit*, at pages 176 to 177.

⁴⁰ See Roger Woolhouse, *Locke: A Biography*, Cambridge University Press, Cambridge, 2007, at pages 344 to 345.

⁴¹ Mark Rose, 'Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain' (2003) 66(1) *Law and Contemporary Problems* 75, 78.

he argued against perpetual ownership and exclusive rights in expressive works.⁴² He acknowledged a pre-existing right to authorial ownership, suggesting that any printing of the work required the author's prior approval and consent. He also spoke in terms of authors having control of their works, if only for a limited time. He drew a distinction between authors having property in their work and the more limited rights of the Stationers' Company, whose monopoly only protected those interests which accrued through registration.⁴³

Locke's influence in relation to the debate on licensing, press freedom and regulation culminating in the *Memorandum* has often been overlooked, with the debate focussing on writers such as Milton, Wilkes and Mill⁴⁴, but there is no denying the role that Locke played in the matter. He appears to have been aware of the extent of concern over the matter in English society and had an ongoing interest in liberty for printing; for example, he referenced *Areopagitica* in one of his early notebooks, one of the very few direct references made anywhere to that work in Milton's lifetime.⁴⁵

As commentators such as JR Milton⁴⁶ have noted, Locke's views on the matter appear to have evolved over time with the young Locke expressing some concern that published dispute and controversial material could agitate to civil war. This view became softened in later works, such as the *Essay on Toleration* commenced around 1667, and when Locke was involved in drawing up the constitution of Carolina in around 1669 he supported provisions as to liberty and press and print freedom. After his return to England in 1679 Locke had been concerned with regulation of the press, if only to the extent that it stifled his then current patron Lord Shaftesbury.⁴⁷

After further time abroad, Locke returned to England in 1689 and following the publication of a number of his key works, such as *The Letter Concerning Toleration*, *the Essay Concerning Human Understanding*, and *The Two Treatises on Government*,

⁴² Lord Peter King, *The Life of John Locke: With Extracts from his Correspondence, Journals, and Common-Place Books* (Colburn and Bentley, 1830), 387.

⁴³ Justin Hughes, 'Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)' (2010) 27 *Cardozo Arts & Entertainment Law Journal* 555.

⁴⁴ See for example J R Milton (ed), *John Locke: Literary and Historical Writings*, (Clarendon, Oxford, 2019) at pages 68 to 78.

⁴⁵ Milton, *Op cit*, at page 73.

⁴⁶ Milton, *Op cit ibid*.

⁴⁷ See for example J R Milton, "Locke's Life and Times", in Vere Chappell, (ed), *The Cambridge Companion to Locke*, (Cambridge University Press, Cambridge, 1994) at pages 5 to 25.

Locke became more and more critical of the legislation and its ongoing review, culminating in his writings to Clarke. It was clear that by this time, in and around 1694, that Locke was now highly critical of the control of the press and the power of the Stationers Company.

In 1695⁴⁸, the Commons refused to further review the Licensing Act, and the legislation lapsed, never to be renewed. This was a watershed moment in the history of the ideas under consideration; the regime established under the Licencing Act would never be restored. Parliamentary objections to the Act mirrored Locke's *Memorandum*, noting that the act infringed on authorial rights by granting too much power to the Stationers' Company:

[the Act] prohibits printing anything before Entry thereof in the Register of the Company whereby ... the ... Company are empowered to hinder the printing of all innocent and useful Books; and have an opportunity to enter a title to themselves ... for what belongs to, and is the Labour and Right of others.⁴⁹

Milton and Locke had contributed to the debate over 1640 to 1695 regarding press censorship and monopoly rights on the one hand and authorial attribution, integrity and dignity on the other. *Areopagitica* and *Eikonoklastes* spoke in emotive terms about the author. Locke was critical of regulation of the press and condemned the system that the Act supported but avoided the emotional response of Milton, taking a measured approach.

In the *Memorandum*, Locke proposed clear and well-reasoned suggestions as to how authors' rights should be protected and what the term of ownership should be⁵⁰:

I know not why a man should not have liberty to print whatever he speak; and to be answerable for the one, just as he is for the other, if he transgresses the law in either.⁵¹

⁴⁸ After review by the Parliamentary committee of which Clarke was a member.

⁴⁹ Quoted in Lowenstein, *Op Cit*, at page 211.

⁵⁰ See Lowenstein, *Op Cit*, at pages 209 to 211 and on and also Rose, *Op Cit*, at page 30 and on.

As we shall see later, here was a summation of natural law rights as attributable to authors. Natural rights were based on large part on corresponding obligations and duties and on actions permissible after a wrong or an injury (*iniuria*) to the individual or his property (*suum*). As Locke wrote, attacks upon an individual's realm, person or creation, be it life, liberty, health, limb or goods, constituted a wrong.⁵²

After the lapsing of the Licencing Act, debate concerning the book-trade became focused more on the author than on the printer-publisher. Discussions of the importance of freedom of the press and of expression, necessary to secure liberty and property rights, raised considerations of authorial property, authorial attribution, and consent, together with authorial protection of the text. This discussion was an important step in the emergence of the modern notions of the author, the literary work and authorial ownership secured through copyright. The debates acknowledged ownership not through a right as primitive as a licence based on registration, but as fully-formed property rights over an incorporeal thing: the text, as acquired through the process of creation.

With the expiration of the Licencing Act, the era of harsh political and religious censorship was passing.⁵³ Expiration meant that the tie between copyright and censorship was cut, a move welcomed by Locke and his 'College'.⁵⁴ The conundrum for Parliament after the act's expiration was how to best regulate the press and publishing industries without reintroducing a monopoly arrangement. With the act's lapsing, the Stationers' Company lost the protection of its own copyright arrangement, ownership through registration, and its power and prestige.⁵⁵

Concerned about the impact on their financial interests, the Company petitioned Parliament for new protectionist legislation, but this was unsuccessful.⁵⁶

⁵¹ Lord Peter King, *Op Cit*, at page 203. See also in Milton, *Literary and Historical Writings*, for the full transcript of the *Memorandum*.

⁵² See, for example, Mautner, *Op cit*, at page 490.

⁵³ See A J K Robinson, "*The Evolution of Copyright*", *supra*, at page 66.

⁵⁴ See Mark Goldie, *Op Cit*, at page 192 to 193, and see also Letter 1860, John Freke and Edward Clarke to John Locke, 14 March 1695 at pages 207 to 208.

⁵⁵ See John Feather, *Op Cit*, at page 49.

⁵⁶ Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement in Copyright Law in Eighteenth Century Britain: 1695 to 1775* (Hart Publishing, 2004), 18.

Even after this, in an extraordinary development, the Company again agitated for a return to the old ways⁵⁷ - not on the basis that this would protect their rights and interests, but that it would protect *authors*. For the first time, the Company submitted that property rights in written works existed in perpetuity not by privilege or licence but as a form of property that the law should recognise and protect.

In the Company's argument, authors had property in their work forever.⁵⁸ The Company appeared to be supporting the author's natural right to literary property but this was disingenuous; the true purpose of the submission was for the Company to claim for themselves what they suggested existed for the author: the right to own the work in perpetuity⁵⁹, a "cuckoo defence".⁶⁰ Parliamentary and public debate continued as to what legislative system should govern the printing trade. The matter remained of concern.

In 1702, Daniel Defoe published an essay on the matter, entitled *The Original Power of the Collective Body of the People of England*. Defoe wrote that while regulation of the press was required, it was unnecessary to renew the Licencing Act. Defoe remained involved in the debate through his periodical, *The Review*.⁶¹ Two years later he published *An Essay on the Regulation of the Press*. In that essay, Defoe invoked the issue of the writer's property and ownership in the work created, rights he thought the old licencing system undermined by making the licence-holder superior to the author:

[licensing] makes the Press a slave to Party; but whatever Party of Men obtains the reins of Management, and have power to name the person who shall license the Press Have the power of keeping the World in Ignorance in all matters.⁶²

⁵⁷ Albeit under "new" legislation.

⁵⁸ With this right passing should the author sell the work to another such as the Company.

⁵⁹ Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press, 2014), 56.

⁶⁰ Peter Baldwin, *Op Cit, Ibid.*

⁶¹ See John Feather, *Op Cit*, at page 57.

⁶² Daniel Defoe, *An Essay on the Regulation of the Press* (The Luttrell Society, 1948), 24.

Defoe was critical of the fact that the author rarely featured in any discussion concerning regulation of the book-trade. The industry had been dominated by the economic interests of the Stationers' Company and the now unregulated publishing industry, more concerned with protecting their financial outlay than authors' rights in their works. Defoe also criticized Parliament for having little interest concerning private property rights for authors over their works. He was alive to the difference between ownership based on registration and ownership based on intellectual labour. For Defoe it was critical that the author had some form of state-sanctioned protection.⁶³ Defoe called for Parliament to settle the issue. He stressed the need for attribution and consent and the importance of the author's dignity and integrity, echoing Milton and Locke.

Defoe's awareness of authorial rights contained in the 1704 essay was critical for two reasons.⁶⁴ First, Defoe acknowledged the right of the author to receive compensation for intellectual labour, a recognition of economic rights:

[There is] a ... Thieving which is ... in full practice ..., and to which no Law extends to punish, viz some Printers and Booksellers printing Copies not of their own ... It robs Men of the due Reward of Industry, The Prize of Learning, and the Benefit of their Studies.⁶⁵

Second, he attacked unauthorised abridgement and cheap careless printing on poor-quality paper, advocating an author's right to control the form in which the text circulates, arguing this right should be as durable as the author's responsibility for any errors in the work.⁶⁶ Only the author⁶⁷ should have the right to amend or interfere in any way with the text. This mischief was the very thing that the present regime permitted, and represents an author's moral rights secured through the natural law theory then emerging:

⁶³ See Ronan Deazley, *Op Cit*, at pages 35 to 36.

⁶⁴ See Loewenstein, *Op Cit*, at page 216.

⁶⁵ Daniel Defoe, *Op Cit*, at page 24.

⁶⁶ See Loewenstein, *Op Cit*, at page 215 and on.

⁶⁷ Or his assignees.

As soon as a book is published by the author, a rascally fellow buys it and immediately falls to work on it This is down-right robbing on the Highway.⁶⁸

Defoe brought to the brink of theory the idea of an author's moral right in the work – and a *continuing* moral right to ensure protection and integrity of the text. This evidences an understanding and awareness of the continuing attachment that an author has to the sequence of printed editions of their works⁶⁹, initiated through their own agency, utilizing their particular skills, an attribution of individualism.

This embryonic theory was a new way of looking at the relationship between the author, the text and ownership over the literary work. It would require the application of a new theory of property rights, then under consideration by John Locke, to bring these rights and relationships into a formal setting and grant them recognition in the Courts and Parliament. Defoe proposed an illuminating solution to the identified problems, calling for Parliament to introduce a law that would protect authorial property rights:

The law we are upon... suppresses this most villainous Practice, for every Author being... obliged to set his name to the Book he writes, has by this law, an undoubted exclusive Right to the Property of It. The Clause in the Law is a Patent to the Author and that settles the Propriety of the Work wholly in himself, or in 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.⁷⁰

Defoe's essay is a critical step in the emergence of the ideas under consideration. The sentiments and language used in the essay were unique: the book and the text are bound to author as surely as property was bound to the occupant.⁷¹

⁶⁸ Daniel Defoe, *Op Cit, ibid.*

⁶⁹ See especially Loewenstein in this regard, *Op Cit*, at page 215.

⁷⁰ Daniel Defoe, *Op Cit*, at page 240.

⁷¹ See Loewenstein, *Op Cit*, at page 216 and then 217.

Defoe built upon the ideas expressed by Milton and added to thinking concerning authorial dignity and integrity. He recognised the self-worth of the author inherent in the process of literary creation, and the dignity and integrity of author as guardian of the work. Defoe recognised the authorial integrity that binds the author to the work, its creation and subsequent editions. Aligned with these points, he recognised the worth of the text's appearance, its need to be free from error and how the honour of the author was bound-up in how the text physically appeared.

Even after the publication of Defoe's essay there were attempts by the print industry to introduce legislation that would re-establish the Stationers' Company's dominance. Defoe continued to agitate for authors' rights.⁷² He was aware that printers now spoke in terms of the protection their system could afford authors but that their real interests were economic, focussed on themselves. Authors' rights continued to be trespassed. He wrote:⁷³:

[The author] has his Labour destroyed, his expenses lost, ... his copy reprinted by sham and piratical Booksellers and Printers, who eat the grain of the poor Man's labour, destroy and spoil the work itself, cheat the buyer by performing it imperfect and ruin the laborious Author.⁷⁴

He advocated for legislation that would protect authors and place them at the centre of the regime, arguing this would be an "encouragement to learning"⁷⁵:

these things call for an Act of Parliament, and that so loud as I hope will not be denied that so Property in Copies may be secured to the Laborious Student, ... to the Encouragement of Letters.⁷⁶ [sic]

After the 1709 petition, a new bill was introduced into Parliament.⁷⁷ It did not survive review by the committee⁷⁸, mainly because it granted the author an exclusive

⁷² Through his periodical, *The Review*.

⁷³ The 3 November 1709 edition.

⁷⁴ Quoted in Ronan Deazley, *Op Cit*, at page 34.

⁷⁵ See A J K Robinson, *Op Cit*, at page 67.

⁷⁶ Defoe in the periodical *A Review of the Affairs of France*, edition of 8 November 1705; see also Ronan Deazley, *Op Cit*, at page 32.

copyright in his work. This was of concern to the Stationers' Company, who pressed that rights in literary works should be reserved to anyone who had lawfully acquired the original manuscript.⁷⁹ Debate continued on the form of any new legislation.

A draft bill was eventually agreed upon.⁸⁰ It would be the world's first copyright statute. This would be a very significant step indeed.

The proposed *Statute of Anne*⁸¹, created a private law concept of property in textual works. While acknowledging the rights of authors, it created a public domain for the circulation of ideas. The legislation was no longer predicated on control through registration or licencing but upon ownership through copyright. Importantly, the Statute conferred legal standing upon the author. This was a first. The Statute of Anne was introduced into the Parliament⁸², with a revealing title⁸³ and preamble⁸⁴, where together authors were mentioned for the first time in legislation with recognition of "creator rights".⁸⁵ The bill passed with few changes.⁸⁶ There was, however, one provision that was closely considered. As the statute granted creators a legislative right of ownership in books, for how long did ownership should last, in perpetuity or a limited term?

⁷⁷ See John Feather, "*Copyright and the Creation of Literary Property*", Simon Eliot and Jonathan Rose, *A Companion to the History of the Book*, supra, at page 523. The bill had been drafted by Jonathan Swift.

⁷⁸ A J K Robinson, *Op Cit, ibid*.

⁷⁹ A J K Robinson, *Op Cit, ibid*; Mark Rose, *Op Cit*, at pages 44 to 45 and on to 48; Ronan Deazley, *Op Cit*, (very detailed review of the passage of the legislation) pages 31 to 51.

⁸⁰ In mid to late 1709.

⁸¹ The *Statute of Anne*, also known as the *Copyright Act 1710* (cited as *Copyright Act 1710, The Statute of Anne*, 8 Ann. c 21; 8 Ann. c. 19).

⁸² It would apply to England and Scotland.

⁸³ "*A Bill for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors, or Purchasers, of such Copies during the times mentioned therein*".

⁸⁴The preamble to the Statute read:

"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 too 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; May it please Your Majesty, that it may be Enacted ..."

⁸⁵ See Peter Baldwin, *Op Cit*, at pages 65 to 70.

⁸⁶ See Mark Rose, *Op Cit*, at pages 46 to 47.

Ever since the Statute of Monopolies, there had been concern about open-ended monopolies. Parliament recognised that copyright should be for a fixed term to ensure the free flow and exploitation of ideas.

After debate, a term for the period of ownership was introduced into the legislation: authors had ownership in their work but limited as to time, depending upon when the book had been first published⁸⁷ and allowing for a transition period.⁸⁸ The Statute of Anne was the first modern copyright law.⁸⁹ It recognised that the text originated with the author, not with the printer-publisher, who were simply the purchasers of the work that the author through his own intellectual labour had created.⁹⁰ It changed the focus concerning ownership of literary works by acknowledging ownership through creation and established the author as a legally empowered figure in the market place of the Enlightenment economy.⁹¹ This was in keeping with the emerging notions of personal liberty and private property that had come to dominate the economy and the political debates.

From the commencement of the new copyright statute⁹², authors would exercise their legislative rights having a greater appreciation of the protection that had now been afforded to them and their works. The statute, however, was somewhat ambiguous. It contained a conundrum, one that would lead to a series of cases that would culminate in the dispute at the heart of the present discussion. The conundrum was this: the statute created certain rights in the author limited as to time. What, however, was the position prior to the legislation being enacted? Was it the case that prior to the statute there existed a common law copyright that vested in authors? If the common law did act in this way, were such property rights founded on natural law rights and critically, did those common law rights exist in perpetuity?⁹³ If there was a common law right to

⁸⁷ See David Finkelstein and Alistair McCleery, *An Introduction to Book History*, supra, at page 77.

⁸⁸ If the work had been published after 1710, the term of copyright was fourteen years; if published before, the term was twenty-one years. In addition, any author who lived until the copyright expired was granted a further term of fourteen years. When that expired, the work would enter the public domain, for anyone to print and publish. Authors were given limited exploitation rights.

⁸⁹ See Peter Baldwin, *Op Cit*; *ibid*, and also at page 22.

⁹⁰ See John Feather, *Op Cit*, at page 55.

⁹¹ See Mark Rose, *Authors and Owners*, at page 5.

⁹² There is some confusion on this point, but generally 1710 is agreed as the relevant date.

⁹³ See, for example as a description of the possible contradiction between common law copyright and statutory copyright Peter Baldwin, *Op Cit*, at page 65.

copyright that existed in perpetuity, how did this right sit with statutory copyright, did it continue after statutory copyright had expired?

It would not be until 1769 that there was a decision on these questions. With the enactment of the statute, the notions of what it meant to be “an author”, by “literary property” and “copyright” had changed fundamentally. It was a seismic shift, in terms of legal meanings, values and protections afforded to these terms and had an impact on the ideas of what it meant to be “an author”, what constituted “literary property”, and what “copyright” under the Statute entailed.

In 1600 being “an author” meant having few rights in the work. The economic interests of others were of greater importance than those of the author: the publisher featured more notably in the production of any work, with identification in the work.

While it was acknowledged that the author had initial ownership of the original manuscript, once someone else secured that text, no rights remained with the author. The formal recognition of ownership over the text came first through an *ad hoc* exercise of the Royal Prerogative, protecting economic not creative rights. This served a political purpose: the establishment of the Stationers’ Company allowed for delegated control and censorship, in return for the grant of monopoly rights to the Company. The century saw fundamental change. The Crown lost its power. Control of the press moved into the institutional setting of Parliament. As ideas of liberty, property and freedom gathered pace and as natural rights theory emerged out of long considered issues of natural law theory, any attempt to re-establish a draconian regime for press regulation met with public outcry.

Milton, Locke, Defoe and Swift championed the rights of the author, causing the notion of what it meant to be the author to evolve dramatically from the period of *Areopagitica* to the Statute of Anne.

Milton emotionally proclaimed author’s rights. Locke assumed a more practical view. Defoe took up these ideas, advocating a change in the system that would put the individual author at the heart of regulation as the source of authorial autonomy. Milton pressed for the recognition of authorial proprietary and property.

Locke recognised the fundamental problem with the Licensing Act and its monopoly rights. Defoe supported the author's right to the fruits of his intellectual labour. These discussions evidenced the emergence of an ideology of possessive individualism, anchoring the author in the text, acknowledging ownership of the work in its creator, and identifying the ideas of attribution and appropriation.

The debates also look at issues of authorial ownership and attribution, and matters of authorial dignity and integrity. Ideas of the author having a moral authority over the work, a moral right to be identified with the work and to ensure that there was no derogation of the work over subsequent editions gained prominence. Debates raised issues of life, liberty and freedom, and allowed for the emergence of the conscious autonomous private man, one alive to his reputation and the need to protect any creative extension of him from unauthorized and poor-quality publication.

It was this evolution in the history of ideas that allowed the legal, political and economic developments of the day. No notion of what it meant to be "the author" could exist without an increasing awareness of the self, consciousness, liberty and autonomy and certainly without the emerging theory of natural rights. These were the very ideas championed by Milton, Defoe and others, even writers such as John Locke.⁹⁴ These were ideas on the brink of a theory: a modern notion of what it meant to be an author. By 1710 public debate in the essays and pamphlets of the time could speak in terms of intellectual individuation, and the issues of invention, influence, imitation and inscription.

The notion of what was meant by "literary property" also evolved. In the 1600s the text was a commodity to be economically exploited. It mattered not what was printed, only that it returned a dividend. There was also little concern for authenticity, accuracy or derogation from the original text. There was no inherent value in safeguarding the text. With increasing public discourse concerning ownership and attribution, matters of authorial dignity and integrity came to the fore.

⁹⁴ See Milton, *supra*.

Finally, the period of 1600 to 1710 saw a comprehensive change in meaning in “copyright”. In 1600 ownership of a literary work was secured through pre-publication registration, a form of license. With the Statute of Anne, the author moved to a position of prominence and ownership of literary property through the act of creation had been accepted as a legal concept. The author as creator had a right of copy, to commercially exploit the text. Copyright tied the conscious autonomous creative individual to the abstract notion of the text through the legal ownership recognised in the statute. By 1710, “copyright” had come to mean the author/work relationship. It would emerge as a specifically modern institution. Within the developing and dynamic⁹⁵ marketplace society of the time, the legislation affirmed the author as owner and secured his rights in the work and its exploitation. While this modern view of copyright is deeply connected to economic rights, copyright is also deeply rooted in our conception of ourselves as unique individuals with a degree of singularity and personality.⁹⁶ There would be no institutional embodiment of the author-work relationship more fundamental than the emerging modern notion of copyright⁹⁷, a notion associated not only with legal and economic rights but also with our own sense of privacy and self⁹⁸ and our rights as creative individuals in our own sovereign realm.

And so, by 1710 there had been a fundamental change from the paradigm of copyright that existed in 1600 to that which emerged from the Statute of Anne. The change was comprehensive; it impacted upon all elements involved copyright⁹⁹: the central person, the purpose, the function and the doctrine under protection. In 1600 the ‘person’ had meant the entrepreneur, the ‘purpose’ was economic, the ‘function’ was distribution, and the ‘doctrine’ was economic control. With the Statute of Anne, those elements had evolved to the ‘author’, ‘cultural’, ‘creativity’ and ‘creative ownership’.

⁹⁵ Carl Wennerlind, *Casualties of Credit: the English Financial Revolution: 1620 to 1720* (Harvard University Press, 2011).

⁹⁶ See, for example, in regards this discussion, L Ray Patterson, “*Free Speech, Copyright and Fair Use*”, *supra* and H B Abrams, ‘*The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*’ (1983) 29(3) Wayne Law Review 1119 and also Mark Rose, *Authors and Owners*.

⁹⁷ See Mark Rose, *Owners and Authors*, *supra*, at page 1 and on in *Chapter 1: The Question of Literary Property*.

⁹⁸ See Mark Rose, *Authors and Owners*, at page 125.

⁹⁹ See L Ray Patterson, *Op Cit*, *supra*.

A seismic change had set in and would resonate over the next sixty years, the period covered by the following two chapters.

Chapter Six

The author asserts himself¹: a full expression of authorial rights at law and authorial integrity in a formal setting: 1710 to 1749

The introduction of the *Statute of Anne*² was an important step in the emergence of the matters under consideration. The statute established authors at law, under a posited legal system, as the original holders of certain legal rights in their works. It also by implication recognised in public institutional settings of the Parliament and Courts, the author as the fully formed empowered agent in the new literary marketplace.³

After its enactment by the Parliament, authors began to assert the legislative rights bestowed by the Statute. As will be examined in this chapter, actions brought by authors in this period showed that they were as much concerned with an infringement of their legal and economic rights as they were of violations of their reputation and misattribution and misappropriation of their creative works.

Alexander Pope was one of the earliest agitators. He would bring a series of legal actions against the book-trade. These law-suits would culminate in 1741 where for the first time a court determined what property rights the writer of correspondence had over letters once they had been received by the addressee. The issues at play in that case are of particular importance to the matters under consideration, as letters are a singular example of the author's connection to the personal ideas and thoughts expressed therein, expressions based on personal sentiment, opinion, experience and

¹ Or "herself"; although almost all published authors of this period were men, there were a number of published women. George Eliot, the pen name of Mary Anne Evans, would become one of the great English novelists of the next century. Eliot conceded that she used a male pen name so that her works would be taken seriously. The reference in the title is to Alexander Pope who would take significant steps over the period of 1710 to 1740 to assert himself as an author with complete and intimate control over all of his works for the entire process of creation, production and distribution: and ultimate protection under the new law against acts of appropriation.

² Introduced in 1710. Throughout this chapter and beyond any later reference in the text to "the statute" is a reference to the Statute of Anne.

³ Mark Rose, "The Author in Court: *Pope v Curll* (1741)" in Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press, 1994), 213.

sensation. Letters are a unique and very personal manifestation of an author's creative and expressive individualism.

For Pope the unauthorised publication of his letters was personal, concerning matters of reputation and privacy. He had no direct or simple economic interest in the publisher's exploitation of the correspondence. His concerns were more over abstract rights - authorial reputation, dignity and integrity. As we shall see, Pope was also concerned with the way a published work was presented, in its appearance and quality of paper, but he was also concerned about the correctness and integrity of the text. Such matters did not figure in the case under consideration concerning the unauthorised publication of private correspondence.

In relation to the various forces and historical tensions at play in relation to the matters under consideration, in this regard we see economic or financial concerns had no real role to play. Pope, as we shall see, was not concerned with an account of profits; he sought the protection of letters he believed to be a manifestation of himself as a young and ill-sophisticated man.

As matters stood in about 1710, even with the introduction of the statute, the Stationers' Company still dominated the book-trade, but its monopoly was under attack. The balance began to shift away from this time, from the industry towards the author. As authors began to assert their legal rights, it would become apparent that the new concept of property rights over literary works would require a new theory of determining how property rights were acquired and protected. It would be Locke who would provide a theoretical framework to the relevant concepts, especially literary property acquired through intellectual labour. His writings would also provide for the ongoing emergence of a natural rights paradigm, coming from his writings on property and also on natural law. This occurred later. It would require some early cases on the new notion of copyright before this question of what type of property literary works actually were could be answered.

There was no denying the importance of the statute and its immediate impact on the book-trade. The statute was the world's first copyright act.⁴ It evidenced the emerging anti-cartel and anti-monopoly sentiment and a commitment to the free circulation of knowledge and ideas. It was a legal construct that explicitly acknowledged in a legal context that private property rights vested in the creator of the literary work. The statute created a private law right, and also by implication ultimately supported the idea of natural law property rights owned by and unique to the author. These natural rights allowed for the assertion of authors' moral rights over created works: rights of attribution, non-appropriation or plagiarism, authorial reputation and protection and accuracy of the text. These natural rights of a particular moral nature, ie reputation, dignity and integrity, would be revealed after some early litigation under the statute.

This was a new mode of thinking about the rights that the author as the work's creator possessed.⁵ Certain legal and economic rights were now openly acknowledged⁶ and protected under legislation. The statute gave the author legal standing to pursue those who had infringed their legal rights and do so in the public institution of the courts.⁷

The statute recognised and protected copyright and commercial exploitation of literary works. Certain other rights, however, that were implicit within the legislation would ultimately come to be recognised as natural law rights, existing independently of the statute, inherent by virtue of man's creative nature.⁸ These natural law rights were not fully recognized at this time. Further evolution of the matters under consideration was required. Literary property rights would become seen as a universal constant perceived through reason that existed separate of government or the courts, based on human ability and individual skill to create the written text.⁹

The important question of whether the statute truncated or expunged these natural law rights would also ultimately be considered by the Courts. The statute was a

⁴ See J H Baker, *An Introduction to English Legal History*, supra, at page 453.

⁵ Mark Rose, 'Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain' (2003) 66(1) *Law and Contemporary Problems* 75.

⁶ The long title of the Act was: *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.*

⁷ See Mark Rose, *Authors and Owners*, supra, at page 49.

⁸ HLA Hart, *The Concept of Law* (Oxford University Press, 2012), 193-200.

⁹ Joseph Koterski Jr, SJ, *Natural Law and Human Nature: Parts 1 and 2*, (The Teaching Company, 2002), 53.

commingling of economic, legal, aesthetic, ethical and philosophical ideas. It was an important step in the history of the idea of “the author” and what rights (and what types of rights) were vested in him.

Under the statute, the author now had legal standing as plaintiff to bring a case for infringement of rights held over incorporeal, intangible property. Previously the author had typically featured as the defendant, an infringer against the rights of the registered owner. This was an important distinction. No longer was the author the focus of retribution; the author was the aggrieved party seeking protection of rights, creative and economic, through the Courts. The statute afforded the author important claim-rights, that could be sought to be protected in matters of transgression, violation, or trespass. This was in keeping with emerging notions of human rights, based on ideas that a violation of anything that is the individual’s own, be it life, liberty or estate, makes the use of force or action against the offender permissible.¹⁰

The direct legal intention of the statute was to protect property and economic interests. Authors used the legislation to protect economic rights but also to protect reputation, attribution, reproduction, formatting and the like, a concern which highlights the scope of historical forces and tensions at play in respect of the matters under consideration.

As will be considered, the authors’ concerns went beyond economic interests. They became concerned with matters of repute and integrity. They sought relief through the Courts for an abuse of the created work, by way of cheap editions, and attempted to protect the personal experiences expressed in correspondence that others wished to publish simply for financial reward. Authors were adamant that the personal thoughts expressed in their literary works were their property, as much as was a house or a cart. Being property rights, they were afforded protection by the Courts.

The statute had other important implications. No longer was literary control based on grant of patronage or registration: it was a property right enshrined in legislation. No longer was the property in issue the original tangible manuscript. It was now sited in the expression and sentiment of the text. This was a fundamental shift in the way in

¹⁰ See, for example Mautner, *Op cit*, at page 472.

which concepts of property were viewed. No longer was property a right over a tangible corporeal substance, with rights secured by occupation. The statute suggested that a property right could be acquired through mental creation asserted over intangible rights inherent in the text. This would prove to be a paradigm shift in the history of the idea of property. It would require a sound philosophical basis and rely upon the property theory crafted by Locke before the introduction of the legislation to justify any recognition of such a right.¹¹ The statute was a fundamental step towards a modern understanding of what it means to be “the author” and what a “literary work” is, as an aesthetic entity, separate from all but its expression but still containing the identity, reputation and a connection with the author. The very title of the statute¹² located the origin of literary property in the act of composition defining the author as the original source of rights in the copy.¹³ In relation to the issue of aesthetic, important to authors such as Pope and Defoe, the statute would allow an author to have a right of control over how the published work looked, how it was formatted and what quality it took on.

One of the ongoing concerns of authors had been the publication of unauthorised copies of their works, cheaply made on poor-quality paper, crudely printed, giving the end-result an ungainly look; what the printer had gained in economy and quantity, the work had lost in visual quality.¹⁴ By the time of the statute’s enactment, an independent and professional public court system was emerging. The Courts had developed into an institution separate from the Crown and Parliament. This emergence of an independent professional judiciary was essential for the impartial administration of justice and critical for a modern commercial society, becoming more focused and based on trade, commerce and technological advances.¹⁵

¹¹ John Greville Agard Pocock, “The Mobility of Property and the Rise of Eighteenth Century Sociology” in Anthony Parel and Thomas Flanagan (eds), *Theories of Property: Aristotle to the Present* (Wilfred Laurier University Press, 1979), 141-166.

¹² Being “*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*”.

¹³ Harry Ransom, *The First Copyright Statute: An Essay on An Act for the Encouragement of Learning 1710* (University of Texas Press, Austin, 1956), 95.

¹⁴ See, for example, Simon Eliot, “*From Few and Expensive to Many and Cheap: The British Book Market 1800 to 1880*” and Megan L Benton, “*The Book as Art*”, both in S Eliot and J Rose, *A Companion to the History of the Book*, supra at pages 291 and 493, see especially at page 495.

¹⁵ Michael Conforti, *An Inconvenient Forum: Power, Politics and the English Common Law courts in the Age of Mansfield* (2012) DigitalResearch@Fordham <<https://fordham.bepress.com/dissertations/AAI3495884>>.

The next sixty years would see an ever-increasing amount of judicial activity, as actions were brought in relation to literary matters arising under the statute. The issues that the Courts were considering would themselves evolve. For the first thirty years, cases focused on the author and their rights under the statute. 1740 was a year of transition as we shall see below; and over the period of 1740 to 1770 the cases came to consider the exact nature of the rights bestowed by the statute in relation to literary works and consider texts in their own right.

The first case to deal with matters arising under the statute was *Burnet v Chetwood*¹⁶, a dispute over translated works.¹⁷

Burnet was an author's case brought to protect the original author. This was a case more concerned with matters of reputation, rather than economic return and financial rights, and again, it evidences the range of forces at play in the debate.

It concerned the work of Dr Thomas Burnet who had written two works in Latin. Parts of one¹⁸ were published in an unauthorised English translation undertaken by another writer without Burnet's consent. The translation embarrassed Burnet¹⁹ as his obscure works became accessible to all who could read.²⁰ Burnet acted as best as he could under the old system²¹ to prevent further unauthorised translations but was effectively unable to do so. When Burnet died in 1715, the London bookseller William Chetwood arranged to have all Burnett's Latin works translated into English and published.

Burnet's literary executor, George Burnet, brought legal action and sought an injunction under the statute against Chetwood, hoping to stop the publishing of the unauthorised translations.²²

¹⁶ *Burnet v Chetwood* (1721) 2 Mer 441.

¹⁷ L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2015) <http://www.copyrighthistory.org/>; Heard over 1720/1721.

¹⁸ *The Archaeologia Philosophica*, the Netherlands, 1692.

¹⁹ See for this and the following paragraphs Rose, *Authors and Owners*, supra, at page 49 and on.

²⁰ The original Latin works contained, it was said, some rather lascivious and lewd passages, kept safe in Dr Burnet's opinion from the uneducated lower classes by the Latin publication.

²¹ His original action took place prior to the introduction of the Statute of Anne.

²² Generally, at law, an injunction is a court order commanding or preventing an action. To get an injunction, the complainant must show that there is no adequate remedy at law and that an irreparable

The motivation for the lawsuit was not economic but out of concern that the translated works would hold Dr Burnet, his reputation and legacy up to ridicule. George Burnet, as executor, sought to stop publication of the unauthorised translations. He argued that the translated works still belonged to Dr Burnet, that they were protected under the statute, and that as they were published before 1710, they were protected until 1731. No unauthorised publication of the works could occur until then, when the works would enter the public domain.

Chetwood argued that the works fell outside of the statute, because they were English translations from the original Latin. These were “new” works. Chetwood submitted that the statute did not apply to the translations. These were the unique issues that the Court had to determine. It was now apparent that with the introduction of the statute, the Courts would be required to determine the actual scope of rights that the statute conferred and protected.

In *Burnet’s* case, the Court ruled in favour of Burnet, not on the basis that the statute did apply to unauthorised translations but that the translated works were too vulgar to be circulated, a finding based on censorship not on an infringement of property rights.

What is of interest concerning the matters under consideration is that Burnet was not seeking to protect economic interests. What Burnet was trying to protect were matters of dignity and reputation.

Burnet’s case was important for another reason. Prior to the statute, disputes were settled in the Court of Assistants, a private forum operated by the Stationer’s Company. Matters were determined through compromise or negotiation. Now, as matters fell under the statute and were heard before independent public Courts, judges were required to interpret the statute and articulate the principles that it conferred.²³ In *Burnet’s* case, the judge was expressly required to consider what it meant to be “an author”²⁴ and what constituted a “literary work” that was afforded statutory

injury or harm will result unless the injunction is granted; Bryan A Garner (ed), *Black’s Law Dictionary* (Thomson & West, 2004), 800.

²³ See Rose, *Authors and Owners*, supra, at page 51.

²⁴ The question being was a translator of a work an author, as much as the creator of the original work.

protection. He appears to have squibbed his duty in both regards but this is not surprising given that this was one of the first cases where the Court was asked to interpret the statute – no prior case could be looked to for guidance or precedent. These were issues with which no Court had never previously dealt.

Burnet's case was one of the few cases over the period of 1710 to 1740 concerning author's rights. Most cases involved actions by booksellers seeking injunctions against other booksellers – matters mainly of an economic concern and financial interest competed with each other over copy. *Knaplock v Curl*²⁵, *Tonson v Clifton*²⁶ and *Gay v Read*²⁷ were all injunction cases brought by booksellers against booksellers, attempting to prevent the publication of new editions of works over which the applicant claimed ownership secured through prior registration with the Stationers' Company. Generally, these cases were successful.²⁸

A watershed moment came in 1731 when rights protected under the statute started to expire and new unauthorised editions appeared. The critical issue for determination now was if the statutory copyright had expired, did there exist a separate and continuing common law copyright? This issue would vex Courts and the book-trade for the next forty odd years.

Initially, it was the booksellers who sought to protect their works from appropriation by others, on the basis that although the copyright afforded under the statute had expired, there was still ownership under common law copyright, which the statute had not rendered void. The booksellers were alive to the fact that under the new regime their old rights and protections as were under attack. The booksellers again petitioned Parliament, seeking a change to the law that would benefit them by extending the length of the term of statutory copyright. As with previous petitions, the Company disingenuously stressed original authorial ownership over literary works, albeit ownership authors could assign to others. An abstract intangible right was beginning to take shape.

²⁵ *Knaplock v Curl* (1722) PRO c11 690/5; 96 ER 276.

²⁶ *Tonson v Clifton* (1722) 2 Bro P.C 138; 1 ER 842; PRO C11 749.

²⁷ *Gay v Read* (1729) PRO C33 351/305; PRO C11 1739/34.

²⁸ See Deazley, *On the Origin of the Right to Copy*, supra, at pages 51 to 87.

The issue attracted wide attention. Boswell in his *Life of Samuel Johnson* noted:

Alexander Donaldson, bookseller of Edinburgh, ... opened a shop in London, and sold his cheap editions of the most popular ... English books, in defiance of the ... common law right of Literary Property. Johnson ... was ... very angry that the Booksellers of London ... should suffer from an invasion of what they had ever considered to be secure; ... he was loud and violent against Mr Donaldson: ‘He is a fellow who takes advantage of the law to injure his brethren; for notwithstanding that the statute [of Anne] secures only 14 years of exclusive right, it has always been understood by the trade that he who buys the copyright of a book from the author, obtains a perpetual property ...’²⁹

Boswell’s references to English books and Scottish booksellers are important. At this time, there was considerable growth in the Scottish book-trade, with increasing numbers of printers and booksellers. The Scottish trade was based predominantly in Edinburgh.

Edinburgh booksellers saw London as an unnecessary monopoly and many, such as Alexander Donaldson, set out to challenge the southern cartel. Litigation ensued between London and Edinburgh booksellers, with Donaldson a frequent defendant. There was now a discernible change in the nature of the cases brought under the statute. Previously, cases focussed on the author as the creator and originator of the property rights in the work. From 1740 the cases began to consider what “literary property” was and what rights attached to it.

The original conundrum remained. Did the statute alone confer copyright for a limited period or was it an additional protection, supplementing common law copyright that existed in perpetuity? To answer this question, the court needed to articulate what “literary property” was, how it was acquired and how it was justified as a category property in the eyes of the law. The period of 1740 to 1770 would see a coalescing of the ideas and concepts that had developed over the preceding century. This would

²⁹ James Boswell, *The Life of Samuel Johnson*, (David Womersley ed, Penguin, 2008), 231.

culminate in a critical case that is the main focus of the matters under current review, *Millar v Taylor*. That case would prove an important forum in which the matters under consideration would receive significant judicial scrutiny, focusing on what rights and obligations authors had over their works and, critically from a philosophical point of view, where such rights came from and how they could be explained and justified.

Philosophically, over 1710 to 1740, the cases reviewing the terms of the statute were a critical step in the emergence of the modern concepts of author, literary work, and literary property secured through the concept of copyright, importantly, a form of intellectual property, recognising and protecting property rights over intangible and incorporeal matters: expression and sentiment. The statute, ambiguous or silent on significant issues, required that these rights be considered by and defined within the public institution of the Court, by the independent arbiter, the judge, distinct from the old power structures of the Crown, and even Parliament.

By 1740, thirty years after the introduction of the statute, there had been a fundamental change across the concepts under current consideration. By this time the cases evidenced a complex intertwining of law, economics, aesthetics, ethics and philosophy, as the new institutions and concepts began to take on meaning and to have application across society.

The author was now considered an agent who played a fundamentally central role in the process of creation and production. A century earlier the author had been a mere part of the process, subordinate to others involved in the physical production of the end commodity. Creation of the work brought few rights, economic, legal, moral or otherwise.

Since the book-trade's establishment, the market had had little interest in the role and rights of the author. The person who wrote the manuscript was for many simply the person providing the raw material for the economic production of the commodity. They had little control over how the mechanical reproduction of their manuscript

would look or feel.³⁰ Printing, publishing, sales and distribution had been more prominent roles, with greater economic rights. The statute now centred the author as the dominant figure in this process, due to the work's creation. It was the author's intellectual labour that secured his rights and interests. These rights could be (and were) given away³¹, but they originated in the author.

The statute gave the author legal standing to claim against those that had infringed his rights. No longer were authors mainly defendants in a case. They were now accorded rights under the law. The old focus on punishment of the author as an infringer to economic interests had given way to recognition of their creative rights and a protection of those rights within a legal context. The author had gone from defendant to plaintiff, a paradigmatic move from a "Foucaultian" notion of a role based solely on punishment³² to a role based on reward and recognition. The early cases under the statute saw the author as the instigator of actions, seeking redress through the courts, often for reasons beyond an allegation of infringement of economic interests, ones where the author sought to protect his reputation or how the work was presented.

By 1740, authors' rights acquired a more defined and coherent form, due to ongoing judicial determinations. Previously, authors' rights were based on license or grant. No formal instrument or public institution prescribed what indicia were necessary for such rights to be granted. Early ownership rights were not based on the author's creativity but flowed from the Crown's discretion and could be awarded to any person. It was an arrangement that focussed on politics and economics.

Over time, the grant of the right had moved from the discretion of the Crown³³ to legislation by Parliament. Authorial rights were now determined by the judiciary's application of the statute. Should legislation require interpretation, it was for the Court

³⁰ Early authors constantly bemoaned issues as to reputation due to cheap and inaccurate editions published abroad or printed illegally by others.

³¹ Milton sold his rights to *Paradise Lost* in April 1667 to the printer Samuel Simmons for the sum of Five Pounds, see for example, Stephen B Dobranski, "Milton's Social Life", in Dennis Danielson (editor), *The Cambridge Companion to Milton*, supra, at pages 10 and 21.

³² See, for example, Victor Tadros, "Between Governance and Discipline: the Law and Michel Foucault", in *Oxford Journal of Legal Studies* Vol 18, No 1 (Spring 1998), at pages 75 to 103.

³³ See, for example, 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 Martha Woodmansee & Peter Jaszi (editors), *The Construction of Authorship: Textual Appropriation in Law and Literature*, supra, at pages 191 to 210.

to determine the matter. This was one of the key concerns that would emerge with the statute; did it set up a sole legislative and limited form of copyright or did there also exist an ongoing form of copyright at common law that existed in perpetuity? This was an issue that would have to be answered by the Courts.

In addition to these evolving considerations of authors' rights, the role and importance of the literary text as a separate entity was being shaped. There was an acceptance that unique texts had unique creators but were capable of categorisation as a distinct entity. There was an emerging recognition of the text *qua* text, a powerful recognition of signs and symbols, now afforded a legal status and cultural personality. By 1740, the work stood by itself, separate and distinct from the author and from the handwritten manuscript. Many of the cases at this time were ostensibly concerned with issues unique and dependent upon the text itself. Should a cheap but unauthorised version of a work be allowed to be produced? Did the author's name always have to be placed on the text?

Matters that concerned Milton and Defoe, such as textual accuracy, presentation and formatting, attribution, anonymity, misappropriation and plagiarism were more fundamentally concerned with the text *qua* text than with the author. It was the text that was being misappropriated. Attribution afforded the author integrity and dignity, as did control of the edition, but matters such as plagiarism and misattribution were more about the text in its own right. This was an important development. It raised the issue of how author's rights related to rights in the text. What the cases came to show was that authors recognised themselves as trustees over the texts, guardians of textual correctness, insurers of fair presentation and protectors of appearance and quality. The case of *Pope v Curl* considered later bears this out.

Cases over this period continued to consider unique textual issues, especially concerning the question of what adaptation of an existing work could lead to a wholly new work - abridgement? Translation? Annotation? These unique questions, which required answers by the Court, concerned the text *qua* text. Cases concerning the interpretation of the statute acted as a hothouse for the emerging matters under consideration. The statute reflected the emerging notions of possessive and creative individualism, potentially something that comes out of technological advancement,

concerning matters where creativity and skill of the individual are fundamental. The “author” and the “the Literary Property” as specified in Boswell’s *Life of Johnson*³⁴ were terms of the social language emerging from seventeenth and eighteenth century liberalism.

Issues of toleration also became important at the end of the seventeenth century and many writers, especially Locke³⁵, wrote on the importance and benefit to society of a truly tolerant order.³⁶ This debate was critical in bringing about the assertion that individuals are endowed by God with certain qualities and obligations that they cannot renounce or abrogate to any authority.³⁷ Such a vision of the self as an individual leads to a recognition that property is individuality and that in a creative and legal context, literary propriety ultimately becomes literary property.

Alexander Pope stands out as an example of how the author regarded himself as a creative individual. He had a keen sense of the emerging concepts of the author, literary property and ownership over the text. Pope went to considerable lengths to exercise control over all aspects of the production of his works, dramatically shown in a case he brought against one of London’s most prominent booksellers, Edmund Curll.³⁸

Pope was the first ‘modern’ professional author. By the time of his death in 1744 he was considered one of the leading literary figures of the day.³⁹ Pope was initially famous for his translation of Homer and, subsequently, for his own writings. He not only achieved notoriety for his translations of Homer⁴⁰ but he also secured one of the most lucrative publishing deals of the time for his work on the *Iliad*.⁴¹ He was well

³⁴ See above at note 20.

³⁵ John Locke, *A Letter Concerning Toleration* (Create Space Independent Publishing Platform, 2016).

³⁶ Maurice Cranston, “John Locke and the Case for Toleration”, in John Horton and Susan Mendus (eds), *John Locke: A Letter Concerning Toleration in Focus* (Routledge, 2004), 88.

³⁷ See Richard Ashcraft, *Revolutionary Politics & Locke’s Two Treatises of Government* (Princeton University Press, 1986), 88.

³⁸ *Pope v Curll* (1741) 2 Atk 342; 26 ER 608. There are two alternate spellings in the authorities, of Curll and Curl; the former is preferred and so is used in the text.

³⁹ Pat Rogers in “Introduction”, in Pat Rogers (ed), *The Cambridge Companion to Alexander Pope* (Cambridge University Press, 2007), 9.

⁴⁰ See Steven Shankman, “Pope’s Homer and His Poetic Career”, in Pat Rogers (editor), *Op Cit*, at pages 63 to 76.

⁴¹ See Catherine Ingrassia, “Money”, in Pat Rogers (editor), *Op Cit*, at pages 175 to 184.

known during his lifetime⁴², but his work fell out of favour. His reputation was later restored and he is now considered a leading figure in the literary canon.⁴³ Pope was an accomplished and established author, one of the first to be able to support himself through writing. He was vocal in his views on authors' rights and interests.

Pope was responsive to the new commercial and legal world: as author, litigant, contract negotiator, entrepreneur, printer, publisher and distributor. Pope chose to be involved in the production of his works, not only for economic reasons⁴⁴ but because the book-trade was for him a sensitive and articulate register to his literary abilities and talent.⁴⁵ In many ways, Pope was the very embodiment and personification of the range of interests and issues under consideration.

Pope appreciated that the act of literary creation was linked to his own skills and was a manifestation and extension of his own self, indicative of the emerging notion of possessive and creative individualism. He conceived of himself as the sole proprietor of his own skills and of the product of those skills⁴⁶. His works were an extension of himself. While he acknowledged the importance of commerce in his activities, Pope saw himself as a "man of letters", a creative and professional author. This was how he wished others to see him⁴⁷, as an artist, living by his own creativity. Given his involvement in the whole of the creative process, concentrating on reputational *and* financial success, Pope personified the commercial reification of "authoriality".

Significantly, Pope was fully conscious of the business of the book-trade and alive to how the law and recent cases had reshaped authorial protection.⁴⁸ He saw no tension between his life as a writer and his business as a publisher. This ability to see himself

⁴² See for example Dr Samuel Johnson's praise of him in *Boswell's Life of Samuel Johnson*, supra, for example pages 788 and on. Amore, indeed.

⁴³ Entry on Alexander Pope in Margaret Drabble (ed), *The Oxford Companion to English Literature* (Oxford University Press, 2000).

⁴⁴ Although he clearly knew how to achieve a good bargain, securing lucrative publishing deals through out his life due in large part by his savvy determination to control the publication of his texts, and his financial gains were far greater than those of most of his contemporaries: as per Ingrassia, in Rogers, *Op Cit*, supra and at page 175, her commentary.

⁴⁵ See Loewenstein, *Op Cit*, supra, at page 233.

⁴⁶ See, for example, Brian Young, "Pope and Ideology", in Pat Rogers (editor), *Op cit*, at page 118.

⁴⁷ See Helen Deutsch, "Pope, Self, and World", in Pat Rogers, *Op Cit*, at pages 14 to 24.

⁴⁸ See Loewenstein, *Op Cit*, *Ibid*.

in a multi-faceted way was in keeping with the emerging notion of creative authorial individualism.

Pope's actions indicate that he understood what it meant to be an author *qua* author and a publisher, and also appreciated the critical importance in the nature of the text as a unique work, one that carried an aesthetic quality and character, such that the text itself needed recognition, reverence and protection within the market-place of the book-trade. Pope was immersed in the industry, knowing many of the printers, publishers and booksellers.⁴⁹ While he commenced his career as a translator, in later years, Pope assumed control over all aspects of the production of his works.⁵⁰

Evidencing his familiarity with the new legal framework, Pope compiled a list on the state and disposition of his literary property⁵¹, referencing the relevant contracts and the provisions of the statute under which his works were protected.⁵² Pope was so immersed in the book-trade not simply for economic reasons, but because he saw it as a means of self-expression and self-control or self-regulation.⁵³

Pope appreciated the new market dynamic and understood that it had replaced the old licencing system. Such insight is seen in his work *The Dunciad*, which took a satirical and critical view of Grub Street⁵⁴ and the London book-trade. Inherent in all of Pope's activities was that there had been a fundamental move by the author from the private to the public sphere, with the author becoming a social and professional figure.⁵⁵

Pope's desire to have unfettered control over the process of publication was indicative of the "professional author". He was concerned with how the work looked, with its visual presentation. He agonized over all elements of the text's presentation⁵⁶, the

⁴⁹ Paul Baines and Pat Rogers, *Edmund Curll: Bookseller* (University of Oxford Press, 2007), 1-8.

⁵⁰ See James McLaverty, "Pope and the Book-trade", in Pat Rogers (editor), *Op Cit*, at pages 186 to 197.

⁵¹ See Loewenstein, *Op Cit*, at page 234.

⁵² George Sherburn (ed), *The Correspondence of Alexander Pope, Volume 5*, (The Clarendon Press, 1956).

⁵³ See, for example, Catherine Ingrassia, "Money", in Pat Rogers, *Op cit*, at page 175.

⁵⁴ Grub Street was an area in London near Moorfields that was the traditional base of low-end publishers and booksellers, similar to Fleet Street in respect of the newspaper industry.

⁵⁵ See McLaverty, *Op Cit*, supra at page 186.

⁵⁶ David Foxon, *Pope and the Early Eighteenth Century Book-Trade* (Clarendon Press, 1991). See especially the last two chapters which deal with how the presentation of Pope's work developed, under the specific direction of the author.

font, the size of the print and the page, the quality of the paper, and the look and feel of the book.⁵⁷ As his career progressed, he took on a technical interest in the book's presentation: he had a keen interest in layered notes, parallel texts, black letter type and new font styles.⁵⁸ He became deeply concerned with the cleanness of the printing, angering at smudging and blotching on any end-copy.

Philosophically, here is an author deeply involved and intimately intertwined with his creation, conscious of issues of dignity, integrity and respect not only concerning the author but also the work itself. Here is an author who sees the product as an extension of his own skill and talent, which must be presented free from error or mistake. Pope recognised that the process of a book's creation imposed an obligation upon the author to protect the integrity of the work, in being the agent who ensured that there was no part or element wanting in the work created. The author as creator and the resultant text made up the component parts of the ultimate work, and together constituted a unity of creation. His concern with reputation, self-expression and creative individualism rather than mere economic return was evidenced in his relationships with one the main publisher-booksellers of the day, Edmund Curll.

Curll was a dominant figure in the London book-trade. Relationships between Pope and Curll had been strained since Curll had suggested that Lady Mary Wortley Montagu was the author of a work published under Pope's name, *Court Poems*. Pope was deeply angered.⁵⁹ Curll was an influential figure in the book-trade. His support could make or break authors.⁶⁰ This did not prevent Pope from surreptitiously giving Curll a laxative⁶¹ and then issuing a number of pamphlets on the episode.⁶²

There was little wonder about Pope's motivation. Curll was the publisher of *Court Poems*⁶³, aware that Pope was indeed its author. Curll represented all that Pope disliked about the book-trade, the antithesis of authorial respect and dignity. Curll had stated:

⁵⁷ See McLaverty, *Op Cit*, at page 187.

⁵⁸ See Foxon, *Op Cit, Ibid* and McLaverty, *Op Cit*, at page 194.

⁵⁹ Paul Baines, *The Complete Critical Guide to Alexander Pope* (Routledge, 2000), 135-137.

⁶⁰ See Baines and Rogers, *Op Cit*, at pages 318 to 319.

⁶¹ With disastrous consequences for Curll the imbiber.

⁶² See Paul Baines, *Op cit*, at page 19. Curll appeared as a figure of ridicule and derision in many of Pope's satirical pieces, see especially *The Dunciad*.

⁶³ See McLaverty, *Op Cit*, at page 191.

I do sincerely pray Forgiveness for those ... Methods I have pursued in inventing new Titles to old Books, putting Authors Names to Things they never saw, publishing private Quarrels for publick Entertainment.⁶⁴ [sic]

Pope described Curll in a pamphlet he released, tellingly entitled “*A Further Account of the Most Deplorable Condition of Mr Edmund Curll,*” published and distributed 1716:

He takes no responsibility for his publications, hides behind the names of other booksellers, vilifies great men of either party, distorts the facts, puts out works under the names of famous authors when they are not theirs, publishes incorrect editions, abuses great authors, and publishes pornography as a major source of income.⁶⁵

Pope’s concern with misappropriation, misattribution, respect and dignity are at the heart of this passage, evidencing an awareness of the unique role and position of the author in society. To be so critical and publicly opposed to the influential Curll indicated how incensed Pope was concerning Curll’s transgressions against authors. That Curll acted with disdain and treated a popular and successful author with such disregard evidenced the old world order, where publishers figured more, were accorded greater value over authors. The world was changing. Pope’s actions were an example of how far the old regime had changed.

Pope was also an active litigant, using the Courts and the new legislation to protect his rights, economic, reputational and creative, to protect his works and assert his authority over literary property. Pope was one of the first authors to realize that the statute could be used for the author’s own advantage. He was the first author to do so on a large and frequent scale⁶⁶. He sued a number of leading publisher-booksellers of the day.⁶⁷ Cases included, *Pope v Bickham*⁶⁸, an infringement of Pope’s *Essay on*

⁶⁴ See McLaverty, *Op Cit, Ibid.*

⁶⁵ See McLaverty, *Op Cit, Ibid.*

⁶⁶ See John Feather, *A History of British Publishing*, supra, at pages 55 to 56.

⁶⁷ Howard Vincent, ‘Some Dunciad Litigation’ (1939) 18 *Philological Quarterly* 285.

*Man, Pope v Gulliver, Lintot et al*⁶⁹, concerning the printing rights to *The Dunciad*, and *Pope v Illive*⁷⁰, a demand for an account of profits for unauthorised publication.

The apotheosis of Pope's career as a litigant⁷¹ and his ultimate assertion as an author of dignity and integrity, was the action that he would bring against his old foe Curll, *Pope v Curll*.⁷² This case is of fundamental concern to the matters under current consideration. It showed an author seeking to have the Court articulate what rights and obligations arose under the statute in respect of a particular type of text, the letter. It would prove to be an important transitional case, from the old regime to the emerging modern concepts under review. It reflected a commingling of legal, economic, aesthetic, ethical and philosophical considerations. Again, it highlights the scope of historical forces and tensions at play.

The central question in the case concerned who owns property in a letter, the author of that correspondence or its recipient? This case was one of the first to deal exclusively with a consideration of the text, distinct from the physical paper upon which the letter was written. Did the composition contained within the letter become vested in the addressee once received by that person? Or did ownership of the text, as distinct from the physical paper on which the letter was written, remain with the correspondent? The questions had never before been considered. They touched upon the sentiments contained within the text. In this private correspondence of Pope, the content was an expression of personal experiences, sensations, opinions and thoughts coloured by personal emotions. These were deeply personal affairs that were being published without permission. Over time, Pope had exchanged correspondence with the Reverend Dr Swift.⁷³

The letters that the young Pope had written came into Curll's possession.⁷⁴ He published them in a collected edition.⁷⁵ Pope brought suit against Curll. He did not

⁶⁸ *Pope v Bickham* (1744) PRO C11 626/30; C33 382/179.

⁶⁹ *Pope v Gulliver, Lintot et al* (1743) PRO C11 549/39; C33 380/259.

⁷⁰ *Pope v Illive* (1743) PRO C33 837/14.

⁷¹ See Baines and Rogers, *Op cit*, at pages 285 to 288.

⁷² *Pope v Curll* (1741) 2 Atk 342; 26 ER 608; referred to now for ease of reference as "*Pope*".

⁷³ See Leslie Epstein, *Alexander Pope*, see Chapter VI Correspondence, Create Space Independent Publishing Platform; 1 edition, London, 2016.

⁷⁴ John Stubbs, *Jonathan Swift: The Reluctant Rebel* (Penguin, 2017), 404.

⁷⁵ *Dean Swift's Literary Correspondence for 24 Years: From 1714 to 1738*.

seek an injunction or an account of profits.⁷⁶ In this case Pope used a commercial regulatory statute to pursue matters that had as much to do with reputation as with commerce.⁷⁷ He relied upon the statute in support of his case that he continued to own the copyright in the letters after they had been sent.

As will be seen, critically, the originating writ in the case⁷⁸ had been drafted by a friend of Pope, who was a leading barrister at the time, William Murray, later Lord Mansfield. Mansfield would be a leading barrister in copyright cases from this time and would be a justice in the key case, *Millar v Taylor*.

At the heart of the case of *Pope v Curl* was authorial reputation and dignity: Pope found the published letters jejune and embarrassing. He had written the letters to Swift while young; they were overly sycophantic. They also contained many personal and private views held by the young Pope. In Pope's opinion, the decision to publish such material could only be accorded to the author of the letters.

For Pope the unauthorised release of the letters was an infringement of his rights as an author, as he was deprived from deciding for himself "what pieces it may be most useful, entertaining, or reputable to publish, at the time and manner you think best", and that as an individual he had lost his right "even over [my] own sentiments ... to divulge or conceal them" and that as a member of society unauthorised publication seriously harmed:

your private conduct, your domestic concerns, your family secrets,
your passions, your tendernesses, your weaknesses, are exposed to the
Misconstruction or Resentment of some and to the Censure or
impertinence of the whole World.⁷⁹

⁷⁶ See Deazley, *On the Origin of the Right to Copy*, supra, at pages 70 to 73. An injunction would have been an immediate order of the court and have stopped Curll from printing, publishing and distributing the unauthorized edition. An account of profits would have seen any economic benefit from the sale of the work redirected from Curll to Pope. Pope sought neither remedy.

⁷⁷ See Rose, *Authors and Owners*, supra, at page 62.

⁷⁸ Also known as the statement of claim.

⁷⁹ As for these passages and comments: Maynard Mack, *Alexander Pope: A Life* (Yale University Press, 1985), 654-660 and 666.

Pope claimed ownership over the text of the letters that he had written and sent to others, ownership over the form in which his sentiments had been expressed. Pope conceded that the recipient owned the physical paper but maintained that the author retained the ownership of the copy in the text. Curll countered, arguing that the letters Pope had sent were gifts to the recipients, and were no longer Pope's property. Any claim to ownership was abandoned on the sending of the letters.⁸⁰ Pope replied that even though the letters may no longer be his property, he remained the author of their contents and retained the right to decide on whether or not they should be published.⁸¹

The matter came before Justice Hardwicke for determination. No Court had considered the issue before. It was incumbent upon the Courts to enunciate what rights were protected under the statute. Hardwicke had to resolve the issue between the author of the text and the owner of the letter. He found for Pope, dismissing Curll's argument:

I am of the opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a license to any person ... to publish them to the world, for at most the receiver has only a joint property with the writer.⁸²

Adding:

[t]hat where a man writes a letter, it is in the nature of a gift to the receiver, ... the receiver only acquires a qualified interest in it. The paper on which it is written may belong to him, but the composition does not become vested in him as property, and he cannot publish against the consent of the author.⁸³

Accordingly, Curll was unable to publish the letters that had been written by Pope. In relation to publication rights, the author of the text had won out over the owner of the letters. The case acknowledged that the composition of and sentiments expressed in

⁸⁰ Leo Drambrosch, *Jonathan Swift: His Life and His World* (Yale University Press, 2013), 461-462.

⁸¹ See Deazley, *Op Cit*, at page 71.

⁸² *Pope v Curll* at C11 1569/29.

⁸³ See Deazley, *Op Cit*, at page 72 for detailed reference to source.

the text do not become vested in the letter's recipient. Hardwicke's decision was of critical importance. The question raised by the case had no clear answer under the statute - saying nothing about unpublished material, but this was the legislation that governed the matter.

Hardwicke was one of the first judges to give consideration to the relationship between the author, the reader, the book and the text. The decision was a watershed moment, as Deazley argues:

In resolving the issue before him in the way that he did, in the way that best accorded with the underlying principle of the Statute . . . , . . . Hardwicke divorced Pope's physical letter from its metaphysical content, splitting the book and the text asunder in a way that the legislators responsible for the Act had hardly contemplated.⁸⁴

The case was important as it established the difference between the written work's physicality and the immaterial and metaphysical content, with the court finding that the author owned the expressions of their ideas and sentiments.⁸⁵ Philosophically, the case was important because it carried an acknowledgment of the individuality of expression, tethering the author to the sentiments on the paper. This was recognition of an abstract right. And here was a judge articulating rights, which had been found or implied in the statute.

Legally, *Pope* was an important case because it established for the first time the rule that at law copyright in a letter belongs to the author. It was also one of the first cases in which an author went to Court to defend his direct literary and not his economic interests.⁸⁶ Pope was not really concerned about economic rights – this was a case borne out of concerns over reputation and personal interest.

It is telling that the literary works that Pope was concerned about were perhaps the most personal of compositions – private correspondence. The case was more a matter

⁸⁴ See Deazley, *Op Cit*, at page 74.

⁸⁵ See Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle*, supra, at page 86.

⁸⁶ See Rose, "The Author in Court", supra, at page 211.

for Pope of privacy than commerce, and an intrusion in to a domain that Pope infused with a moral sense of property, that being a young gentleman's private letters. Pope's sense of moral ownership over these items was at complete odds with the views of the book-trade, who saw only material and tangible items. It was the author who was more concerned not with the object but with the composition – with the ideas and sentiments, expressed in words that happen to be written down upon the paper. In bringing the litigation, Pope was more concerned with the management of his image and reputation, more concerned with his personal rights than with his economic rights.

As Rose notes, Pope believed that the publishing of his personal correspondence was an offence against decency.⁸⁷ For Pope the unauthorized printing of private letters was “betraying conversation” and undermined social decency:

To open Letters is esteem'd the greatest breach of honour; even to look into them already open'd or accidentally dropt, is held ungenerous, if not an immoral act. What then can be thought of procuring them merely by Fraud, and printing them merely for Lucre? We cannot but conclude every honest man will wish, that if the Laws have as yet provided no adequate remedy, one may at least be found to prevent so great and growing an evil.⁸⁸ [sic]

Pope found this remedy, after consultation with his friend and lawyer, William Murray, in the statute. In *Pope* he was the first author to use a commercial regulatory statute to pursue matters of proprietary and personal rights on the one hand and property and economic rights on the other. This is reflected in Pope's correspondence on the litigation, which blends the language of propriety (*honour, generosity* and *fame*) with that of property (*theft, snatch, and plunder*)⁸⁹:

Your Fame and your Property suffer alike; you are exposed and plunder'd.⁹⁰ [sic]

⁸⁷ See Rose, *The Author in Court*, supra, at page 216.

⁸⁸ See Alexander Pope, *The Correspondence of Alexander Pope*, supra, at Vol 1, x 1.

⁸⁹ See Rose, *The Author in Court*, supra, at page 219.

⁹⁰ See Alexander Pope, *The Correspondence of Alexander Pope*, supra, at Vol 1, x 1.

With the decision in *Pope*, the changes that had been made in the period under consideration were readily identifiable. Property had traditionally been considered to be something secured over a physical tangible object. In the present case, we see property as being something in respect of ownership rights over the intangible nature of the author's sentiments and expression set out in correspondence. The litigation evidences a dispute centred not on economic concerns but on the private concerns of the author as an individual and anxious in relation to matters of reputation and privacy. These were issues of dignity and identity. *Pope* was a transitional case. With the statute established and a number of cases beginning to clarify the law in this area, it was clear that the Stationers' Company's monopoly was under attack on many fronts.

There was by this time a significant increase in activity in Edinburgh in relation to publishing and printing. The number of Edinburgh booksellers dramatically increased. The Scottish booksellers, mainly based in Edinburgh, saw the London book-trade as an unnecessary monopoly and took active steps to establish their own localised book-trade, which often infringed or cut across the right of the London booksellers.⁹¹ Tensions soon led to litigation. This subsequent litigation will concern the following chapter. One further case is, however, worth examining in the context of matters under consideration.

One notable case after *Pope*, between the conflicting interests of London and Edinburgh, was *Midwinter v Hamilton*.⁹² This followed on from much of what had been acknowledged in *Pope*, but in the context of books, not letters, finding that the author remained the proprietor not of the physical book but of the composition and the associated intangible rights that existed in the text. The court accepted that the buyer of the book owned that physical object book but that the rights the buyer had were only in respect of *that* particular book.

In *Midwinter* the Court found in favour of the London booksellers. Nonetheless, Edinburgh booksellers continued to publish cheap unauthorized editions. This resulted

⁹¹ See Deazley, *Op Cit*, at page 124.

⁹² *Midwinter v Hamilton* (1743-1748): see reference to the original petitions in Deazley, *Op Cit*; the fullest report of this truly complex case is in Lord Henry Home Kames, *Remarkable Decisions of the Court of Sessions*, (London, 1766), 154-161.

in further litigation between London and Edinburgh interests and saw several cases where Mansfield was involved as a counsel for one of the parties or eventually as the judge who sat on several of the later cases. The intense litigation captivated the public's imagination⁹³ and became known as the "Battle of the Booksellers".⁹⁴ The issue of what was meant by "literary property" became a subject for increasing discussion in society and Pope remained an influential figure up until his death in 1744 and after.

In 1747, Pope's friend and executor, William Warburton (also a friend of Mansfield⁹⁵ - the three men were intimately connected during Pope's lifetime⁹⁶ and Mansfield remained friends with Warburton for many years), published a pamphlet on the litigation.⁹⁷ This would provide the earliest theorization of copyright as a wholly intangible property⁹⁸ and set out a discourse on the subject outside of the Court battles. The pamphlet quickly followed *Midwinter*, where the London booksellers had argued that text as a stand-alone concept could be property, to be distinguished from the physical book. Warburton's pamphlet was an important example of thinking outside of the Court process and one step removed from the London book-trade.

Warburton set out to demonstrate that "text" is capable of being classified as property. He contended that property is divided into two groups: movables and immovable. Movable property can, in turn, be divided into that property which is natural and that which is artificial. Artificial property thereafter can be divided into products of the hand and of the mind:

For that the Product of the Mind is as well capable of becoming Property, as that of the Hand, is evident from hence, that it hath in it those two essential Conditions, which, by the allowance of all Writers

⁹³ See *Boswell's Life of Samuel Johnson*, supra, at page 231.

⁹⁴ See Gwyn Walters, "The Booksellers in 1759 and 1774: The Battle for Literary Property", *Library*, 29 (1974): 287-311.

⁹⁵ See Norman S Poser, *Lord Mansfield: Justice in the Age of Reason*, supra at page 56.

⁹⁶ See M Mack, *Alexander Pope: A Life*, Yale University Press, New Haven, 1985 at pages 736 to 745.

⁹⁷ *A Letter From An Author to a Member of Parliament, Concerning Literary Property*.

⁹⁸ Section here and on drawn from Mark Rose, "*The Author in Court*", supra, at pages 225 to 229.

of Laws, make Things susceptible of Property: namely Utility, and a capacity of having its Possession ascertained.⁹⁹

In examining the nature of the author's property, Warburton asserted that property of the hand is confined to the individual thing as made and the property is wholly material:

but in the other Case of Property in the Product of the Mind, as in a Book composed, it 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.¹⁰⁰

The author's property was made up solely of the ideas, the sentiments, and the expression of the words, which were the product of his creative mental labour. This was a step forward from what Hardwicke had found in *Pope*, where the Court had distinguished between the property rights of the receiver of a letter and those of the creator. Here in Warburton's essay, as Rose notes, the notion of a property in pure signs, abstracted from any material support, was being systematically developed and promulgated.¹⁰¹ Here was an example of recognition of the metaphysical elements contained within the text.

For Warburton, the essence of the author's property consisted of the ideas that were the product of the author's mental labour – property in an abstract state.¹⁰² This was a fundamentally different proposition to the view of the previous century that authors' rights were based on privilege and patronage¹⁰³, more akin to a private grant of licence than a fully formed public right of property.

Warburton contended that unlike the new patent rights, property in texts secured through copyright was perpetual. This was at odds with the statute, which limited statutory copyright to fixed terms. For Warburton, inventions, as protected by the

⁹⁹ See Warburton, *Op Cit*, at pages 405 and on, and at page 408.

¹⁰⁰ Warburton, *Op Cit*, *ibid*.

¹⁰¹ See Mark Rose, "The Author in Court", *supra*, at page 226.

¹⁰² See Mark Rose, *Authors and Owners*, *supra*, at page 73.

¹⁰³ See R Deazley, "Commentary on Warburton's Letter From an Author (1747)" in L Bentley and M Kretschmer (editors), *Primary Sources on Copyright (1450-1900)*, www.copyrighthistory.org

patent system, were mixed in nature, having both manual and mental elements in their production. This mixed nature of invention did not allow for property rights in perpetuity. Mental labour was another matter:

if there be degrees of right, that of authors seemeth to have the advantage over most others; their property being in the truest sense their own, as acquired by a long and painful exercise of that very faculty which denominateth us MEN.¹⁰⁴

Pope was a transitional case but Warburton's *Letter* is compelling evidence of fundamental change, being a clear example of moving the dialogue forwarded in a more expanded and revolutionary way and doing so in a much broader and more public forum than the Court. The matters that Warburton had opined on - the nature of literary property, the extent of the author's rights and the question of the term of ownership - would be addressed in three important cases heard over the next decade, all involving the issue of copyright and whether there existed separate from the statute a common law right of copyright that lasted in perpetuity. Each case was an important skirmish in the ongoing conflict between the London and Edinburgh booksellers, the 'Battle of the Booksellers'.¹⁰⁵ It is to these cases to which we turn.

¹⁰⁴ Warburton, *Op Cit*, at 405.

¹⁰⁵ See Gwyn Walters, *Op Cit, ibid.*

Chapter Seven

The Battle of the Booksellers: the Opening Skirmishes: 1749 to 1765

By the mid-1700s the key concepts under consideration appeared to have been almost finally fully formed and close to a modern understanding.

Through the actions of Milton, Swift, Defoe and Pope, “the author” was now a clearly recognised figure, acknowledged as fundamental to the process of literary creation, having a degree of possessive individualism or creative self-ownership over the literary work, with the text being the personification of the author’s literary abilities, an extension of himself borne out on his literary skills.

The notion of the author was coming into sharp focus. It was at this time, for example, that Shakespeare was ‘rediscovered’¹ and accorded prominence in the emerging literary canon², as authors began to attain both notoriety and celebrity status and achieved fame as authors.

The notion of the “literary text” had also taken hold. Literary works in their own right became prominent, as sales continued to escalate. Novels achieved much notoriety, such as *Gulliver’s Travels* and *Robinson Crusoe*³. The wealthy took to establishing libraries with a new passion and public libraries began to emerge.⁴ The book was becoming a common and accessible commodity. “Literary property” had been formally acknowledged with the enactment of the Statute of Anne.⁵ This was a critical development.

¹ See Rose, *Authors and Owners*, supra, at page 123.

² Robert David Hume, *The Development of English Drama in the Seventeenth Century* (Clarendon Press, 1976); Lois Marder, *His Exits and His Entrances: The Story of Shakespeare’s Reputation* (J B Lippincott, 1963).

³ Andrew Lambert, *Crusoe’s Island* (Faber & Faber, 2016), 147-148.

⁴ See Elisabeth Leedham-Green and David McKitterick, “Ownership: Private and Public Libraries, in Barnard and McKenzie, (editors), *The Cambridge History of the Book in Britain: Vol IV, 1557 to 1695*, supra, at page 323.

⁵ Enacted in 1710, and again, a reference to “the statute” in this chapter is a reference to the Statute of Anne.

In passing the statute, Parliament had acknowledged the concept of literary property as a legal right and that copyright over literary works vested in authors – but only for a limited period. Parliament had expressly limited the term of statutory copyright.

English law was comprised of a combination of laws enacted by Parliament, and laws established under judicial decisions. In addition to legislation, law could be made through the doctrine of precedent, where a law was said to exist because a Court had previously so ruled. Judges could also be called upon to effectively make new law when they were asked to interpret or apply legislation to particular situations. The body of common law was said to be in general existence, only waiting to be given judicial pronouncement.⁶ Common law existed alongside legislative or posited law.

One issue that remained unresolved concerning the statute with its limited term as to copyright was whether it replaced any common law notion of copyright or whether common law copyright continued to exist, working alongside the statute. As of 1750, the Courts had not yet addressed this question, as to whether there did exist a common law notion of copyright per se, of and in itself, and how any such common law notion sat alongside the legislative framework of copyright as set out in the statute. This was difficult for the judges to determine. The statute was silent on the issue and no body of prior case law existed which could be called on as precedent to give guidance to any judicial consideration of the question.

This absence of prior law would have a direct bearing on three important cases considered below. It would require the lawyers involved to look to the nature of author's rights (and what those rights might be – economic, legal, natural or otherwise) outside of and beyond legislation and common law. The cases importantly also evidenced the beginnings of the emergence of the notion of the author's "moral claim" or "moral right" over his work, as a part of natural law theory applied through an active judicial system.

Besides the legal rights that the statute conferred on authors, as will be considered below and in following chapters, the cases examined show that alongside a consideration of legal rights afforded to authors, several jurists and judges began to

⁶ See, for example, Langbein, et al, *History of the Common Law*, supra, at pages 85 and on.

identify or describe certain specific natural rights that authors might possess. These particular natural rights were moral in nature in that though they were an expression of a natural right (a right that existed in and of the individual, *a priori* and outside of man made posited law), they had a particular content that made them specifically moral in nature.

The specific natural rights under consideration did belong to a family of perfect natural rights⁷, such as life, liberty, and freedom of estate, but they were specifically moral in nature in that they concerned issues such as the author's reputation, the self-ownership of the author's literary and creative abilities, the notions of correct attribution and textual protection and a growing recognition of violations against such rights by instances such as plagiarism, unauthorised publications and editions which due to cost were said to undermine the aesthetics or embodiment of the sentiment in the textual expression. John Locke also heavily influenced the emergence of natural rights theory at this time, again, as will be considered below.

The vexed issue of authors' rights and their content and scope would highlight the deep differences between an unchanging conservative body of legal opinion, and a new and expansive view of jurisprudence. The language of "claim-rights" appears throughout the legal arguments and judgments in the cases. When considered by the lawyers, authors' rights were in the nature of a "claim-right" over property in the literary work and seek an acknowledgement from the Court that it has a corresponding duty to the author to recognise this right. This duty balances the claim-right asserted by the author. The cases evidence the emergence of a right that was beginning to be formulated as a claim that vested in the author, not as an accidental attribute but due and owing to an individual with a rational nature - the creative author imbued with self-consciousness and self-conscious desires.⁸

One figure, acting first as counsel and later as judge, dominated the three cases, William Murray, later Lord Mansfield.

⁷ See Mautner in this regard, *Op cit* at page 485 to 491.

⁸ Patrick Lee, "The Basis for Being a Subject of Rights: The Natural Law Position" in John Keown and Robert P George (eds), *Reason, Morality, and the Law: The Philosophy of John Finnis* (Oxford University Press, 2013), 236.

Mansfield was intimately involved in the litigation, a series of disputes between the London booksellers and the emerging Edinburgh book-trade. The Edinburgh booksellers sought to put an end to the monopoly-hold that London continued to exert over the book-trade. They used the Courts to argue that once the protection afforded under the statute had lapsed, all works were open to unlimited exploitation - the work was now in the public domain.

All three cases to be considered in this chapter looked specifically at the question of whether copyright existed as a common law right, separate from the statute and, if it did, whether it existed in perpetuity. In *Millar v Kincaid*⁹ Mansfield appeared as counsel for the London booksellers; in *Tonson v Walker*¹⁰ Mansfield again appeared as counsel, this time as Solicitor-General, representing Parliament; and in *Tonson v Collins*¹¹ he sat as Lord Mansfield, Chief Justice of the King's Bench. The three cases had a direct bearing on the crucial decision of *Millar v Taylor*.^{12, 13}

Millar would be the case where the conundrum over common law copyright would be 'solved'. The preceding three cases are important, revealing how the language, law and debate changed profoundly in a short period. The cases show that given the paucity of previous decisions on the issue, the lawyers who supported a right to perpetual common law copyright relied upon moral and natural law rights to give their arguments legitimacy. One lawyer, especially, Sir William Blackstone, would utilise Locke's writings to tether these rights to literary property, comprehensively altering the law.

As Rose notes, it is difficult to underestimate Mansfield's overall influence in relation to the emergence of authors' rights at this time:

The intellectual style and the legal substance of the struggle were
shaped by one man ... Mansfield, who is generally considered the

⁹ See *Millar v Kincaid* (1749) see British Library BM 18th Century, 4065/03 and /04.

¹⁰ *Tonson v Walker* (1752) 3 Swans 672; 36 ER 1017.

¹¹ *Tonson v Collins* (1762) 1 Black W 321; 96 ER 180.

¹² See *Millar v Taylor* (1768) 4 Burr 2303.

¹³ A case considered in detail in the following chapters of this work. For ease of reference now referred to as "*Millar*".

single most influential jurist of the eighteenth century. Throughout this period one encounters Murray either as counsellor or as judge.¹⁴

All three cases dealt with the struggle between the competing interests of the London booksellers and the Edinburgh booksellers. Through these cases, the London booksellers sought a finding that even after the expiration of the term of copyright provided for under the statute, the common law term lasted in perpetuity; such an exclusive and monopolistic arrangement did not, of course, suit the Scottish booksellers who sought to dominate the market with cheaper and more economically produced editions - often of unauthorised works. Their investment swung on a finding that once the term conferred under the statute expired, the work is issue was 'fair game' and was without ownership or protection.

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As Oldham and Poser show¹⁵, Mansfield was a reforming judge, committed to making the law responsive to the needs of an emerging commercial nation. He believed the Courts should function in a professional and independent manner. Prior to this, as Mokyr notes, courts had been unpredictable, slow and entrenched in out-dated precedent and constructs.¹⁶ As Chief Justice, Mansfield undertook substantial reform. He overhauled the jury system, introduced the use of expert evidence, and established

¹⁴ See Mark Rose, *Authors and Owners*, supra, at page 68.

¹⁵ James Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina Press, 2004); Norman S Poser, *Lord Mansfield: Justice in the Age of Reason*, McGill-Queen's University Press, Montreal, 2013.

¹⁶ Joel Mokyr, *The Enlightened Economy: Britain and the Industrial Revolution: 1700 – 1850* (Penguin, 2009), 65 (on Mansfield's support of free trade in the courts) and 405-406 (on concerns about the need for reform in the English judicial system at this time).

rules for determination of disputes by arbitration, separate from the court.¹⁷ As a private individual, Mansfield believed that the common law provided a term of copyright in perpetuity.¹⁸ As a lawyer, his judgments show that he held this view on the basis that an author had a natural right to the fruits of their labours.

The three cases in relation to the issues at hand revolved around straightforward but controversial arguments.

Those in favour of perpetual common law copyright relied on the argument that an author had an unfettered natural right to his creation, a right to the commercial exploitation of the fruits of his labour, independent from posited law. This was a natural right, existing outside of the legislation, inherent in human nature and the author's creativity. Those who argued against perpetual common law copyright asserted that "ideas" could not be classified as property. In any regard, the term of copyright was limited under statute. The common law did not grant a separate perpetual term. This was strict legalistic argument. It saw law as a fixed construct, not open to incremental change. It was reminiscent of the approach taken by humanist lawyers in previous centuries, where only posited and prescribed laws were of effect and application.

In response, those in favour of common law rights stated that it was not ideas that were under consideration but the "expression" of those ideas, in a unique form solely attributable to the "expression's" creator. Ownership was asserted over the expression of that idea: the literary text. These respective arguments revealed three important matters.

First, the lawyers who supported of common law property formulated a rights-based argument, using the language of "rights", and "rights" beyond those prescribed by the statute. "Rights" were couched in terms of emerging natural law rights. They were claim-rights held by the author that the Courts had a corresponding duty to recognise

¹⁷ Lord Mansfield drew on writings by John Locke in respect of the new arbitration provisions and processes, which Locke himself had drawn up and advocated for some eighty years earlier while Secretary of the Board of Trade.

¹⁸ Mansfield had drafted the statement of claim in the case of *Pope v Curl*, see the chapter above.

and protect in instances of a violation of those rights.¹⁹ Next, lawyers grappled with the issue of whether the incorporeal intangible nature of literary works could be categorised as property under the law. Counsel who opposed common law copyright found the position anathema to English law, where property was based on rights of occupation and possession. In response, counsel offered a new view on how property rights could be secured, not through occupation or possession, but through labour, relying upon Locke's writings concerning property in *The Two Treatises*. Third, the cases sought an acknowledgement of common law copyright on the basis of an individual's desert; an author deserved the right of perpetual copyright due to his creative endeavours and the acknowledgment that the text was an extension of the author's own literary talent, his creative individualism, or as Macpherson has stated²⁰, as his possessive individualism.

These arguments reflected not only emerging notions of the individual but economic and technological developments, again highlighting the historic forces and tensions at play. England was a rapidly expanding economy in the early stages of the Industrial Revolution, with a focus on trade and undergoing accelerated economic growth.²¹ New innovations required an evolution in the law.

As MacGregor-Burns argues, at this time England was a place of extraordinary economic and demographic dynamism²² and the book-trade was no longer on the fringes of this economy. Printing was a major industry, with significant investment and financial return.²³ Courts were required to protect investments in the new technologies. Oldham notes that Mansfield was an important voice²⁴ in expanding the role of the Courts. Like Selden²⁵, Mansfield believed that the law was capable of

¹⁹ In this regard, see the discussion on right-based arguments in Jeremy Waldron, *The Right to Private Property* (Clarendon Press, 1988) especially within chapter one and chapter three.

²⁰ Macpherson, *Op cit*, see introductory section, for example.

²¹ Joel Mokyr, *The Enlightened Economy: Britain and the Industrial Revolution: 1700 – 1850* (Penguin, 2009), Chapter 2 Enlightenment and Economy, 20-30.

²² James MacGregor Burns, *Fire and Light: How the Enlightenment Transformed Our World* (St. Martin's Press, 2013), 40-43.

²³ See, for example, James Raven, "The Business of Print and the Space of Reading: The Economic Context", in Barnard and McKenzie, *Op cit*, at pages 568 to 582.

²⁴ See James Oldham, *English Common Law in the Age of Mansfield*, *supra*, see especially pages 3 to 78.

²⁵ See chapter four above re John Selden.

change and adaptation to the new economy. He was recognised for his commercial approach to the law²⁶ and his innovative approach to the law. Jefferson wrote of him:

Mansfield, a man of the clearest head and most seducing eloquence has been able to persuade the courts to revise the practice of construing their texts equitably. The object of former judges has been to render the law more and more certain. That of this person to render it more uncertain under pretence of rendering it more reasonable.²⁷ [sic]

Mansfield had established a successful commercial practice and was involved in the leading cases of the day.²⁸ He was instrumental in inculcating and bringing about a respect for the rule of law in his roles as Solicitor-General for the Government and as a senior judge. Mansfield was a significant agent for change in the judicial system to protect commercial interests.

Mansfield also had a deep respect for the rights of individuals and a concern for individuals' worth and value.²⁹ The ultimate example of this is *Somerset v Stewart*³⁰, where Mansfield as Chief Justice held that chattel slavery was an 'odious thing', incapable of being upheld on any reason, moral or political basis, and contrary to the common law.³¹ Several of Mansfield's judgements were highly influential in bringing about the end of slavery in England. It was in this world of dynamic economic growth and new technological developments, with a need for the law to keep pace, that the matters under consideration were acquiring a 'modern' shape.

By 1750 the book-trade was a sizeable industry. Book production grew exponentially; there were approximately 21,000 titles on release in the first decade of the 1700s, and

²⁶ Steven M Wise, *Though the Heavens May Fall: The Landmark Trial that Led to the End of Human Slavery* (Da Capo Press, 2005), 71.

²⁷ Paul Leicester Ford (ed), *Writings of Thomas Jefferson* (Putnam New York, 1894), 115.

²⁸ John Holliday, *The Life of William, Late Earl of Mansfield, Eighteenth Century Collections* (Ecco Print Editions, 1797, reprinted 2012), 65.

²⁹ Steven M Wise, *Though the Heavens May Fall: The Landmark Trial that Led to the End of Human Slavery* (Da Capo Press, 2005), 180; James Oldham, 'New Light on Mansfield and Slavery' (1988) 27(1) *Journal of British Studies* 45, 52-54.

³⁰ *Somerset v Stewart*, (1772) 98 ER 499. Mansfield sat as the judge in this case.

³¹ This decision allowed for the release of certain slaves in England and began the process to ultimate emancipation.

65,000 by the 1790s.³² This period also saw the rise of new genres, especially the novel and the proliferation of newspapers³³, journals and gazettes.³⁴ Religious books began to lose ground to literary and scientific texts³⁵, examples of early popular works being Swift's *A Tale of Tub* and Pemberton's *A View of Sir Isaac Newton's Philosophy*.

Book prices continued to fall and books became more accessible to a wider public. As a result, as Ferrone notes, the act of reading became more independent, daring and irreverent.³⁶ Readers took to the lurid and scandalous volumes, made even more affordable in subscription and episodic form.³⁷ Ever-increasing affordability and access influenced the way the public read. The old collective public mode of one reader reading aloud to an assembled group, such as a family or fraternity, gave way to silent private reading, a pursuit Ferrone argues underscored the existence of the individual³⁸ and aided an investigation of the issues of life and existence that called now for learning and discovery through experience rather than acceptance of innate ideas or existing doctrine.³⁹ The notion of the author was fast evolving and was soon to be central figure in contemporary ideas and cultural practices.

The conundrum remained, however. While authors' rights were expressly protected under the statute, these legal rights were limited as to term. The rights expired under the provisions of the statute. But did parallel rights exist at common law, affording common law copyright that existed in perpetuity? It was a question that the legal system would have to address.

It would require four cases to arrive at an answer. Any answer would have far-reaching commercial consequences: if the common law term existed in perpetuity the

³² Frederic Barbier, Sabine Juratic and Dominique Varry (eds), *L'Europe Et Le Livre: Reseaux et Pratiques Du Negoce De Libraire: XVI – XIX siecles*, (Klincksieck, 1996), middle passages.

³³ G A Cransfield, *The Development of the Provincial Newspaper: 1700 to 1760* (Oxford University Press, 1962), Introduction and Chapter 1.

³⁴ See Andrew Pettegree, *The Invention of the News: How the World Came to Know About Itself*, supra, at pages 269 and on.

³⁵ Vincenzo Ferrone, *The Enlightenment: A History of An Idea* (Princeton University Press, 2015), 113.

³⁶ Ferrone, *Op Cit, Ibid*.

³⁷ See John Feather, "The British Book Market 1600 to 1800", in Eliot and Rose (editors), *A Companion to the History of the Book*, supra, at pages 232 and on to page 246.

³⁸ Ferrone, *Op Cit, Ibid*.

³⁹ Anthony Kenny, *A New History of Philosophy* (Oxford University Press, 2010), 588.

London booksellers could continue their longstanding monopoly. If it did not, the Edinburgh booksellers would be at liberty to exploit all texts once the statutory term expired. There were not only commercial issues at play. To answer this question in a legal context several other fundamental questions would need to be addressed.⁴⁰ These were, what was the exact nature of literary property? How could there be property in ideas when they existed solely in the mind? How could a literary work be seen as being any different from any other kind of invention? In reviewing these questions, the Courts' decisions evidenced a dramatic intellectual change in how these concepts were formulated and lead to a more deeply considered and sophisticated synthesis of ideas of self, the individual, property, rights, law, history, aesthetics and the expression of ideas.

*Millar v Kincaid*⁴¹ was the first case that asked the question of whether there was an author's common law right of copyright.

In 1743 Millar (with several others) brought an action against Kincaid and several other Edinburgh booksellers in relation to a number of works over which Millar claimed copyright and ownership.

The matter was considered at first instance in the Scottish Court of Sessions. Two judgments were given in Edinburgh, with the Scottish court finding against the notion of common law copyright.

The London booksellers appealed their case to the House of Lords and Mansfield appeared for them.⁴² In the appeal, on the central issue of whether the common law bestowed an unlimited term of ownership upon authors, Mansfield argued that it did, relying upon the principle in his submission that an author had a 'natural right' to the

⁴⁰ See Mark Rose, *Authors and Owners*, supra, at page 66 and on through Chapter 5.

⁴¹ *Millar v Kincaid* (1749) 4 Burr 2319; 98 ER 210.

⁴² See Mark Rose, *Authors and Owners*, supra, at page 68 to 71.

fruits of his labour.⁴³ This echoed sentiments expressed by his late friend Pope⁴⁴, with shades of Locke.⁴⁵

The argument formulated by Mansfield is illuminating. In this case, in support of the legal issue that the common law did recognise perpetual copyright, Mansfield did not rely upon prior case law. Rather, he chose to ground his argument on the issue of a “natural right” held by the author, one that arose by virtue of the author’s labour. Mansfield utilised a rights-based argument to support his case, more than a legal argument.

Counsel for the Scottish booksellers countered by arguing that literary composition was not capable of being recognised as property. “Text” was simply an intangible expression of ideas or sentiment. This was a static view of the law, one not open to an acceptance of new paradigms of how property rights (and rights per se) might arise. Also, in contrast to the focus on the individual and individual rights, the argument for the Scottish booksellers favoured the notion of the public domain.

In reply, Mansfield disagreed entirely with the Scots’ case. At the heart of Mansfield’s submission was the proposition that the statute:

... admits a property in copies of books to have existed in authors before the making of it [which property] is grounded upon Principles of Common Right, and Publick good, and is not created to support the actions given by the statute; but on the contrary, those actions are given to fence and preserve that property, as their object and foundation.⁴⁶ [sic]

Again, Mansfield used language of matters beyond the posited law, of justification based on the common right and the public good, seeking to construct his argument not on legal principles but on a moral basis.

⁴³ See Rose, *Authors and Owners*, supra at page 69.

⁴⁴ See, for example, Helen Deutsch, “Pope, *Self and World*”, in Pat Rogers (editor), *The Cambridge Companion to Alexander Pope*, supra and at pages 14 to 24 especially.

⁴⁵ John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises of Government* (Cambridge University Press, 1969), 120.

⁴⁶ *Millar v Kinkaid*, see *British Library collection, Eighteenth Century Reel, 4065/03 at 04*.

The Court gave no answer to the question, due to a legal technicality. In reviewing the first instance decisions of the Scottish Court, the House found that the London booksellers had confused their pleadings, blending together different causes of action.⁴⁷ The Court invited the appellants to recommence and replead their case.⁴⁸ The London booksellers chose not to do so, preferring instead to wait for when a more suitable matter arose on which to litigate. The question did perpetual common law copyright exist, was unsuccessfully dealt with - due to a drafting error.

The next case to address the issue of whether common law copyright existed beyond the statute was *Tonson v Walker*.⁴⁹ This case involved two well-known booksellers, Jacob Tonson and Robert Walker, and concerned the unauthorised publication of Milton's *Paradise Lost*. Tonson brought suit against Walker, engaging Mansfield as counsel.

Tonson proclaimed himself the true assignee of ownership in the work. In his claim, Tonson omitted any reference to the statute, thereby seeking relief outside of the terms of the statute and under the common law:

When their right and title to the said Book, Copy, Manuscript and Poem and to the several additional improvements had been established by such a length of uninterrupted possession, they should quietly have continued to enjoy the whole and sole right, benefit and advantage of printing the same and that no other person or persons would have invaded such Right by printing the same of any part thereof.⁵⁰

For Tonson, 'their' rights were the ones vested in the true owners of the original works and these rights should be protected from unauthorised intrusion.

⁴⁷ Unlike *Poe v Curl*, Mansfield played no part in crafting the original pleadings.

⁴⁸ See AJK Robinson, "*The Evolution of Copyright*", supra, at pages 70 to 72.

⁴⁹ *Tonson v Walker* (1752) 3 Swans 672; 36 ER 1017.

⁵⁰ *Tonson v Walker*, at C 11 1106/18.

Walker refuted the main allegations in the case, arguing that the work in the edition that he had published had been heavily edited and annotated by others, such that it had resulted in the production of a *new* work.

Implicit in this argument was the proposition that an original work could be sufficiently altered by way of annotation and editing that a wholly new work arose. Argument appeared not to have touched upon the degree of annotation and editing required for a separate and original work to be recognised but is of interest to the matters under consideration that the parties to the dispute were willing to at least consider that apart from the production of a literary work by way of wholly independent creation, a piece of literary property could also come in to existence by way of the alteration and editing of an existing work. This suggests that the parties were cognisant that the property existed not in and over the ideas in issue but in the expression of that idea.

In relation to copyright issues, Walker stated:

The defendants do not dispute but that ... Milton had a right and property in the fruits of his own genius, learning and application; had power to assign and convey such property to the said complainants, or those persons under whom they claim, for such time as is allowed for law.⁵¹

The argument of the Scots was plain: the period of protection afforded to Tonson had expired as per the terms of the statute; there was no perpetual term of copyright. The work was therefore theirs to exploit without restraint; the term under the statute had expired; the work was now in the public domain. As had been the case in the previous dispute⁵², the lawyers for the Scottish booksellers relied upon a strict legalistic view of the law, as an unchanging paradigm and one where the public domain was superior to individuals' concerns.

⁵¹ See *Tonson v Walker*, *ibid*

⁵² *Millar v Kincaid*.

The matter came before Lord Hardwicke, with Mansfield appearing for the plaintiffs. In this particular case, Mansfield did rely on legally based arguments. He gave an overview of the law before the statute, of the development of the statute and of the law since its introduction. Regarding pre-1710 common law matters, Mansfield argued all “authors have a right to their productions upon principles of property, upon the constant opinion of all men”⁵³ and that there existed prior to the statute “*a constant and unending property*” in the reproduction of an author’s work vested in that author or his assignees.

Mansfield also reviewed the cases that looked at the King’s prerogative and right to issue private printing patents. If the King could hold a property in books and grant that property to a printer by Royal Prerogative, then logically, so too could a private person hold property rights over literary works⁵⁴.

In Mansfield’s argument, the statute was an important development in an acknowledgement of the rights of authors, because it was an act to encourage authors. Taking away any rights from authors would negate such encouragement. Perpetual ownership encouraged authors in their endeavours.

Having heard the arguments, Hardwicke found that the matter should move to a full hearing before all common law judges, so that the point of law could be finally determined. Hardwicke appeared to favour the notion of common law property⁵⁵ and perpetual copyright. Hardwicke urged the parties to continue with their cases, and granted a provisional injunction but the parties chose not to proceed. The question remained unanswered. It would not be long until there was another attempt to seek guidance from the court and by that time the matter would come before Mansfield now sitting as judge, having been made a judge in November 1756 and sitting as Chief Justice of the King’s Bench.

⁵³ See Deazley, *Op Cit*, at page 134 (and on).

⁵⁴ See Mark Rose, *Authors and Owners*, supra, at page 70.

⁵⁵ *Ibid.* See also A JK Robinson, *Op Cit*, at page 72.

The next significant case in which the question of the existence or otherwise of common law copyright would be considered was *Tonson v Collins*.⁵⁶ The case would consider important arguments central to the notion of what is an author and what is literary property. The plaintiff's arguments would be a watershed moment in how the relevant arguments were formulated. Matters of law and rights intersected. Importantly, the case would see the framing, in legal argument, of a new way of looking at how property rights came into existence, a challenge to existing views on property law.

Tonson involved a reprint of an edition of *The Spectator* first published in 1711. By 1761 the work was outside of the term of copyright under the statute. Tonson claimed he had acquired the rights "for valuable consideration to him and his assigns for ever", but the work was reprinted in Scotland by Collins, and unauthorised copies had been sold.⁵⁷ Tonson sued Collins for infringement of his rights due to unauthorised publication. The matter was initially heard before Mansfield. Alexander Wedderburn of counsel represented Tonson and Edward Thurlow appeared for the defendant.

Wedderburn presented three arguments in support of the proposition that copyright existed at common law, independent of the statute.⁵⁸ Wedderburn reviewed the history of the rights and privileges associated with printing and authorship going back to the original Royal Prerogative rights granted by the Crown. Wedderburn considered the notion of property, citing Grotius, invoking the maxim "invention is one ground of property, occupancy another".⁵⁹ In Wedderburn's submission, the author's right was not in respect of a physical object but was an incorporeal notion based on invention:

⁵⁶ *Tonson v Collins* (1761) 1 Black W301 for first days of hearing (Wedderburn et al) and (1762) 1 Black W 321 for further argument (Blackstone et al). For ease of reference, now referred to as "*Tonson*".

⁵⁷ See A J K Robinson, *The Evolution of Copyright*, supra, at page 71.

⁵⁸ See here and on with particular reference to Ronan Deazley, "Commentary on *Tonson v Collins*", in L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2015) <<http://www.copyrighthistory.org/>>.

⁵⁹ As Deazley notes: Hugo Grotius (de Groot) (1583 to 1645), Dutch jurist whose major work *De iure belli as pacis* (*On the Law of War and Peace*) sought to establish certain universal principles of law which could be applied irrespective of time or place and deduced directly from man's nature (see Deazley at footnote 15). See especially Chapter 9 below on this.

The right of authors is now to be determined; not of any particular bookseller. 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, [or] style.⁶⁰

Finally, Wedderburn relied upon previous case law, citing cases in which Mansfield had appeared as counsel and had pressed for the recognition of perpetual common law copyright. An examination of Wedderburn's argument shows a critical step in respect of the matters under consideration, evidencing the beginnings of an expanding view of the way in which 'property' was recognised. Not only could property rights be founded on occupation of the object in issue, property arises through industry and invention. Here was a novel argument in respect of literary property.

Thurlock for the defendant argued that there was no separate common law right of copyright and that all rights derived solely from the statute. Accordingly, the work was now common property. Thurlock had two main submissions. He argued that literary property "*does not exist naturally or flow from natural law*"⁶¹, the law simply did not recognise a literary work as being capable of being property.

In response to the proposition that the property existed in the profits of the work, Thurlock reasoned:

Property in the profits of publication must presuppose property in the thing itself. And the subject of this property, if any, must be in the abstracted, ideal, incorporeal composition. Now, the idea of the composition, as it lies in the author's mind, before it is substantiated by reducing it into writing, has no one idea of property annexed to it.

Thurlock argued there were two aspects to literary property: the physical book, protected by the existing common law, and the composition, that incorporeal labour of the head, but which existed only under the statute. Once the statute's term had come

⁶⁰ *Tonson v Collins* (1761) 1 Black W 321; 96 ER 169.

⁶¹ *Supra Op cit ibid.*

to an end “every man was free to do what he pleased with his book”.⁶² Any insistence on rights that existed prior to the statute was an assertion of a privilege and “totally foreign to any notion of copyright”.

Mansfield stood the case over for further argument and recommended to counsel that they investigate previous cases dealing with expired terms and unpublished manuscripts. Mansfield was encouraging a line of reasoning that would operate in the booksellers’ favour and a closer examination of cases in which he had appeared as counsel for the copyright-holder.⁶³ The matter was reheard in 1762 before Mansfield⁶⁴, with different counsel. Sir William Blackstone⁶⁵ appeared for the plaintiff and Joseph Yates appeared for the defendant.

Blackstone’s involvement was critical for two reasons.

First, as counsel he based his arguments on notions of “reason” and “principle”, arguing that the existence of common law copyright was not based on the law or the posited legal forms but was “founded in reason”⁶⁶, argued through “principle”, “natural justice” and “universal law”. This was a significant event in the history of the matters under current consideration and in keeping with the emergence of notions of natural rights beyond matters of natural law.

Looking at previous cases as Mansfield had suggested, Blackstone conceded that they were not decisive on the issue of common law copyright but that they showed “the uniform opinion of the Court that a copy-right may and does exist independent of the Statute”. Accordingly, common law copyright was not based on precedent but was “founded on the principles of reason, universal justice, public convenience and private property”. Here is the sentiment of previous cases; it is not precedent but a “rights-based” argument that underpins the common law right and acknowledges the right of the rights bearer to bring an action against those who may transgress or violate the

⁶² See Deazley, *op cit, ibid.*

⁶³ Deazley, *Op cit, ibid.*

⁶⁴ *Tonson v Collins* (1762) 1 Black W 321; 96 ER 180.

⁶⁵ Sir William Blackstone SL KC (10 July 1723 – 14 February 1780) was an English jurist, judge and Conservative politician of the Eighteenth Century. He is most noted for writing the *Commentaries on the Laws of England*.

⁶⁶ See Deazley, *On the Origins of the Right to Copy*, supra, at page 142 and on to 147.

right. The sophistication of the argument put forward by Blackstone is apparent, appealing directly to matters of natural law (“universal justice”) and impliedly to natural rights (“private property”).

Secondly, and critically, Blackstone based his arguments concerning literary property and how such property rights came into existence expressly on Locke’s writings.⁶⁷ This is also a significant and critical point. Blackstone specifically cited Locke⁶⁸ as authority for his key submission⁶⁹ on the existence of literary property. These arguments portrayed the author and text in an inseparable possessive arrangement, aligning the author with the output of his creativity, personal skill and craft. The literary work was an extension of himself through an application of his literary talents. Here again are notions of both creative and possessive individualism. Relying on Locke’s property theory as we shall see later, in a highly novel and unique way, Blackstone submitted that the ‘natural’ foundation of property was “invention and labour” and that a literary work exhibited these features: its “originality” implied invention and the work’s “composition” implied labour.⁷⁰

Invoking Locke and his writings regarding the role that labour played in the acquisition of property, Blackstone continued:

the exertion of the animal faculties [and] the exertion of the rational powers [could have] as fair a title to confer property [as each other, and that] property may with equal reason be acquired by mental as by bodily labour.⁷¹

For Blackstone, interests as diverse as agriculture and the arts can be supported by vesting a property in whatever a man’s industry can produce, be it physical or mental exertion. This was an important development of the ideas put forward by Locke, which were restricted to physical property acquired through physical labour. Here

⁶⁷ See John Locke, *Two Treatises of Government*, Peter Laslett (editor), *Cambridge Texts in the History of Political Thought*, Cambridge University Press, Cambridge, 1988.

⁶⁸ In particular on Locke’s notions of property as set out in Chapter V of the *Second Treatise of Government*.

⁶⁹ See in the case report in 1 Black W 322 at 322 and 323.

⁷⁰ Again, see Deazley, “*Commentary on Tonson v Collins*”, *supra*, at sections 6 and 7.

⁷¹ 1 Black W 322 at 322.

Blackstone was applying Locke's theory to the acquisition of incorporeal property through mental labour. It was Locke's theory that Blackstone relied upon to give legitimacy and justification to his submissions to the Court, not any previous case law.

As to the existence of common law copyright, Blackstone argued "a literary composition, as it lies in the author's mind had [before being reduced to writing] the essential requisites to make it the subject of property." Extrapolating from this, Blackstone set out a tripartite paradigm of the literary work: identifying the physical "book", the "ideas" conveyed by that book, and the "composition" of the ideas under examination: the expression of the author's ideas: "those words in which an author has clothed his ideas".

In a unique statement Blackstone continued: "characters are but the signs of words, and the words are but the vehicles of sentiments". For Blackstone, it was the composition of the ideas that was the thing of value in literary property. Having grounded this right to property through the concept of acquisition through mental exertion and having set out the tripartite nature of the work, Blackstone concluded that while the purchaser of a book acquires certain rights over the book as his own physical property, they do not acquire "a right to the sentiment, so as to multiply copies".

Fundamental to this is the understanding of "rights", and what "rights" the author retains:

If an author has an exclusive property in his own composition, while it lies in his mind, when clothed in words, when reduced to writing; he still retains the sole right of multiplying the copies, when it is committed to the press. The purchaser of each individual volume has a right over that which he purchased; but no right to make new books.⁷²

⁷² See 1 Black W 322 at 324 and 325.

This is a statement of creative individualism. It was supported by Mansfield, who interjected from time to time in support of Blackstone's case.⁷³

Yates, appearing on behalf of the defendants, responded to Blackstone, accepting the principle he had put forth, "that the author has a property in his sentiments till he publishes them" but insisted that the author's ideas ceased to be private property from the moment of publication – a limit on ownership similar to patent law.⁷⁴ Once a work was published that work entered the public domain and could be used by anyone. Again, on the side of the case of the Scottish booksellers we see an argument that favours the public domain over the rights and interests of the individual author.

Yates agreed mental labour could ground property rights, but any such ownership was "thrown into a state of universal communion" upon publication. He rejected Blackstone's focus on invention and labour and emphasised the importance of the longstanding legal indicia of property under common law in England: possession and occupation.⁷⁵

Yates's position reflected the traditional legal view of property and property rights. Yates stressed that longstanding authorities and jurists⁷⁶ insisted that property "must be something susceptible of possession". His central argument was that property was in respect of the possession of a physical rather than a metaphysical entity⁷⁷, something "that may be seen, felt, given, delivered, lost or stolen".

In relation to *indicia*, Yates analysed what marks of appropriation were necessary to ascertain that property existed.⁷⁸ He relied on old authorities, such as Kames's⁷⁹ *The History of Property*⁸⁰, which insisted on "visible possession as an essential condition

⁷³ See Deazley, "Commentary on *Tonson v Collins*", supra, at section 7.

⁷⁴ See Mark Rose, "The Author in Court", supra, at page 227.

⁷⁵ See Deazley, "Commentary on *Tonson v Collins*", supra at section 7.

⁷⁶ Such as Pufendorf and Bynkershoek.

⁷⁷ *Ibid*, *Op cit*.

⁷⁸ *Ibid*, *Op cit*.

⁷⁹ Henry Home, Lord Kames (1696 – 27 December 1782) was a Scottish advocate, judge, philosopher, writer and agricultural improver. A central figure of the Scottish Enlightenment, a founder member of the Philosophical Society of Edinburgh and active in the Select Society, his protégés included David Hume, Adam Smith and James Boswell.

⁸⁰ Andreas Rahmatian, 'The Property Theory of Lord Kames' (2006) 2(2) *International Journal of Law in Context* 177.

of property”. Yates could see no such *indicia* in relation to literary property: “what are the marks? ... how is an author to be distinguished?”. Any ownership was rendered nugatory anyway with publication: “the act of publication has thrown out all distinction, and made the work common to everybody; like land thrown into the highway it is become a gift to the public”.

Yates reviewed cases before the introduction of the statute. He found no pre-existing right to literary property or copyright. All rights were privileges or public regulations, and the pronouncements of Star Chamber had been political in nature. He concluded that there were no natural common law rights in literary property. It was only Parliament that could acknowledge author’s rights and protect them through legislation, there being no difference between the work of an author and an inventor:

Both are the productions of genius, both require labour and study, and both by publication become equally common to the world. The Legislature seems to have judged so.

Blackstone in response noted that Yates had failed to consider existing distinctions between corporeal and incorporeal rights, that both were a proper basis for property. Blackstone did not agree with Yates’s submission that “when a book is published, it is a gift to the public, like land thrown into a highway”; for Blackstone:

It is more like making a way through a man’s own private grounds, which he may stop at pleasure; he may give out keys, by publishing a number of copies; but no man who receives a key, has thereby a right to forge others, and sell them to other people.

Blackstone invoked the language of Warburton⁸¹, reaffirming the immaterial nature of literary property⁸²:

⁸¹ As contained in *The Letter*. See William Warburton, *supra*.

⁸² See Mark Rose, “*The Author in Court*”, *supra* at page 227.

Style and sentiments are the essentials of a literary composition. These alone constitute its identity. The paper and print are mere accidents, which serve as vehicles to convey that style and sentiment to a distance.

The arguments of opposing counsel concluded on these bases.

It seemed as if the moment had come when the Court would make a determination on the matters at hand and the question would, at last, be answered on whether there was a perpetual right to common law copyright. Much seemed to favour the plaintiff's case. There was language from the bench⁸³ in support of the plaintiff's case.

Mansfield, however, considered the matter to be of such importance that he ordered that the matter be stood over for further argument before all common law judges.⁸⁴ In a dramatic turn of events, before the matter could be heard, evidence of collusion between the parties emerged. Upon discovery of this, the matter was immediately set-aside by the Court.⁸⁵ It would be another seven years before the question again be put before the Court.

Tonson was an important part of the evolution of the notions of the author, literary property and copyright. The arguments put forward⁸⁶ indicated how far the concepts had developed into wholly thought-out ideas. By the time of *Tonson* the nature of the debate about literary property had changed profoundly⁸⁷. A much more nuanced discussion had begun on what "literary property" was, using historical, legal, theoretical and philosophical arguments to support the case that literary property was a fusion of ideas and language.

"Text" was being considered as something capable of being a type of property, worth protecting and capable of economic exploitation.⁸⁸ The argument was formulated with reference to law and matters of rights, aesthetics and philosophy in support of

⁸³ Especially from Lord Mansfield.

⁸⁴ The Court of King's Bench at this time heard essentially only common law matters. The Court was comprised of a total of 12 judges.

⁸⁵ See Mark Rose, *Authors and Owners*, supra, at page 76.

⁸⁶ Especially those of Wedderburn and Blackstone in particular.

⁸⁷ See Deazley, "Commentary on *Tonson v Collins*" supra, at section 8.

⁸⁸ See Mark Rose, "The Author in Court", supra, at page 228.

common law copyright, literary property and the belief that authors' intellectual labour grounded property in their invention. Here was a formal consideration of what was meant by "the author" and "literary property" where several lawyers had no issue with abstract issues. Here in the advanced marketplace society of 1762, the solidity of once concrete referents was dissolving, being replaced by the circulation of signs⁸⁹, with the formal institutions of society, such as the Courts, starting to acknowledge the place of expression, creativity and possessive individualism within the context of longstanding but evolving paradigms, such as property, singularity, creative individualism and self-consciousness.

Critically, authors' rights were now being seen as not only a legal right (beyond mere economic rights) under the terms of the statute but language used and arguments utilised in the relevant cases now started to identify or acknowledge authors' rights as a particular type of natural right, a moral right. A "moral" right in that alongside such perfect natural rights as life, liberty and self-ownership, the natural rights specific to the author had a strong moral content, of reputation, authorial dignity and integrity, and an acknowledgement of the sanctity of textual authenticity tethered to the guardianship or trusteeship of the author.

As an indication of how much the cultural landscape had changed, in 1766 Blackstone published the monumental *Commentaries on the Laws of England*.⁹⁰ The four-volume work was a sweeping commentary and review of the laws of England as at that time and was based on a series of lectures that Blackstone had delivered at Oxford and was originally published by the Oxford University Press. *The Commentaries* was one of the first significant and comprehensive reviews of the laws of England and Wales and would become the primary source for matters of common law both in England and beyond to countries such as Australia and the United States.

In considering what legal property rights were, Blackstone noted that "occupancy" had once grounded the right to permanent property but that as time passed and due to "the introduction and extension of trade and commerce ... [the law had] learned to

⁸⁹ See Rose, *Authors and Owners*, supra, at page 129.

⁹⁰ See William Blackstone, *Commentaries On the Laws of England*, The University of Chicago Press, Chicago, 1979, 5 Volumes, facsimile reproduction edition.

conceive different ideas“ of property.⁹¹ Blackstone identified a new species of property which “being grounded on labour and invention, is more properly reducible to the head of occupancy than any other”. This right of occupancy⁹² was founded on “the personal labour of the occupant”:

When a man by the exertion of his rational powers has produced an original work as he pleases ... any attempt to take it off him or vary the disposition he has made of it, is an invasion of his right of property.⁹³

Critically, this right extended to literary compositions. By 1766 literary property was recognised as legal “property” in a textbook that became the backbone of common law⁹⁴:

The identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed 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; and no other man can have a right to convey or transfer it without his consent, either tacitly or expressly given. This consent may perhaps be tacitly given, when an author permits his work to be published, without any reserve of right, and without stamping on it any marks of ownership: it is there a present to the public, like the building of a church or the laying of a new highway: but in case of a bargain for a single impression or a sale or gift of the copyright, the reversion is plainly continued in the original proprietor or the whole of the property transferred to another.⁹⁵

⁹¹ See also Deazley, *On the Origin of the Right to Copy*, supra, at pages 158 and 159.

⁹² Derived straight from Locke, as we shall soon see, and via *Tonson v Collins*, with Blackstone as counsel for the plaintiff.

⁹³ Blackstone, *Commentaries*, supra, Book 2, Chapter 26 at 8 and on, see page 405 and 406.

⁹⁴ Wilfred Prest, *William Blackstone: Law and Letters in the Eighteenth Century*, (Oxford University Press, 2012), 306-311. A most remarkable jurist.

⁹⁵ Blackstone, *Op cit*, at page 406.

Blackstone has synthesized the arguments in the relevant cases, drawn together the historical, legal and philosophical arguments into one coherent theory of intangible incorporeal property over literary works and negated the old world-views and theories espoused by Thurlow and Yates. He had in large part utilised concepts of both legal and natural rights in this regard.

The question, however, still remained unresolved as a matter of law. Did copyright exist at common law separate and independent from the Statute of Anne? An answer would be forthcoming, three years after *The Commentaries* were published; it is to this case that we now turn.

Chapter Eight

The Question is at Last Answered: the Decision of *Millar v Taylor*: 1765 to 1769¹

The outcome of *Tonson* left the conundrum unanswered, that being was there a perpetual right of copyright that existed separate and distinct for the Statute of Anne and which arose under common law or were any such common law rights (whatever they may be) rendered otiose under the legislation?

While the case was a step forward in the emergence of the modern notions of the author, the literary work and literary property, there remained no judicial pronouncement on whether such legal rights existed and what form those rights took under the statute or common law. Lawyers acting on behalf of the parties had developed legal arguments in respect of the matter and more than one judge had recognised the importance of the issue. No Court, however, had ruled on the issue in any definitive way.

The arguments in *Tonson* in support of perpetual common law copyright, while dealing ostensibly with copyright matters, went beyond that, reviewing the creative individualism of authors and what property rights might be accorded to incorporeal forms of expression. Blackstone, in particular, had pressed arguments in support of common law copyright and ownership through creative labour.²

But still the question went unanswered.

There had been an expectation that the Court would find that common law copyright did exist. Shortly after the case, Willes stated:

¹ *Millar v Taylor* (1769) 4 Burr 2303 (There are a number of published reports of the case; unless otherwise stated, this particular report will be the case law cited as the reference for the judgment in this chapter). There is also a degree of confusion as to the year in which the decision was given; see further below.

² See Wilfred Priest, *William Blackstone: Law and Letters in the Eighteenth Century*, Oxford University Press, Oxford, 2012, especially Chapter Ten: A Great and Able Lawyer: at pages 161 to 176.

I have been informed from the best authority that so far as the Court had formed an opinion, they all inclined to the plaintiff.³

But the case had been dismissed due to evidence of collusion.

The issue of authors' rights continued to agitate the book-trade. It also became a matter of national interest, "the issue of literary property was discussed everywhere ... by everybody".⁴ Johnson and other literary figures discussed the matter.⁵ Pamphlets were circulated which analysed the matter and periodicals⁶ debated the issue.⁷

The London booksellers continued to assert their dominance, agitating Parliament to restrict the Scottish book-trade. They were reluctant to bring the matter back before the Courts, as ongoing litigation⁸ suggested against perpetual right to copyright under the common law.⁹ An Edinburgh bookseller then took a most provocative step.

Alexander Donaldson¹⁰ had established a successful Edinburgh printing/bookselling business. He was adamant that when the term of copyright under the statute expired, copy vested in the public domain and he and anyone else could print without restriction. His business specialised in selling "expired" works at prices cheaper than the London editions. These "low-cost" editions attained the opprobrium of the refined classes:

³ Justice Edward Willes, apparently reporting on a conversation he had had with Lord Mansfield at the time of *Tonson v Collins*, see Mark Rose, *Authors and Owners*, supra, at page 75 and see also *English Reports* 98:214.

⁴ See Gwyn Walters, "The Booksellers in 1759 and 1774: The Battle for Literary Property", supra, at page 303.

⁵ Edward A Bloom, 'Samuel Johnson on Copyright' (1948) 47(2) *Journal of English and Germanic Philology* 165.

⁶ Such as the recently established *The Spectator* and *The Tattler*.

⁷ See Andrew Pettegree, *The Invention of the News: How the World Came to Know Itself*, supra, at pages 276 to 280.

⁸ in the period of 1762 to 1765.

⁹ See Deazley, *On the Origin of the Right to Copy*, supra, at page 169 to 172.

¹⁰ Alexander Donaldson (1727 to 1794) was a leading Edinburgh printer, publisher and bookseller. He had opened his bookstore in Edinburgh in 1748 and believed that once the term of copyright as afforded under the Statue of Anne had expired he and others had an unfettered right to reprint every work now in the public domain. He made a considerable fortune reprinting editions sold far cheaper than the original London editions.

For no person would purchase an Edinburgh book when he could get an English one, for the Scotch editions were generally incorrect and not fit for a gentleman's library.¹¹

Donaldson was a great threat to the London booksellers. He had always played on the edges of regulation, testing the law.¹² In 1765 he took the game into the heart of the competition and opened a bookstore in London.¹³

He issued inflammatory advertisements:

This is to give notice that Alex. Donaldson, from Edinburgh has now opened a shop for cheap books, ...where they are sold from thirty to fifty per cent under the usual London prices ... The London booksellers ... having prevented their brethren from dealing with him, have forced him in self-defence to establish this shop.¹⁴

Donaldson's move spurred the London booksellers into litigation. Two cases were commenced in July 1765 in London against Donaldson, *Osborne v Donaldson* and *Millar v Donaldson*.¹⁵

Osborne and Millar sought court orders to stop Donaldson from selling unauthorised editions of three works.¹⁶ They were granted an interim injunction. Donaldson counter-sued, arguing that any term of statutory protection over the works had expired and the works were now in the public domain. The matter was set to proceed to a full hearing. However, Lord Northington dissolved the injunctions, ruling that the important issue should be sent to all common law judges for determination:

¹¹ See Gwynn Walters, "The Booksellers in 1759 and 1774", supra, at page 304.

¹² See John Feather, *A History of British Publishing*, supra, at page 66.

¹³ In the Strand, on Norfolk St.

¹⁴ Printed at the end of the pamphlet: Alexander Donaldson, *Some Thoughts on the State of Literary Property, Humbly Submitted to the Consideration of the Public* (Donaldson, 1767), annexure/appendix.

¹⁵ Both cases report in the same law report: *Osborne v Donaldson* (1765) 2 Eden 327; *Millar v Donaldson* (1765) 2 Eden 328.

¹⁶ *The Seasons* by James Thomson, Homer's *The Iliad* as translated by Alexander Pope, and *Miscellanies*, a collection of writings by Jonathan Swift.

It might be dangerous to determine that the author has a perpetual property in his books ... Such a property would give him not only a right publish but to suppress others ... [this] would be a fatal consequence to the public.¹⁷

The cases did not proceed and the matter remained unresolved. Millar, however, continued to litigate. He and James Dodsley commenced an action against Robert Taylor, a Scot, complaining¹⁸ that Taylor had printed unauthorised copies of a work he owned.¹⁹ Millar sought an injunction and an order for the payment for lost profits.

Taylor relied upon the statute to defend the claim:

The Author of Books of Genius and Composition of the Brain or their Assignees have not vested in them by Law a perpetual indefinite right or property to the copies of such Books.²⁰

Taylor argued that the term of statutory copyright had expired and ownership had returned to the original owner. Accordingly, the plaintiffs could not bring their case.²¹

Millar brought a second action against Taylor. Here Millar's complaint was not that Taylor had produced an unauthorized reprint but that Taylor was selling an unauthorized edition. The change was subtle but important. Taylor's response was that there was no legal protection afforded to the work under the statute and the author had been long deceased. Accordingly:

Thomson's works were become the property of the publick uncontrolled and unaffected by any Acts either of the Author or proprietors thereof which extended beyond the term of 14 years.²² [sic]

¹⁷ Taken from judicial comments and the plaintiff's Information in the case of *Hinton v Donaldson* (1773) SRO CS 231 H2/4.

¹⁸ *Millar v Taylor* (1765) 4 Burr 2303; C 33 426/60. A legal action and case quite separate and distinct from *Millar v Taylor* (1769).

¹⁹ *Night Thoughts*, a book of poetry by Mr Edward Young. Young had sold his rights to the poem in 1743 and 1744 to Mr Robert Dodsley, who in 1759 had assigned those rights to Mr James Dodsley, Millar's co-plaintiff in the litigation.

²⁰ C 33 426/60.

²¹ *Op cit; ibid.*

Having heard from the parties, the Court of Chancery decided that the matter should go before the Court of King's Bench. *Millar v Taylor* would eventually be heard over the period 1767 to 1769 before the King's Bench. While awaiting hearing, skirmishes between the London and Edinburgh interests took place beyond the courts.

Donaldson released two pamphlets, one²³ he had written²⁴, the other²⁵ written by John Dreghorn.²⁶ The pamphlets captured the essence of the conflict between the London and Edinburgh interests.

The two pamphlets are a helpful example of the two competing issues at play at this time, the modern notion of the author and his right of control over his creations and the old world view of the dominance and superiority of the old economic interests of the printers and publishers, with literary works simply being fodder for the business of the book-trade. The pamphlets also highlight the issues that would come before the court that year and suggest the mood within society at the time. The pamphlets are also revealing in terms of their contents and the insight they evidence in respect of the times not only in relation to the ongoing dispute between the London and the Edinburgh booksellers but, critically, what they show about how far the notions of the author and literary property had come in the last half century.

In his pamphlet²⁷, Donaldson's primary concern was over economic issues and the monopoly of the London booksellers. His pamphlet, however, marks an important step in the emergence of the matters under consideration.

²² C 33 426/60.

²³ *Some Thoughts on the State of Literary Property, Humbly Submitted to the Consideration of the Public.*

²⁴ Alexander Donaldson, *Some Thoughts on the State of Literary Property, Humbly Submitted to the Consideration of the Public* (Donaldson, 1767). (Yale University Library, Beinecke Rare Book and Manuscript Library: with thanks).

²⁵ *Considerations on the Nature and Origin of Literary.*

²⁶ John Maclaurin Dreghorn, *Considerations on the Nature and Origin of Literary Property* (Alexander Donaldson, 1767); sourced through the Buffalo & Erie Public Library Buffalo, New York, on-line service.

²⁷ A Donaldson, *Some Thoughts on the State of Literary Property, Humbly Submitted to the Consideration of the Public*, supra.

While Donaldson acknowledges that legal interests over literary works were once grounded in license or privilege, he accepts the emerging view of literary property as a legal property right held by the author with that right arising due to the author's mental labours.

The pamphlet acknowledges "an author's right of property in his book".²⁸ It indicates how far the concept of "the author" had developed. It is the acceptance of the role and rights of the author that underpin Donaldson's argument. He presumably thought this was a safe ground to commence the argument on, given the evolving concerns over authors and authors' rights, both under posited man-made law and the emerging notion of natural law rights specific and implicit within individuals. Natural rights for authors related directly to moral issues implicit within the author, such as reputation, integrity and protection of the text.

Donaldson had been criticised by the new "author class". Johnson had said of him: "he is no better than Robin Hood" in terms of his theft of authors' rights for his own financial benefit.²⁹

Where Donaldson is at issue with authors' legal rights is as to their term. He denied that authors had a perpetual right of ownership. For him, ownership was limited as to term under the statute and this was of ultimate benefit to society, allowing for the free flow of ideas. Donaldson maintained that to his mind perpetual common law copyright:

does not seem to have proper foundation in any known principle of law or justice.³⁰

It is clear that Donaldson's main concern was his own access to the book-trade and the financial returns that it brought. Despite Donaldson's economic focus, his pamphlet accepts the existence of authors' legal rights and literary property. Donaldson sensed that the times were changing, that it was wise to be seen to support

²⁸ Alexander Donaldson, *Op Cit*, at page 4.

²⁹ See James Boswell, *The Life of Samuel Johnson*, supra at page 231.

³⁰ Donaldson, *Op Cit*, at page 5.

the notion of the author and see author's rights over their literary works as a point of origin from which ownership and property rights emanated, which in turn allowed for economic exploitation of those rights. Notions were now starting to be hammered out and take on greater form and substance.

Dreghorn³¹ had written the second other pamphlet.³² Dreghorn noted that the dispute between the London and Scottish booksellers was not directly concerned with the rights of authors, such matters were ancillary to the debate:

Several acute and ingenious Essays have been published on the Subject³³, but every one who reads them must observe that however much the London Booksellers may pretend all Authors are interested in the Quarrel, these pamphlets are not the spontaneous Productions of Authors, zealous in their efforts to assert their injured rights but the laboured Efforts of Gentlemen learned in the law, employed or importuned to compose them.³⁴

This passage would seem to be a criticism of Mansfield and Blackstone, the barristers who in the past had been retained by the London booksellers to represent those interests in past disputes with the Scottish book-trade, and the Edinburgh printers and publishers.

Dreghorn acknowledged that profits in the book-trade went not to authors but to booksellers who were only interested in economic exploitation. Dreghorn suggested that the arrangement degraded authors as they are subjugated and held under the booksellers' dominion. They are now required to keep producing product for the book-trade, little more than wage slaves. Dreghorn examined the origins of literary property, noting that authors' rights originated out of Crown grants of privileges and patents which had no basis in creativity or any notion of property rights:

³¹ John Maclaurin, Lord Dreghorn (1734 to 1796), Scottish judge and poet.

³² Also published by Donaldson in 1767 *Considerations on the Nature and Origin of Literary Property*.

³³ Ie on the nature and origin of literary property.

³⁴ Maclaurin, *Op cit*, at page 1.

all on a narrative of the humble supplication of the Printer or Author, and of the favour and Indulgence of the Prince.

Upon this footing stood these Privileges all over Europe, it never once having been dreamed that they were granted ex justitia in virtue of a perfect right but indulged from favour.³⁵

Dreghorn held that any rights authors had were based solely within the statute; once the statutory term expired, those rights were lost. He insisted that the common law gave authors no rights over literary works. The only authorial property rights were limited statutory rights:

It is true, this Exclusive Privilege is named a Property in the Statute and so it is in one sense, because it is proper or peculiar to those whom it is given by Statute. But then it was not intended to be made Property in the strict sense of the word, for we cannot suppose the Legislature guilty of such a gross Absurdity.³⁶

This evidenced the old worldview that there can be no property over an incorporeal ‘thing’³⁷ nor any right which could exist beyond the posited law. Dreghorn held that property rights could not be based upon mental effort.

Finally, Dreghorn puts the Scottish booksellers’ case, maintaining that the unlimited right of access to books outside of the term of the statute will be beneficial for society, as this will allow for cheaper and more accessible editions. Accordingly, Dreghorn accepted the constructs of “the author” and “literary property” but would not recognise any property right held by the author over the work. In this atmosphere, the dispute over whether copyright existed at common law or was solely limited to the term afforded under the statute moved to the next important case, *Millar v Taylor*. The

³⁵ Maclaurin, supra at page 5.

³⁶ Maclaurin, supra, at page 17.

³⁷ Such as the simple right to exploit a literary work.

facts of the case were similar to previous disputes³⁸ except in this litigation the wrongdoing focussed not on unauthorised printing but on unauthorised sale.

Millar alleged that he had printed³⁹ 2000 authorised copies of *The Seasons*.⁴⁰

Following this, in May 1763, Taylor had sold 1000 copies of an unauthorised reprint. Millar claimed not to know who had published the unauthorised edition⁴¹; Millar very well knew that Alexander Donaldson had published the edition.⁴² Nevertheless, Millar claimed an account of lost profits on the sale of the unauthorised editions, bringing action against the unauthorised sale not the unauthorised printing. Taylor pleaded “not guilty” and the matter proceeded to hearing before a jury.

The jury found that before the statute’s enactment:

It was usual to purchase from Authors the Perpetual Copy-Right of their Books; and to assign them from Hand-to-Hand for valuable Considerations.⁴³

The jury accepted the facts submitted by Millar but sought direction from the Court as to whether Taylor was liable in law.⁴⁴ The matter went to hearing.

John Dunning appeared for the plaintiff and Edward Thurlow⁴⁵ appeared for the vendor-defendant. The matter was stood over for further argument with Blackstone appearing for Millar and Arthur Murphy for Taylor. At the conclusion of that day, the matter was stood over for further hearing until the next year.⁴⁶ Judgment was given

³⁸ The following summary is taken both from the Burrows Report and also from R Deazley, *On The Origin of the Right to Copy*, supra, at page 174.

³⁹ On 20 January 1763.

⁴⁰ This work was very popular and had been widely bought and read. It would form the inspiration for Vivaldi’s *Four Seasons*.

⁴¹ The pleading referred to it having been “*injuriously printed by some person or persons unknown*”.

⁴² See R Deazley, “*Commentary on Millar v Taylor (1769)*”, in Bently and Kretschmer (editors), *Primary Sources on Copyright (1450 to 1900)*, supra, at section 5.

⁴³ *Millar v Taylor* (1769) 4 Burr 2303; 98 ER 201, 204.

⁴⁴ The jury stated that if the judge found that Taylor was liable, they as the jury would find him guilty of the charge as brought by Millar.

⁴⁵ Who had appeared previously for the defendant in *Tonson v Collins*.

⁴⁶ The next day, Andrew Millar died. As a sign of respect, the Court ordered that when judgment was handed down in the matter the date of the official judgment would be 7 June 1768, i.e. during the

in April 1769. The judgment is critical to the matters under consideration but before any detailed review of the case concerning property rights and Locke's influence, it is beneficial to put the case within its legal context.⁴⁷

The legal arguments in *Millar*⁴⁸ had in large part been previously formulated in *Tonson*. Contemporary commentators reviewing the case acknowledged this⁴⁹. It was the judgments in the case that were of fundamental importance to the matters under current consideration.

The bench that heard the case was comprised of four justices: Mansfield, Willes, Aston and Yates.⁵⁰ Mansfield, Willes and Aston found in favour of the plaintiff, holding that perpetual common law copyright existed. Yates found otherwise. Each judgment is critically important to the matters under consideration.

The case's importance was recognised when it was heard: it was the first matter to come before the Court of King's Bench seeking an interpretation of the statute.

Burrow released to the public a special edition on the case, writing:

course of Millar's life – actual judgment in the matter was not given until 20 April 1769. This would appear to be the source of confusion as to whether the date of the case is 1768 or 1769.

⁴⁷ Once that has been done, there can then be a consideration of the case and the judgements given in the proceedings to explore the unique commingling of matters concerning the legal, philosophical, aesthetic and ethical issues that were at play in the litigation. The balance of this chapter will review the legal issues in the case. The remaining issues will be considered in the following chapter, especially the role and influence that the political writings of John Locke had in giving legitimacy to what would be a new way of looking at property and property rights in relation to property generally but with special application to literary property.

⁴⁸ For ease of reference the case *Millar v Taylor* will now be referred to simply as “*Millar*” throughout this chapter.

⁴⁹ James Burrow, *The Question of Literary Property, Determined by the Court of King's Bench on 20 April 1769 In the Cause between Andrew Millar and Robert Taylor* (W. Strahan and M. Woodfall, 1773), 2-3. In that work Burrow wrote: “It would be tedious and tautologous, to repeat the arguments of the Counsel at the Bar, or the Cases and Authorities cited by them; as they were, all of them, so fully and amply taken up again from the Bench, and so elaborately expiated upon, canvassed and discussed by the judges, in delivering their Opinions, and the reasons whereupon they formed them.

Let it suffice to say in general, that the Counsel for the Plaintiff⁴⁹ insisted, ‘That there is real Property remaining in Authors, after publication of their Works; and that they only, or Those who claim under them, have a Right to multiply the copies of such their Literary Property, at their Pleasure, for Sale.’ And they likewise insisted, ‘That this Right is a Common Law Right, which always has existed, and does still exist, independent of and not taken away by the Statute of 8 Anne c19.’ On the other side, the Counsel for the Defendant⁴⁹ absolutely denied that any such Property remained in the Author, after the Publication of his Work: and they treated the Presentation of the Common law Right to it, as a mere Fancy and Imagination, void of any Ground or Foundation. They said that formerly the Printer, not the Author, was the person who was supposed to have the Right, (whatever it might be) And accordingly the Grants were all made to Printers. No Right remains in the Author, at Common Law.”

⁵⁰ Yates had appeared as a barrister in the more important recent copyright disputes on the side of the Scottish reprinters and booksellers.

This case was a revival of the old and often-litigated question concerning literary property: and it was the first determination which the question ever received in this Court of King's Bench.⁵¹

Each judgment dealt with the matters in a variety of ways, covering different aspects of the relevant issues.

Willes⁵² gave the first judgment.⁵³ His focus was upon questions of law, examining cases that had been heard and legislation that had existed before the introduction of the statute. As a threshold issue, Willes had little hesitation in accepting the central role that the author plays in the creation of the literary work and the legal rights to which such mental labour gives rise. He presented a sophisticated sense of what can and cannot amount to a literary composition, acknowledging:

certainly bona fide imitations, translations and abridgements are different, and in respect of property might be considered as new works.⁵⁴

For Willes there were two fundamental questions: whether the copy of a literary composition belonged to the author at common law; and whether the common law right of authors to copies in their own works was taken away by the statute.⁵⁵

Willes acknowledged literary property as a property right, with both legal and economic interests at play, embodied in possessing the sole right of printing, publishing and selling a literary work, that particular right being a species of property and a property right long-known to society. Willes reviewed the regulations, privileges, patents, ordinances and legislation that had been issued by the Stationers'

⁵¹ As per Burrows above. James Burrow, *The Question Concerning Literary Property Determined by The Court of King's bench on 20 April 1769 In the Cause Between Andrew Millar and Robert Taylor With the Separate Opinions of the Four Judges; and The Reasons Given by Each, in support of his Opinion*, supra. The following analysis of (and references to) each of the judgments is taken from that publication of the case⁵¹.

⁵² Henceforth, I will use the shorthand style of "Willes" *mutatis mutandi* in references to the judges.

⁵³ Burrow having noted that the judges delivered their opinions separately, with the junior judge beginning and proceeding upward to the Chief Justice, see Burrow, at page 5.

⁵⁴ Burrow, at page 10.

⁵⁵ Burrow, at page 11.

Company, Star Chamber, the Crown and Parliament since the arrival of printing to consider the issue of copyright prior to the statute. Willes was satisfied that a common law right did exist through principles of justice, moral fitness, precedent and usage.⁵⁶ In reviewing the emergence of notions of the author and of literary property, Willes acknowledged that matters had been thrown into a state of confusion after the abolition of Star Chamber and the return of regulation to the Company. Willes referred to Milton's essay on unlicensed printing and the strong objection Milton made to the control of the book-trade that the Company sought to impose, at odds to the notion of common law property vesting in authors.

In reviewing past cases and legal disputes, Willes was of the opinion that the author's right to property in the literary composition was grounded in his "*invention and labour*"⁵⁷, a right secured in the common law.

Accordingly, Willes answered his first question, whether an author's property in his own literary composition is such as will entitle him at common law to the sole right of multiple copies of it, in the affirmative.

Willes turned to his second question, whether the common law right of authors to copy in literary works was taken away by the statute.

Willes believed that it was necessary to look at the facts of usage and authority since the introduction of the statute. Willes did not believe that the statute introduced a new right. In his opinion he found:

Therefore the whole jurisdiction exercised by the Court of Chancery since 1710 against pirates of copies is an authority that authors had a property antecedent; to which the Act gives a temporary additional security.⁵⁸

Willes concluded that the prior cases had established that:

⁵⁶ Burrow, see pages 11 to 14.

⁵⁷ See Burrow, at page 16.

⁵⁸ Burrow, at page 25.

From hence, it is clear that there is a Time, when without any positive Statute, an author has a Property in the Copy of his own work, in the legal Sense of the Word. *Id quod nostrum est, sine nostro i acto, ad Alterum transferri non potest.*⁵⁹

Critically, in respect of the matters under consideration, Willes was careful to distinguish between the competing interests at play, all of which emanated from the book but showed its complex makeup, convergence of rights and interests and the tensions between creative rights and interests more aligned with control and economic exploitation, highlighting the historic forces and tensions at play:

... printing is a trade or manufacture. The types 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 a quite distinct Thing from all the Book communicates. And there is no incongruity to reserve that Right; and yet convey the free Use of all the Book teaches.⁶⁰

Here is modern statement of what rights and interest and competing concepts of control and ownership are contained within a literary composition, but one that acknowledged that printing rights are subordinate to rights conferred through and tethered in creativity. The former are primarily economic in content, whereas the latter are both legal and moral rights.

In respect of the answer to the second question, Willes did not believe that the statute took away authors' common law rights:

It is certainly not agreeable to natural justice that a stranger should reap the beneficial pecuniary Produce of another Man's Work: *Jure naturae*

⁵⁹ "That which is ours cannot be transferred to another without our consent". See Burrow, at page 34.

⁶⁰ See Burrow at page 35.

*aequum est, neminem cum alterius detriment et injuria fieri locupletiozem.*⁶¹

Finally, Willes touched upon the nature of property rights in respect of literary compositions. He noted that property can be obtained through the labours of the author and that securing property in authors is of benefit to the state:

It is wise in any State to encourage Letters and the painful Researches of learned Men. The easiest and most equal way of doing it is by securing to them the Property of their own Works. Nobody contributes who is not willing: And though a good book may be run down, and a Bad One cried up, for a Time; yet sooner or later, the Reward will be in Proportion to the Merit of the Work.

A Writer's Fame will not be less, that he has Bread, without being under the Necessity of prostituting his Pen to Flattery or Party, to get it.

He who engages in a laborious Work (for instance such as Johnson's Dictionary), which may employ his whole Life, will do it with more spirit if, besides his own glory, he thinks it may be a Provision for his family.⁶²

Accordingly, Willes answered his second question also in the affirmative - that there was a common law right of an author to his copy that it was not taken away by the statute.⁶³

Aston framed his enquiry in a slightly different way. The issue was "How the Common Law stands, independent of the Statute ... in respect to an Author's sole right to the Copy of his Literary Productions".⁶⁴ Aston accepted the proposition that

⁶¹ "According to the laws of nature, it is just that no one should be enriched with detriment and injury to another." See Burrow, at page 39.

⁶² See Burrow, at page 39.

⁶³ See Burrow, at page 40.

⁶⁴ See Burrow, at page 40.

the author as original creator of the work, by his mental labours, has ownership in the literary work. Moreover, Aston expressed concern that the work in issue⁶⁵ had been reprinted without consent and that the author's dignity and integrity had been impugned. Aston contended that three questions needed to be addressed:

First, whether an Author's Property in his own Literary Composition is such as will intitle Him, at Common Law, to the sole Right of multiplying the copies of it; or secondly, supposing he has a Property in the Original Composition, whether the Copy-Right, by his own Publication of the Work, is necessarily given away, and his consent to such Gift implied by Operation of Law, manifestly against his Will ; or thirdly, taken away from Him, or restrained by the statute.⁶⁶ [sic]

Aston did not review past cases and legislation, in His Honour's opinion, this having been more than adequately done by Willes J. He chose to enquire into the nature of property itself. This was at the very heart of the defendant's case; that there was no property in the thing itself, there was no such a thing possible at law as literary property, "not an object of law, nor capable of Protection."⁶⁷

Given this extreme position, Aston declared:

I think it fit (however abstract they may seem) to consider certain great Truths and sound Propositions, which we, as rational Beings; We, to whom Reason is the great Law of our Nature; are laid under the obligations of being governed by; and which are most ably illustrated by the learned Author of the Religion of nature delineated.⁶⁸

Aston proceeded to review "a great theory of property", holding that "there is such a thing as Property, founded in Nature and Truth."⁶⁹ His comments have a strong flavour of Locke's property theory.⁷⁰

⁶⁵ *The Seasons* by James Thomson.

⁶⁶ See Burrow, at page 41.

⁶⁷ See Burrow, at page 42.

⁶⁸ See Burrow, at page 42.

⁶⁹ See Burrow, at page 43.

In the opening paragraphs of Chapter V of *The Second Treatise of Government*⁷¹, Locke writes that:

Though the Earth and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any right to but himself. The Labour of his Body, and the Work of his Hands ... are properly his. Whatsoever then he removes out of the State that Nature hath provided ... he hath mixed his Labour with ... and thereby makes it his Property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men. For this labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.⁷²

In a similar vein, Aston writes:

That a Man may have property in his Body, Life, Fame, Labours, and the like; and, in short, in any Thing that can be called His. That it is incompatible with the Peace and Happiness of Mankind, to violate or disturb, by Force or Fraud, his possession, use or disposal of those Rights, as well as it is against the Principles of Reason, Justice and Truth.⁷³

Like Locke⁷⁴, Aston contends that traditional notions of property theory, such as occupation, were not adequate to the concept of ownership over literary works. They were not tangible objects. Touching upon the property theories of Pufendorf, Grotius

⁷⁰ These are considered in much greater detail in the following chapter. It is, however, of benefit setting out a brief sketch of them here so that Aston's comments can be fully appreciated, even within the confines of a legal consideration of the matters at hand.

⁷¹ John Locke, *Two Treatises of Government*, supra.

⁷² Locke, *Op cit*, at pages 287 to 288, ie *Second Treatise*, Chapter V, 27.

⁷³ See Burrow, at pages 43 to 44.

⁷⁴ See, for example, commentary in A John Simmons, "John Locke's Two Treatises of Government", supra, at page 542 and on.

and explicitly Locke⁷⁵, and reminiscent of the views of Selden⁷⁶, Aston argued that categories of property could develop with the times:

since those supposed Times, ... the Objects of Property have been much enlarged by Discovery, Inventions and Arts.⁷⁷

And, critically:,

the Rules attending Property must keep pace with its Increase and Improvement and adapt to every case.⁷⁸

This is a clear comingling of law, philosophy and aesthetics - that property law must develop and evolve to allow for ownership over the expression of ideas in a literary composition with ownership tethered to the creator, through mental labour. Aston's comments in this regard are deeply connected to Locke's writings on property. Whereas Willes's judgment was more "Lockean" in nature, Aston was referencing⁷⁹ Locke.⁸⁰

Aston moved to a consideration of what matters can be the subject of property rights, something once based on mere occupation, but now which must take into account and allow for things of fancy, pleasure or convenience:

In short: anything merchandisable.⁸¹

Aston starts to put in place an argument that allows for an expanding notion of what can amount to property rights: property is not a closed class; it must be open to accepting modern and emerging matters. This is clearly the case with literary compositions, though it had not always been so:

⁷⁵ These are dealt with in great detail in Chapter 9 below.

⁷⁶ See Chapter 4 above, on Selden's view that English law is evolving at all times.

⁷⁷ See Burrow, at page 45.

⁷⁸ See Burrow, at page 45.

⁷⁹ And did indeed do so by footnote in his judgment.

⁸⁰ This matter is taken up in detail in the next chapter.

⁸¹ See Burrow, at page 46.

It is settled and admitted⁸², and it is not now controverted, but that Literary Compositions, in their original State, and in the Incorporeal Right of the Publication of them, are the private and exclusive PROPERTY of the Author.⁸³

For Aston it is not an issue that the notion of literary property is founded on the sentiment or expression of ideas, which are communicated through the medium of printing. This is how ideas are rendered useful to mankind. In addition, publication of the work does not amount to a renunciation of property rights. Aston was able to distinguish between notions of ownership in the expression and of the work as purchased at a bookstore. The buying of the copy does not include the work's inherent incorporeal rights, although the purchaser does in fact own that very physical book:

Can it be conceived that in purchasing a Literary Composition at a Shop, the Purchaser ever thought He bought the Right to be Printer and Seller of that specific work? The Improvement, Knowledge or Amusement which he can derive from the Performance, is all his own: But the Right to the Work, the Copy-Right remains in Him whose industry composed it.⁸⁴

Accordingly, Aston answers his first question in the affirmative:

I do not know nor can I comprehend any Property more empathically a Man's Own, nay, more incapable of being mistaken, than his Literary Works.⁸⁵

In respect of the second question – does publication give such rights of copyright away, Aston simply held “no”.

⁸² Citing the case of *Pope v Curl*. See Chapter 6 above dealing with *Pope v Curl*.

⁸³ See Burrow, at page 46.

⁸⁴ See Burrow, at page 48.

⁸⁵ See Burrow, at page 52.

Finally, in relation to the third question, whether the statute takes away common law rights, Aston answered “no”: there was an antecedent common law right of copyright and the introduction of the statute did not take that right away.

Aston concludes his judgment in rousing language:

Upon the whole I conclude, that upon every Principle of Reason, Natural Justice, Morality, and Common Law upon the evidence of the long-received Opinion of this Property, appearing in ancient Proceedings and in Law Cases; upon the clear Sense of the Legislature; and the opinions of the greatest Lawyers of their Time, in the Court of Chancery ... the right of an Author to the Copy of his Works appears to be well founded; ... And I hope the Learned and the Industrious will be permitted from henceforth not only to reap the Fame, but the Profits of their ingenious Labours without Interruption, to the Honour and Advantage of Themselves and their Families.⁸⁶

Yates, who had been counsel for the Edinburgh booksellers in earlier cases⁸⁷, found for the defendant. He gave the sole dissenting judgment; it reflected the old worldview on property and literary matters.

Yates considered the notion of literary property and of the effect of publication on the issue of ownership. He recognised literary ownership and property over private original works; where he diverged from his fellow judges was on the issue of publication. What Willes and Aston had overlooked were not the interests of the author, but of society as a whole. Authors do have rights, but the statute limits those rights. Common law had no role to play in the matter. Any right due and owing to the author must in Yates’s eyes be balanced against the rights and interests of the rest of society. Yates held it impossible to accept the notion that a right could accrue to an author forever⁸⁸, to so hold would have dire consequences for the rest of society:

⁸⁶ See Burrow, at page 62.

⁸⁷ Such as *Tonson v Collins*, see supra.

⁸⁸ See Deazley, “*Commentary on Millar v Taylor*, supra, at section 6.

Shall an Author's Claim continue, without Bounds of Limitation; and for ever restrain all the rest of Mankind from their natural rights, by an endless Monopoly? Yet such is the claim that is now made; a claim to an exclusive Right of Publication, for ever: For, nothing less is demanded as a reward and fruit of the Author's Labour, than an absolute Perpetuity.⁸⁹

Unlike Willes and Aston, Yates had significant issues with accepting the notion that property existed in 'ideas'. An idea, as an existence in the mind, was incapable of being the subject of property. They were "mere phantoms" and:

from the time of publication, the Ideas become incapable of being any longer a Subject of Property: all Mankind are equally intitled to read them; and every reader becomes as fully possessed of all the Ideas, as the Author Himself ever was.⁹⁰ [sic].

This was a fundamental flaw in Yates's argument. He had not understood that in literary property it is not the idea that is the essence of the property right, but the expression or sentiment of those ideas.

Yates stressed that the publication of the work ended all rights to assert a right of private property over the literary work:

When an author throws his work into so public a state that it must immediately and unavoidably become common, it is the same expressly given to the Public ... And when an Author prints and publishes his work, He lays it entirely open to the Public, as much as when an Owner of a Piece of Land lays it open into the High-Way.⁹¹

As to matters concerning what can fall under the definition 'property' as a legal construct, Yates concluded that literary works fell short of long-accepted standards

⁸⁹ See Burrow, at page 70.

⁹⁰ See Burrow, at page 73.

⁹¹ See Burrow, at page 74.

and dismissed the suggestion that it may exist as a kind of “customary property”. Yates’s view of property was conservative and ‘non-evolutionary’. Yates also undertook a detailed review of the ordinances, privileges, patents and licenses that had existed prior to the statute. He found nothing to suggest that any of these entitlements amounted to a common right of property in the work. He also disagreed with the proposition that the statute was declaratory of the common law⁹²:

How then can we consider this Act, but as vesting in Authors a property in their Works, which they had not before.⁹³

Finally, Yates dealt with the argument that a common law right of copyright was critical, as it acted as an encouragement to learning. He accepted that all valuable improvements should be encouraged but that every reward has its boundaries⁹⁴.

Yates found it a dangerous notion that an author should have a perpetual right to ownership of a literary work:

I wish as sincerely as any man, that learned Men may have all the Encouragements, and all the advantages that are consistent with the general Right and Good of mankind. But if the monopoly now claimed be contrary to the great Laws of Property, and totally unknown to the ancient and Common Law of England; if establishing of this claim will directly contradict the Legislative Authority, and introduce a species of Property contrary to the end for which the system of property was established; if it will tend to embroil the Peace of Society, with frequent contentions; - (Contentions most highly disfiguring the face of Literature and highly disgusting to a liberal Mind;) if it will hinder or suppress the Advancement of Learning and Knowledge; and lastly; if it should strip the subject of his natural Right; if these or any of these Mischiefs would follow; I can never concur in Establishing such a Claim.⁹⁵

⁹² See Burrow, at page 104.

⁹³ See Burrow, at page 106.

⁹⁴ See Burrow, at page 107.

⁹⁵ See Burrow, at page 111.

Yates concluded:

It is equally my duty, not only as a judge, but as a member of society, and even as a friend to the course of learning, to support the limitations of the statute.⁹⁶

He found against the plaintiff, upholding the arguments of the Scottish booksellers: there was no perpetual common law right to copyright.

It is interesting to note that while Yates dismissed the notion of literary property, he does touch upon concepts of property law. But his view of property rights under common law was confined to the old world order in that he at no time looked at whether ownership or property rights might be obtained through creation or labour. In many ways, Yates did not approach the issue as one of property at all. He seems to see the central issue as one of civil remedies and access-rights between individuals rather than property rights of individuals. Yates is more concerned with users than with authors.⁹⁷

Mansfield gave the final judgment.⁹⁸ He commenced by noting that this case was the first occasion in his time as Chief Justice where there had not been a unanimous decision. He made particular note of the fact that there had been long discussion between all judges where they had endeavoured to try to convince each other of the merits of their respective positions – but, in vain. Mansfield stated that he concurred with the judgments of Willes and Aston, such that it might be understood “as if he had spoken the substance of them and fully adopted them.”⁹⁹

Accordingly, Mansfield fully subscribed to the legal approach of Willes and the property theory approach of Aston. This is hardly surprising: both Willes and Aston

⁹⁶ See Deazley, “*Commentary on Millar v Taylor*”, supra at section 6 and also see Burrow, at pages 108 to 111.

⁹⁷ See, for example, in this regard, H B Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright* (1983) 29(3) Wayne Law Review 1119.

⁹⁸ His prerogative as the most senior judge on the bench, sitting as Chief Justice.

⁹⁹ See Burrow, at page 112.

had relied in their respective judgments on case law in which Mansfield had been involved either as counsel for the London booksellers or as judge.

Turning to a consideration of the common law, Mansfield held that:

It has long been expressly admitted, ‘that by the Common Law, an Author is intitled to the Copy of his own Work until it has been once printed and published by his Authority.’¹⁰⁰ [sic]

He had no hesitation in finding the notion of copyright, while an incorporeal notion, capable of being categorised as “property” and one not too illusory or without sufficient form to ground a property right. Mansfield presented a particularly modern and sophisticated view of the rights under consideration. Under the common law the property in the copy of the work is identifiable as an incorporeal right in a set of intellectual ideas or modes of thinking as communicated in a set of words and sentences and modes of expression.¹⁰¹

This was the very argument that Mansfield had made as a barrister in *Pope v Curl*, where Mansfield had stated that the property right of an author in his work was an incorporeal right that:

relates to ideas detached from any Physical Existence.¹⁰²

Now, as judge, Mansfield gave an explicit determination within a public institutional setting on what copyright was; the notion was being argued into existence.

Mansfield was able to perceive the myriad forms of ownership and property that could exist in the book as the literary work, acknowledging that copyright could exist equally detached from the work’s original manuscript or any other physical existence of the work:

¹⁰⁰ See Burrow, at page 113.

¹⁰¹ See Burrow, at page 113.

¹⁰² See Norman S Poser, *Lord Mansfield: Justice in an Age of Reason*, supra, at pages 324 to 326.

the Copy ... is equally a Property in notion and has no Corporeal tangible Substance.¹⁰³

This abstract property in the original manuscript work, capable of legal expression, could also be assigned or passed down from generation to generation. This right also existed wholly separately and detached from the original work. It was a right that existed even where the original manuscript had been lost or destroyed. This was, again, a similar position to that which Mansfield had taken in *Pope*, where, as counsel for Pope, Mansfield had argued about the difference between one owning the paper upon which correspondence was written to owning the substance of the words as set out on those physical pages.

Contrary to the objections raised by Yates, that ideas in the work were incapable of being property as they expressed none of the existing and accepted indicia of what did amount to property or how property rights traditionally came about, Mansfield found that incorporeal rights could exist in relation to ideas and expression that were detached from any physical existence.

While Yates presented a non-changing static view of what were property rights, Mansfield, like Blackstone in his *Commentaries*¹⁰⁴ and Aston above, saw property as a category that could change and evolve. Mansfield believed that the recognition of incorporeal rights existed within the common law. He acknowledged that such rights could not be said to have arisen due to custom or usage since time immemorial. This was because printing was only introduced into England in about 1419.

This raised a possible insoluble problem for Mansfield, in that if notions of literary property and copyright were anchored in common law, but had not been a right that had arisen due to long usage and traditional, in what then was the right founded:

From what source, then, is the Common Law drawn, which is admitted to be so clear, in respect of the Copy before publication?¹⁰⁵

¹⁰³ See Burrow, at page 113.

¹⁰⁴ See William Prest, *William Blackstone*, supra, at page 217 and on.

¹⁰⁵ See Burrow, at page 115.

The answer to this conundrum was given as follows, and while it was one that was built upon the views of property law long held by Mansfield, he used this bedrock of property law to add a singular notion of the author's moral rights, implied under natural law rights, as fundamental to the process, something not to be found so explicitly in any of the other judgments:

From this Argument: Because it is just, that an Author should reap the pecuniary Profits of his own Ingenuity and Labour. It is just, that Another should not use his name, without his Consent. It is fit, that He should judge when to publish, or whether he will ever publish. It is fit he should not only choose the Time, but the Manner of Publication; how many; what Volume; what Print. It is fit, he should choose to Whose Care he will Trust the Accuracy and Correctness of the Impression; in Whose Care he will Trust the Accuracy and Correctness of the Impression; in Whose Honesty he will confide, not to foist in Additions; with other Reasonings of the same Effect.

I allow them sufficient to show 'it is agreeable to the Principles of Right and wrong, the Fitness of Things, Convenience, and Policy, and therefore to the Common Law, to protect the Copy before Publication.¹⁰⁶

However, the same reasons held also once the work had been published:

But the same reasons hold, after the Author has published. He can reap no Pecuniary Profit, if, the next Moment after his work comes out, it might be pirated upon worse Paper and in worse Print, and in a cheaper Volume.¹⁰⁷

¹⁰⁶ See Burrow, at page 115.

¹⁰⁷ See Burrow, at page 116.

Here is an explicit determination of the author's legal and moral rights, as to reputation, attribution and textual protection and an acknowledgement of the modern author.

The strong ties between Mansfield and Pope¹⁰⁸ and the influence that Pope had¹⁰⁹ in relation to the rights and benefits of authors break to the surface:

The Author may not only be deprived of any Profit, but loose the Expense he has been at. He is no more Master of the use of his own Name. He has no Control over the correctness of his own Work. He cannot prevent Additions. He cannot retract error. He cannot amend; or cancel a faulty Edition. Any One may print, pirate, and perpetuate Imperfections, to the Disgrace and against the Will of an Author; may propagate Sentiments under his Name, which he disapproves, repents and is ashamed of. He can exercise no Discretion as to the Manner in which, or the Persons by Whom his work shall be published.

For these and many more Reasons, it seems to me just and fit to (also) protect the Copy after Publication.¹¹⁰

These were the very issues of authorial control, integrity and dignity that had troubled Pope in *Pope*.¹¹¹ Pope's influence on Mansfield was clear. He had known Pope for a considerable period of time at least from his very early days as a barrister and had been his lawyer in several key legal cases. Lord Mansfield had drawn up the Bill of Complaint as counsel for Pope in the case against Curll, a document that talked in terms of authorial consent, control and absolute ownership over written works and literary property.

¹⁰⁸ See Edmund Heward, *Lord Mansfield: A Biography of William Murray 1st Earl of Mansfield 1705 to 1793, Lord Chief Justice for 32 Years*, supra, at pages 13 to 18 and also pages 25 to 28: "There is no doubt that Pope was one of the main formative influences on Murray [ie Mansfield]". As an indication of the strength of their friendship, Murray is specifically referred to in at least two of Pope's poems, "Ode to Venus" and "The Imitation of Horace".

¹⁰⁹ John Paul Russo, *Alexander Pope: Tradition and Identity* (Harvard University Press, 1972), 129.

¹¹⁰ See Burrow, at page 116.

¹¹¹ See, for example, Mark Rose, "The Author in Court: Pope v Curll 1741," supra, at pages 211 to 229.

Mansfield then turned to examine a “fundamental principle” as the corner stone of common law¹¹²:

The whole then must finally resolve in this Question: Whether it is agreeable to Natural Principles, Moral Justice, and Fitness, to allow Him the Copy, after publication as well as before.¹¹³

Mansfield binds up the argument with elements of authors championing their own rights while directly invoking Lockean notions of property and ownership. In this way Locke underpinned the primary element of possessive individualism expressed in the likes of Swift, Pope and others:

The single Opinion of such a Man as Milton, speaking, after much Consideration, upon the very Point, is stronger than any inferences from gathering Acorns and seizing a vacant Piece of Ground.¹¹⁴

As will be considered below, notions of gathering acorns and the like featured in Locke’s theory on property. Upon this basis, Mansfield found in the affirmative for the existence of common law copyright both before and after publication. The rights of the author were fundamental to the matter:

All the reasoning that subsequent Editions should be correct holds equally to an Author. His name ought not to be used against his will. It is an injury, by a faulty, ignorant and incorrect Edition, to disgrace his Work and mislead the Reader.¹¹⁵

Mansfield then reviewed the statute. He found no evidence to suggest that it was the intention of the legislature to remove any common law rights as to copyright.

¹¹² See Deazley, “*Commentary on Millar v Taylor*”, supra, at section 6.

¹¹³ See Burrow, at page 117.

¹¹⁴ See Burrow, at page 117.

¹¹⁵ See Burrow, at page 123.

In conclusion, Mansfield again voiced unequivocal support for the decisions of Willes and Aston. Mansfield then notes his own involvement in the journey of the issues before him:

The subject at large is exhausted ... I have had frequent Opportunities to consider it. I have travelled in it for Many Years. I was counsel in most of the cases which have been cited from Chancery: I have copies of all ... The first case of Milton's *Paradise Lost* was upon my motion. I argued the second: which was solemnly argued by one on each side. I argued the case of Millar against Kincaid Many of the precedents were tried by my advice. The accurate and elaborate Investigations of the Matter in this cause and in the former case of Tonson and Collins has confirmed Me in what I always inclined to think: That the Court of Chancery did right in giving Relief upon the Foundation of a Legal Property in Authors; independent of the Entry, the Term of years and all the other provisions given by the Act.

Mansfield found for the plaintiff, holding that there was a common law perpetual copyright vested in authors, which was the same both before and after publication and was not affected by the statute.

The plaintiff's executors returned the case to Chancery, as Millar had died before judgment could be given, on 8 June 1768. He had been known to be ill for some time.

It had now been established at law that Taylor did have property in *The Seasons*. Lord Apsley, ordered Taylor to account to Millar for all copies of the unauthorised work that had been sold, and Millar was granted a perpetual injunction against Taylor printing or selling the work again.¹¹⁶

Of the utmost importance, for the very first time, the London booksellers had won a definitive affirmation of the author's common law right in perpetuity to print and publish the literary work, a right not taken away by publication or by the statute. The argument, which had begun many years earlier, had now ended with an explicit

¹¹⁶ See Deazley, "Commentary on *Millar v Taylor*", supra, ibid.

determination.¹¹⁷ Having traversed the judgments, what philosophical issues were at play in the decisions? What was the real intersection of the law, philosophy and aesthetics in the case? What issues in the history of the ideas of the author, literary property and the literary work were at play?

Millar was a fundamentally important decision; it was the midwife by which the notion of common law copyright was argued into existence. Copyright was an expressly modern concept, and is a specifically modern institution. This was a new and evolving notion of property and one that required an explicit and sophisticated theory to underpin it and give it justification. This justification was provided by Locke's property theory, which was very suited to intellectual property. That Locke's theory of property was integral to the development and the emergence of the notion of copyright – of ownership rights over literary creations, has long been acknowledged.¹¹⁸

However, what has never been fully appreciated is that Mansfield moved beyond mere legal expressions of ownership to cap them off and bind them up with an express statement of moral rights under the broader rubric of natural rights due and owing to authors, making the tripartite nature of the notions of the author, the literary work and ownership in that work a thoroughly modern paradigm. As Rose argues¹¹⁹, the practice of securing marketable rights in texts that are treated as commodities is a specifically modern institution, the creation of the printing press, the individualization of authorship in the late Middle Ages and the early renaissance and the development of the advanced market place society of the seventeenth and eighteenth centuries.¹²⁰

Mansfield gave clarity and form to the notion of common law copyright as a modern type of property but he added a critical acknowledgment of the role of the individual *qua* individual in the process and one that relied upon the writings of Locke, who influenced not only the issues of property at play in the copyright wars but also the notion of personal identity and the self. As Ray Patterson argues, the two are more bound up than it would first appear:

¹¹⁷ See Deazley, *Op cit, ibid.*

¹¹⁸ See, for example, Deazley, Rose and Lowenstein, *supra*.

¹¹⁹ See Rose, *Authors and Owners*, *supra*, at page 3.

¹²⁰ See Rose, *Authors and Owners*, *supra*, at page 3.

The institution of copyright is deeply rooted in our economic system, much of our economy depends upon intellectual property rights. But no less important, copyright is deeply rooted in our conception of ourselves as individuals with a modern degree of singularity and personality.¹²¹

The development of the concept of property also requires an understanding of the development of the notion of the self and personal identity to fully appreciate the emergence of our three notions. One cannot be understood without the other. These matters are the subject of the next chapter.

¹²¹ See L Ray Patterson, “*Free Speech, Copyright, and Fair Use*”, *supra*.

Chapter Nine

The evolution of private property rights

Having reviewed the legal issues in *Millar*, it is appropriate to now consider how the decision sits within the history of ideas, with reference to the concept of property and the process by which property rights might be justifiably acquired.

Millar was important because it was a revolutionary development in the legal theory of property, holding that intangible incorporeal objects, literary works, had the status of property acquired through mental labour. Locke's influence was critical. There were, however, more than legal rights at play. *Millar* was important in finding that private property rights were also a moral right within the family of natural rights and, what might be called today, a human right.

In relation to private property as a legal right, *Millar* was a critical development. By applying Locke's labour theory of property¹, for the first time the Courts recognised the existence of common law copyright and established a new process by which property rights could be acquired, not through the old indicia of possession or occupation but through labour, including intellectual labour.

To appreciate the significance of this, it will be necessary to place Locke's theory into an historical context. This will require a review of the long period of historical debate over property rights, of whether private property is permissible or is an affront to moral relative values, and a consideration of the theoretical question of how private property rights first came about.

It will also be necessary to consider how suitable Locke's theory of property is when applied to literary property. There is a fair 'fit', but it is more appropriate to term the application of the theory 'Lockean' rather than a pure application of 'Locke'. Problems that arise when Locke's theory is applied to intellectual property, especially

¹ Outlined by John Locke in *The Two Treatises*, supra.

copyright, will be considered. These inconsistencies appear not to have been previously identified as will be shown.

There will then be a consideration of how through *Millar* private property came to be acknowledged as a moral right, based on emerging natural law rights at this time, Locke will be shown to have had a direct influence on this aspect of the judgment as well.

Before commencing a review of the two main issues, private property as a legal right and as a general natural and specific moral right, it is helpful to consider the outcome of *Millar*.

In *Millar* the question of whether perpetual common law copyright existed was finally answered.² The Court found that perpetual common law existed, secured through the literary work and vesting in the work's author, independent of the statute.³ This legal right was a form of private property, contained within the literary work. It was a property right that vested on the basis that the author's mental labour had brought the work into existence. Labour justified the right. The decision gave ontological weight to the matters under current consideration. It also provided a coherent and compelling justification for how a legal right of private property arose. This was new law.

The acknowledgement of authors' common law copyright was a very different paradigm to previous times, where authors' rights⁴ were secondary to other interests, and any notion of a claim over the text was more aligned with a license than with a legal right. Authors had had little control over their works, often excluded from the commercial exploitation. Through the cases argued since the introduction of the statute, the notion of literary property, and the right to protect and commercially exploit that property through copyright, had been argued into existence. It was the author who now grounded ownership over the work. *Millar* was critically important because by relying upon Locke's theory of how property rights came about, the

² Marjorie Plant, *The English Book-trade: An Economic History of the Making and Sale of Books* (George Allen & Unwin, 1974), 119-120.

³ Again, a reference in this chapter to "the statute" is a reference to the Statute of Anne, aka the Copyright Act.

⁴ However they might be categorised at that time.

Court⁵ recognised copyright and literary property as pre-existing legal rights and a type of private property.

Commentators such as Rose, Loewenstein, and Dahos⁶ have identified Locke's influence on the case and on the recognition of literary property as a legal right. In addition to legal rights, moral rights were also at play. A moral right⁷ is a reference to certain specific rights that authors have over their work beyond rights that exist at law. They may be seen as a particular type of natural right specific to both authors as creators and literary texts as the creations of these intellectual labourers. Moral rights ensure that authors have a claim-right to be respected and treated with dignity, to be given attribution to the work that they have created, beyond any right to commercially exploit the work. Such moral rights exist *a priori* beyond posited law, found through an application of natural law and, in particular, natural rights.⁸

Therefore, the other reason why *Millar* is important is because there was recognition⁹ of literary property as a legal and a moral right, both anchored in Locke's writings.¹⁰ This connection between the moral right of the author, now subsumed in and a part of modern copyright law and legislation, and Locke's philosophy has not been previously appreciated.¹¹ *Millar* is a significant milestone in the development of legal rights and a natural rights theory.

Let us turn now first to private property as a legal right.

Millar was essentially an argument over the theory of property. It was a revolutionary step in the evolution of legal property theory, holding that an intangible object, the expression of ideas contained in literary form, had the status of property rights, rights that came about through intellectual labour. This was a significant departure from

⁵ That is, Lord Mansfield and Justice Willes and Justice Aston.

⁶ As will be reviewed below.

⁷ And a natural right.

⁸ See Mautner, *Op Cit, Ibid*

⁹ In the judgment of the Chief Justice, Lord Mansfield.

¹⁰ Notably the *Two Treatises* but also in other works such as the *Essay* and Locke's essays on Natural Law and Natural Rights. In this regard generally see especially A John Simmons, *The Lockean Theory of Rights*, (Princeton University Press, 1992).

¹¹ See below for a detailed analysis of this claim.

existing notions that legal property rights were grounded in occupation¹² and possession of tangible chattels.¹³

The significance of the case was recognised at the time. In 1771 William Coke published the judgments attaching his own essay on the case as an annexure to the work.¹⁴

In the essay Coke was highly critical of the precedent that the case had set; to his mind the decision was “nonsense”, an acknowledgement of a type of property so complex as “to obscure reason”, contrary to the end for which the system of property was established:

this amazing discovery of a perpetual exclusive monopoly in books, which has lain concealed from the understandings of all mankind, in all countries of the world, from the invention of the art of printing till the year 1769 when it was first discovered by the three eminent judges, it was a discovery as wonderful as would be! But unluckily it happens to run counter to the law of the land and will vanish like the baseless fabric of a vision.¹⁵

Coke’s was a conservative view: the legal *indicia* for property were fixed, and were not open to expansion.

Despite these protests, *Millar* established the notion of legal property rights in a literary work, the expression of ideas in the text and the right to commercially exploit this property. This new legal right was one that had as its legitimacy not in the old *indicia* of possession or occupancy but was based on mental labour. As Willes stated:

¹² See for example Langbein, Lerner & Smith, *History of the Common Law*, supra, at page 881 to 883.

¹³ See, for example, J H Baker, *An Introduction to English Legal History*, supra, at pages 223 to 315 and pages 379 to 400.

¹⁴ William Coke, *Speeches or Arguments of the Judges of the Court of King’s Bench in the Cause of Millar Against Taylor for Printing Thomson’s Seasons, to which are added Explanatory Notes and an Appendix Containing a Short State of Literary Property* (William Coke, 1771).

¹⁵ Coke, *Op Cit*, at page 123.

It is wise in any state to encourage Letters and the painful researches of Men. The easiest and most equal way of doing it is by securing them property of their own works.¹⁶

Aston agreed, noting that a man has property in his body, life and labours:

The present claim is founded upon the original right [of the author] to the work as being the mental labour of the author and that the ... produce of the labour are his.¹⁷

This was a new way for Courts to look at property rights and how such rights arose and were justified. The Court had moved into philosophical territory in recognising the ‘property-conferring’ quality of mental labour. As Aston noted, the concept of property in law should change:

the rules attending property must keep pace with its increase and improvement and must be adapted to every case.¹⁸

This was reminiscent of Selden’s views as discussed in earlier chapters - and contrary to the view expressed by Coke.

Millar was part of a discussion that had been occurring for some time concerning theories of private property: of what private property was, how it might be justified and whether it was part of the natural law or was created by man-made law. It was a discussion not only of interest to lawyers but also philosophers, theologians and politicians.

The concept of property is an important philosophical issue in the history of ideas. Notions of who can own something and what is “property” have proven to be difficult to explain. Even when property has been defined, there remain issues as to what laws and conventions are necessary to define the rights and duties of owners and others,

¹⁶ *Millar v Taylor*, supra, at page 39.

¹⁷ *Millar v Taylor*, supra, at page 45.

¹⁸ *Ibid.*

and whether these rights are economic, legal, natural, moral or something else.¹⁹ It is of benefit briefly to consider the historical development of this debate, especially to show how significant Locke's contribution was to the issue of what private property rights were and how they might come about and of how a theory of natural rights developed in this regard.

Since classical times, the discussion had generally considered two main issues.

Firstly, how did one resolve the tension between goods held in common as opposed to goods held exclusively by one person to the exclusion of all others²⁰: should communality prevail over private property? Was there scope for public *and* private property? Even if the posited law allowed for certain private property rights, what were the moral issues surrounding the holding of property to the exclusion of all others? Was it contrary to the laws of nature or against the teachings of the early Christian church to hold private property to the exclusion of others?

Secondly, if the emergence of private property was permissible²¹ for whatever reason, any debate must presuppose that all property was once held in common prior to the establishment of a private property regime. What legitimised the first private acquisition from the public commons? This question led to two other issues.

One issue central to any debate about private property was the conundrum of whether the advent of private property marked a decline or an advance in the affairs of mankind. Second, in a state of nature when all things were free from private property, were resources held in common such that all had an equal share or were they owned by no one at all.

Issues of communality and private property had been debated in classical Athens.²² Plato²³ spoke²⁴ in favour of communality in preference to private property²⁵, writing

¹⁹ James O. Grunebaum, *Private Ownership* (Routledge, 1987); Stephen R Munzer., *A Theory of Private Property* (Cambridge University Press, 1990).

²⁰ Harold Demsetz, 'Toward a Theory of Property Rights II: The Competition between Private and Collective Ownership' (2002) 31(S2) *Journal of Legal Studies* S653.

²¹ See Grunebaum, *Op cit* and Munzer, *Op cit*, supra.

²² Plato, and Giovanni R F Ferrari (ed), *The Republic, Cambridge Texts in the History of Political Thought* (Cambridge University Press, 2013), xi-xxxii.

that the rulers and guardians in the perfect city should own only that which was essential.²⁶

In *The Laws*, Plato wrote:

That city and polity come first and those laws are best where it is observed as carefully as possible throughout the whole city the old saying that ‘friends have all things in common.’²⁷

In that dialogue, the ideal polity is one where all are subject to the same sharing regime, arguably an expansion of the view in *The Republic*.²⁸ Plato was in favour of collectively owned property²⁹, believing that all property should be shared amongst the citizens. Only with communality could civic harmony be achieved.

Aristotle³⁰ did not share Plato’s enthusiasm for communality.³¹ He considered³² that private property with common usage was preferable³³ to communality. Aristotle was, however, vehemently against monopolies, hoarding, and dilapidation. Goods held in private had to be common-in-use.³⁴

²³ Plato: 427 BC – 347 BC.

²⁴ In his review of the elements of the perfect state.

²⁵ Plato, *The Republic* (Penguin Classics, 2007), 118 and 178. And in *The Laws*. In Book 3 and Book 5 of *The Republic*, the work wherein Socrates and three different interlocutors considered the notion of the perfect community and the ideal citizen.

²⁶ Nikolas Pappas, *The Routledge Guidebook to Plato’s Republic* (Routledge, 2013), 98.

²⁷ Plato, *The Laws* (Penguin Classics, 2006), 739 B to D.

²⁸ See Garnsey, *Op cit*, at page 14.

²⁹ Sheryl D Breen, “Plato: Private Property and Agriculture for the Commoners—Humans and the Natural World in The Republic” in Peter F. Cannavo and Joseph H. Lane (eds) *Engaging Nature: Environmentalism and the Political Theory Canon* (Massachusetts Institute of Technology Press, 2014).

³⁰ Aristotle: 384 BC – 322 BC.

³¹ William Mathie, “Property in the Political Science of Aristotle” in Anthony Parel & Thomas Flanagan (eds), *Theories of Property: Aristotle to the Present* (Wilfrid Laurier University Press, 1979), 25.

³² Aristotle, *The Politics* (Thomas Alan Sinclair ed, and Trevor J Saunders trans, Penguin Classics, first published 1962, 1992), 112-119; Christopher Shields, *Aristotle* (Routledge, 2014), 412-440 (Chapter 9, on politics); C W Taylor, “Politics”, in Jonathan Barnes (ed), *The Cambridge Companion to Aristotle* (Cambridge University Press, first published 1995, 1999), 233-258.

³³ Fred D Miller Jr, *Nature, Justice, and Rights in Aristotle’s Politics* (Clarendon Press, 1995), 321-328.

³⁴ John Finnis, *Natural Law & Natural Rights* (Oxford University Press, 2011), 170-171.

In *The Politics* private property was of social and economic value. Communal ownership was detrimental to the wellbeing of the city, leading to discord, whereas private property allowed for the exchange of mutually beneficial skills and the exercise of generosity. Private property promoted the values of possession and stewardship, through care and temperance³⁵, appealing to a citizen's self-regard.³⁶ With Aristotle's response to Plato's preference for communality there commenced a debate between the two positions, one that favoured communality, the other private property.

The Roman Republic had a detailed system of property rights³⁷ protected by law.³⁸ Generally, Roman jurists and politicians did not consider the issue of communality versus private property. Even Cicero did not explore the Platonic/Aristotelian debate in any real detail³⁹, limiting his comments on private property to matters of civic responsibility, believing that it was the duty of the state to defend and safeguard private property.⁴⁰

The Platonic/Aristotelian debate died out towards the end of the Roman Republic, especially with the loss of the major writings of Plato and Aristotle.

Jumping ahead for a brief moment in this chronology, it was not until the rediscovery and recovery of the writings of Plato (and Aristotle)⁴¹ in the 1400-1500s that Plato's specific thoughts on communality were again widely known. Once these writings began to be circulated debate was rekindled⁴², especially within the writings Decembrio, Bessarion and Ficino.⁴³

³⁵ Eugene Garver, *Aristotle's Politics: Living Well and Living Together* (University of Chicago Press, 2014), 50.

³⁶ Judith Ann Swanson, and C David Corbin, *Aristotle's Politics* (Continuum, 2009), 38.

³⁷ See, for example, Susan Treggiari, "*Sentiment and Property: Some Roman Attitudes*", in Parel & Flanagan, *Op cit*, at pages 53 to 88.

³⁸ Howard Hayes Scullard, *From the Gracchi to Nero: A History of Rome from 133 BC to AD 68* (Methuen, 1976), 209.

³⁹ Jill Harries, "The Law in Cicero's Writings" in Catherine Steel (ed), *The Cambridge Companion to Cicero* (Cambridge University Press, 2013), 107-121.

⁴⁰ See Andrew P Peabody, *Cicero: De Officiis*, BiblioLife LLC, reprint, 2017 web edition.

⁴¹ Especially through the efforts and endeavours of Averroes of Cordoba (1126 to 1198) in the thirteenth century.

⁴² Peter Garnsey, *Thinking About Property: From Antiquity to the Age of Revolution* (Cambridge University Press, 2007), 31-59. Garnsey is acknowledged throughout this chapter section.

⁴³ Pier Candido Decembrio (1392 to 1477), Cardinal Bessarion (1403 to 1472), and Marsilio Ficino (1433 to 1499).

These three sought a synthesis of Platonism with Christian teachings.

Ficino made a particularly spirited defence of Platonic property theory, holding that private property had failed mankind. Following the decline of Rome and the beginning of early Christian Europe, and even during the long period when the West was not directly exposed to the Platonic versus Aristotelian communality debate, consideration of the benefits and detriments of communal and private property continued to agitate lawyers, philosophers, and theologians.

For instance, in the early history of the Church, much was made of Christ's call for a renunciation of property, with Church leaders advocating freedom from personal possession. There was Biblical authority for communality. *Acts* referred to the holding of property in common:

And fear came upon every soul; and many wonders and signs were done through the apostles. And all who believed were together and had all things in common; they had sold their possessions and goods and distributed them to all, as had any need.

Now the company of those who believed were of one heart and soul, and no one said that any of the things which he possessed was his own, but they had everything in common.⁴⁴

Early Church historians, such as Eusebius in his *Church History*⁴⁵ concerning the early Christian communities, noted that property was often held on a communal basis. Other writers advocated similar views on the benefits and sanctity of communal asceticism through the abandonment of private property⁴⁶, such as Origen and Cyprian.

⁴⁴ *Acts* 2:43 to 45 and 4:32 to 5:5

⁴⁵ Eusebius, *The History of the Church from Christ to Constantine* (Andrew Louth ed, G.A. Williamson trans, Penguin Classics, London, 1989).

⁴⁶ Paul Johnson, *A History of Christianity* (Penguin Books, 1990). See in particular on the early Church and Christian communities, Part One, and pages 52 and on.

Communality was given full realisation in the emergence of the monastic orders, from the third century on. Monasteries flowered⁴⁷, advocating communal asceticism and a renunciation of property, becoming one of the main institutional models for communal living. Many early Church philosophers and theologians were also drawn to communality and an ascetic life.

St Augustine did not directly consider private property⁴⁸, but did see political power in the holding of goods to the exclusion of others.⁴⁹ He advocated communality and a divesting of worldly goods, especially for those entering holy orders. Augustine held a nuanced view on private property. He acknowledged that earthly goods were a gift from God and accepted that the wealthy could keep their possessions - unless they aspired to perfection, by the taking of holy orders for example. Even in this limited way, however, the wealthy were merely the tenants of property; true *dominium* lay with God.

A withering attack on private property was written by an anonymous cleric around 415 AD.⁵⁰ It would be highly influential.

*De Divitiis*⁵¹ was an attack on individual wealth and proclaimed that the renunciation of private property was incumbent on every Christian. Such an extreme view influenced one of the most ascetic monastic orders, wherein a wholly new way of looking at private property and communality emerged. St Francis established the Franciscan Order around 1209.⁵² Leading theologians in the order placed a special emphasis on poverty. Several extremists declared that the Order should not even hold property in common, the only right that the Order had was usufructuary.⁵³

⁴⁷ Philippe Wolff, *The Awakening of Europe: The Pelican History of European Thought Volume 1* (Penguin, 1968), 32.

⁴⁸ Richard J Dougherty, 'Catholicism and the Economy: Augustine and Aquinas on Property Ownership' (2003) 6(2) *Journal of Markets & Morality* 479.

⁴⁹ Paul Weithman, "Augustine's Political Philosophy" in David Vincent Meconi and Eleonore Stump (eds), *The Cambridge Companion to Augustine* (Cambridge University Press, 2014), 237-238.

⁵⁰ See Garnsey, *Op Cit*, at pages 75 to 76.

⁵¹ *On Wealth*

⁵² John Moorman, *A History of the Franciscan Order from its Origins to the Year 1517* (Oxford University Press, 1968), Introduction.

⁵³ Being a mere limited right to only use something for a limited period of time See the discussion in this regard above at Chapter 4.

A consideration of the inherent tensions between communality and private property also agitated early canonical lawyers. One of the most influential was Gratian.

Gratian's main work⁵⁴ was *Concordia Discordantium Canonum*⁵⁵, the first undertaking that provided a systematic exposition of canon law.⁵⁶ Gratian brought a new urgency to the debate on private property.⁵⁷ He supported the notion of natural communality and saw iniquity in private property. Gratian drew on a parallel between the communal property regime of the first Christian community at Jerusalem and Platonic thought.

Relying upon *Acts 4:32*, Gratian saw the holding of property in common as being in accordance with natural law: "for in the law of nature everything is shared by everyone".⁵⁸ Gratian believed that private property was contrary to natural law, only revealed by convention under man-made laws. Gratian was supportive of the Platonic view on private property within a Christian context. While Gratian was highly influential, his views on private property were to be challenged.

Support for the views of Aristotle on the legitimacy of private property began to emerge with the recovery of *The Politics*⁵⁹ and the commentaries on the text that followed.⁶⁰ The Platonic/Aristotelian debate was rekindled. Aquinas was aware of *The Politics* through Islamic translations.⁶¹ He wrote a commentary on it⁶² and endorsed the views of Aristotle.⁶³

⁵⁴ See Philippe Wolff, *Op Cit*, at page 270.

⁵⁵ The "Concord of Discordant Canons".

⁵⁶ See, for example, Paul Johnson, *Op Cit*, at page 206.

⁵⁷ See Garnsey, *Op Cit*, at page 80 and on.

⁵⁸ Gratian, *Decretum*, Distinctio 8.12.

⁵⁹ Peter Critchley, *The Recovery of Aristotle and the New Science of Politics in Thirteenth Century Europe* (2004)

<[http://www.academia.edu/788728/The Recovery of Aristotle and the New Science of Politics in Thirteenth Century Europe](http://www.academia.edu/788728/The_Recovery_of_Aristotle_and_the_New_Science_of_Politics_in_Thirteenth_Century_Europe)>.

⁶⁰ Jean Dunbabin, "The Reception and Interpretation of Aristotle's *The Politics*", in Norman Kretzmann, Anthony Kenny, and Jan Pinborg (eds) *The Cambridge History of Later Medieval Thought* (Cambridge University Press, 1982), 724-737.

⁶¹ Denys Turner, *Thomas Aquinas: A Portrait* (Yale University Press, 2013), 112-114; see also pages 92 to 96 concerning the influence and importance of Averroes to Aristotelian recovery and rediscovery in Europe.

⁶² Peter S Eardley, and Carl N Still, *Aquinas: A Guide for the Perplexed* (Continuum, 2010), 93-116.

⁶³ Brian Davies, *Thomas Aquinas's Summa Theologiae: A Guide & Commentary* (Oxford University Press, 2014).

In *Summa Theologiae*, Aquinas asked “*Is it legitimate for individual men to possess anything as their own?*”.⁶⁴ He responded that private property is legitimate and necessary for human life.⁶⁵ Aquinas’s endorsement of the thoughts of Aristotle would have a profound impact on the development of the theories of private property.⁶⁶

Aquinas made a case for private property, stressing that humans are the suitable managers of the resources that belong to God held for the interests of all:

A rich man that takes prior possession of something that was common beforehand is not doing anything wrong provided he is ready to share it; he sins only if he unreasonably prevents others from using it The individual holding of possession is not therefore contrary to the natural law, it is that which rational beings conclude as an addition to the natural law.⁶⁷

Aquinas was of the view that while private property rights do not exist according to natural law, but were an institution evolved by mankind, private property was still beneficial as long as acquisition does not replace felicity and beatitude as the ends of life and that private property rights do not intrude on common usage⁶⁸ and are in accordance with what is “fair”.⁶⁹ Aquinas paved the way for an emerging view that there was nothing iniquitous in the holding of private property. Medieval canonists relied on his writings to develop a theory that private property was a natural right but one which was ‘adventitious’.⁷⁰

Given these developments steered by theologians and canonical lawyers, Continental lawyers soon developed a theory of private property, with Vitoria⁷¹ and Suarez⁷²

⁶⁴ Thomas Aquinas, *Summa Theologiae*, 2.2ae.66.2.

⁶⁵ Jason T Eberl, *The Routledge Guidebook to Aquinas’s Summa Theologiae* (Routledge, 2016), 149, 167 and 207-220.

⁶⁶ See, for example, Garnsey at page 43.

⁶⁷ See as per Garnsey, *Op Cit*, at page 132.

⁶⁸ See, for example, A Parel, “*Aquinas’s Theory of Property*”, in Parel & Flanagan, *Op cit*, at pages 89 to 114.

⁶⁹ See Finnis, *Op cit*, at page 206.

⁷⁰ A right created by humans themselves through the application of their God-given reason.

⁷¹ Francisco de Vitoria: 1483 to 1546.

⁷² Francisco Suarez: 1548 to 1617.

writing about private property rights.⁷³ English lawyers, Glanvill⁷⁴, Bracton⁷⁵, Britton⁷⁶ and Fortescue⁷⁷, also wrote on property rights with ownership based mainly on possession and occupation. It would seem that a consensus was emerging that was in keeping with the views of Aristotle, Augustine, and most importantly Aquinas, that private property was no longer the iniquity that it had been for the likes of Gratian. Aristotle had prevailed over Plato.

A second issue was soon to receive attention: if private property was permissible, how did private property rights first come about.⁷⁸ Implicit within this was whether the establishment of private property rights marked a decline or an advance in the humanity's progress.

The Platonic/Aristotelian debate about private property contained within it another issue that exercised philosophers, theologians and lawyers. It concerned the origins of private property.

If one accepts the existence of private property, that presupposes that prior to the advent of private property, all property must have been held in common. At some point in time, however, something occurred which allowed for the first private acquisition of property out of the commons.

This problem of *occupatio*⁷⁹ was the focus of several philosophers of the period. It was an issue that, however, had been under consideration for some time, since the time of the Greeks, who considered whether there had been a Golden Age in the past, a better country where all property was owned or held in common.

⁷³ John Kilcullen, *The Origin of Property: Ockham, Grotius, Pufendorf and Some Others* (2001), Macquarie University
<https://www.mq.edu.au/about_us/faculties_and_departments/faculty_of_arts/mhpir/staff/staff-politics_and_international_relations/john_kilcullen/the_origin_of_property_ockham_grotius_pufendorf_and_some_others/>.

⁷⁴ Ranulf de Glanvill: 1154 to 1189.

⁷⁵ Henry de Bracton: 1210 to 1268.

⁷⁶ Known as Britton – said to be one John de Breton: circa 1280 to 1300.

⁷⁷ Sir John Fortescue: 1394 to 1479.

⁷⁸ The problem of “first acquisition”.

⁷⁹ The problem of first private acquisition out of the commons.

Golden Age theory presupposes a world where the fruits of the earth were *communia*.⁸⁰ Nature had provided humanity with a life that was ‘felicitous’, so how was the transition to a regime of private property explained and justified⁸¹ or is private property, excluded from the state of nature, inherently anti-social and amoral?

Golden Age narratives were pessimistic. The myth first appears in Hesiod’s *Work and Days*⁸², which presented vision of an idyllic golden age from which all after was decline. It was echoed by Virgil: “all need was met in common..”⁸³; and Ovid: “

Earth would be used to give all things of her own accord ... without any wicked lust for possession.⁸⁴

Occupatio had been recognised by the early Church. The issue came to a head in the usufructary writings of extremist Franciscans⁸⁵, who decried any claim over resources. There was no ownership - only a limited right of usage. In response to this, John XXII issued a Papal Bull⁸⁶ declaring that Adam had received *dominium* from God in two senses: not only rule and control over the rest of creation but also private property rights. God had granted private property rights to Adam in the Garden, and these rights had been lost with the Fall, but now, as part of God’s direct command, a private property regime had been reinstated. This argument would be taken up 350 years later by Sir Robert Filmer in *Patriarcha*⁸⁷, which supported absolute sovereignty and stated that the monarch held all property under a direct grant from God to the exclusion of all others. Locke would have much to say about this. The Papal Bull marked the beginnings of the view that private property was evidence of man’s advancement.

⁸⁰ Shared by all.

⁸¹ See Garnsey, *Op Cit*, at page 108.

⁸² Hesiod, *Work and Days* (A.E. Stallings trans, Penguin, 2018). a poem written circa 700 BC.

⁸³ Virgil, *The Georgics*, Betty Redice (ed), (Penguin, 1982), 20.

⁸⁴ Ovid, *Metamorphoses* (David Raeburn ed, Penguin, London, 2004), Book I, page 3 (re the Four Ages of Man).

⁸⁵ Such as William of Ockham and Duns Scotus.

⁸⁶ *Quia Vir Reprobus*

⁸⁷ To which, see below, concerning Locke’s motivation for the drawing up of his theory on private property but see especially Richard Ashcraft, *Op cit*.

The problem of *occupatio* was of concern to Grotius and Pufendorf. Both sought to give private property the status of natural law⁸⁸, by placing its emergence in the theoretical state of nature.⁸⁹ The dilemma they faced was that there was a strong tradition going back to antiquity of an original regime of communality where everyone had equal access to the resources of the Earth.⁹⁰ For Grotius and Pufendorf justification for the breach of the principle of equal access to all resources was the argument that consent, express or implied, had allowed for the first *occupatio*.⁹¹

Grotius's main writings on private property were written in 1625.⁹² He set out his argument on "the origin and development of private property" in *On the Law of War and Peace*. Namely: mankind began as the original gatherers of the fruits of the Earth; in that period of antiquity, life was easy and free from toil. God had bestowed on humanity superiority over all other created things such that each person could take what they wanted from the common stock of resources. Men, however, had desire for community and became dissatisfied with a life that was simple and basic. Due to this, individuals began to appropriate things for themselves and, in this way, private property rights arose with appropriation based upon consent between members of the community.⁹³

At the heart of Grotius's solution to the problem of *occupatio* is the argument that private property did not come about by way of unilateral self-directed appropriation but through *pactum*, an agreement by division or occupation. Grotius stated that private property was not emblematic of man's decline but was a product of the natural reason God had given mankind. Private property was evidence of mankind's advance.⁹⁴

⁸⁸ Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford University Press and Clarendon Press, 1991), Introduction.

⁸⁹ Arild Saether, *Natural Law and the Origin of Political Economy: Samuel Pufendorf and the History of Economics* (Routledge, 2017), 76-86.

⁹⁰ See Garnsey, *Op Cit*, at page 136 and on.

⁹¹ Garnsey, *Op Cit*, *Ibid* and on.

⁹² See Hugo Grotius, *On the Law of War and Peace*, A C Campbell (editor), JazzyBee Verlag, Amsterdam, 2016.

⁹³ See Garnsey, *Op Cit*, page 138.

⁹⁴ Stephen C Neff, *Hugo Grotius on the Law of War and Peace* (Cambridge University Press, 2012), 167.

In 1672 Pufendorf published *On the Law of Nature and of Nations*.⁹⁵ Pufendorf submitted that in the state of nature, mankind was a miserable lot and life was wretched. Pufendorf identifies two possible forms of community, the “negative”, where “all things lay open to all men and belong no more to one than the other” and the “positive”, where all was shared equally by mankind.

The negative community was a form of *terra nullius* where no property rights existed and was what Pufendorf endorsed. The appropriation from this negative commons was done by consent: “now men left this original negative of things and by a pact established separate dominion over things”⁹⁶; and the negative commons was predestined to give way to consensual private property rights as it would collapse when individuals began to acquire things for themselves. Private property rights acted as a safety valve: “rather it is mine and thine ... that were introduced to avoid wars”.⁹⁷

God left the distribution of resources to the agreement of mankind. The pact was everything:

assuming an original equal faculty of men over things, it is impossible to conceive how the mere corporal act of one person can prejudice the faculty of others, unless their consent is given.⁹⁸

Through the mechanism of consent, Grotius and Pufendorf advocated a new theory to legitimise private property rights, with Pufendorf arguing that first acquisition of goods came out of the negative commons where all things were free from any claim.⁹⁹

The work done by Grotius and Pufendorf in respect of *occupatio* was significant. They had developed a fresh way of looking at property and at the acquisition of property rights. There was some difficulty though in respect of the notion of consent and its application. Many were especially concerned as to how the actual consent of

⁹⁵ Given the size of the original work, I have referred to J Spavan (editor), *Pufendorf's Law of Nature and of Nations as abridged*, Nabu Press, London, 2011.

⁹⁶ Pufendorf, as per the Spavan edition, at 4.4.4.

⁹⁷ Pufendorf, *Op Cit*, at 4.4.7.

⁹⁸ Pufendorf, *Op Cit*, at 4.4.5.

⁹⁹ Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge University Press, 2001), 177-178, 96 and 128.

all peoples might realistically be obtained¹⁰⁰ and many were sceptical about Grotius and Pufendorf's political views, seeing their writings as justification for the colonial expansion of their governments.¹⁰¹ Their approach to acquisition would be turned on its head.

Locke published *Two Treatises of Government*¹⁰² in 1689. It set out a revolutionary theory of how private property rights could be acquired, not through consent but legitimised and justified through labour. Locke had touched upon the issue in several other works. In his major work¹⁰³ Locke argues that the idea of property is a right to anything and that a person owns his own actions.¹⁰⁴ Matters concerning property would also be raised in *The Essay on Liberty of the Press* and *The Essay on Labour*.¹⁰⁵ It was in *Two Treatises*, however, that the main theory of private property was set out. While concerned with property rights, the *Two Treatises* was written to challenge the idea of absolute political sovereignty put forward in *Patriarcha*, where Filmer had advocated a property theory whereby property rights and absolute dominion over all mankind were an original gift from God to Adam and his descendants, who were the Stuart monarchs¹⁰⁶.

Locke set out to write an essay in support of limited constitutional monarchy.¹⁰⁷ It was no doubt an important political and economic work, for example it also perhaps sought to establish legitimacy for the emerging colonialism of England in North America¹⁰⁸, but it is essentially a work of political philosophy.¹⁰⁹ Within the *Two*

¹⁰⁰ Alan Ryan, *On Politics: A History of Political Thought from Herodotus to the Present* (Allen Lane, 2012), 854-857.

¹⁰¹ See Mautner, *Op cit*, at page 487; and also N Miura, *John Locke and the Native Americans: Liberalism and Colonialism*, (Tokyo Ochanomizu Shobo, 2009); and more generally Anthony Kenny, *A New History of Philosophy*, (Oxford University Press, Oxford, 2010), at page 712.

¹⁰² I will refer to the overall two treatises as the '*Two Treatises*' and where necessary make specific reference to the '*First Treatise*' or the '*Second Treatise*' (in the *Two Treatises* most of Locke's writings on property occur in the *Second Treatise*); the publication used as reference is the edition of John Locke, *Two Treatises of Government*, Peter Laslett (editor), *Cambridge History of Political Thought*, Cambridge University Press, Cambridge, 1988.

¹⁰³ John Locke, *An Essay Concerning Human Understanding*, Penguin Classics, London, 2004.

¹⁰⁴ See, *An Essay*, at Book 2.27.17.

¹⁰⁵ See John Locke, *Political Writings*, David Wootton, Penguin, London, 1993 and also John Locke, *Political Essays*, Mark Goldie (editor), *Cambridge Texts in the History of Political Thought*, Cambridge University Press, Cambridge, 2006.

¹⁰⁶ See for example Sarah Hutton, *British Philosophy in the Seventeenth Century* (Oxford University Press, 2017).

¹⁰⁷ Steve Pincus, *1688: The First Modern Revolution* (Yale University Press, 2009), 43.

¹⁰⁸ See for example Duncan Iveson, "*Locke, Liberalism and Empire*", in Peter A Anstey, *The Philosophy of John Locke*, (Routledge, 2003), at pages 86 to 105

Treatises Locke set out his new theory of property rights and the acquisition of private property rights. Locke wished to protect property rights from political interference and to show that private property rights were natural rights held independently of government.¹¹⁰

Most of Locke's argument is set out in the *Second Treatise*. He first elaborates his thoughts on the state of nature, natural law and natural rights and ideas on equality and freedom. He then comments on matters associated with executive power and the right and duty to punish and on war and slavery before turning¹¹¹ to "*Of Property*".

Locke starts by arguing that natural reason and scripture show that man has a right to self-preservation and that the world is a gift from God common-to-all. This identifies the problem of *occupatio* – if the world is a common gift from God, how can one person come to have property in a thing to the exclusion of others? Locke states that the answer is not due to God's exclusive grant to Adam and his successors nor to agreement between humanity. He argues that as an opening premise, every individual has property in their own person and in this way, every person has property in their own labour and the work of their own hands.¹¹²

Locke then identifies ways in which labour may allow for acquisition, such as the gathering of fruit and nuts¹¹³ (we recall the reference to the gathering of acorns in *Millar*), where consent is unnecessary and impracticable:

the taking of this or that part [of the commons], does not depend on the express consent of all of the Commoner¹¹⁴.

¹⁰⁹ See A John Simmons, "John Locke's Two Treatises of Government", in Anstey, *The Oxford Handbook of British Philosophy in the Seventeenth Century*, supra, at page 542 to 562.

¹¹⁰ John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises of Government* (Cambridge University Press, 1969), Part III.

¹¹¹ In Chapter V.

¹¹² The key passage set out in earlier chapters above, is worth noting again:

"Whatsoever then he removes out of the State that Nature hath provided ... he hath mixed his Labour with, and joyned to something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, hath by this labour something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what is once joyned to ..."

Second Treatise, Chapter 5, 27, lines 4 to 11.

¹¹³ Or the cutting of turf or the mining of ore.

The compelling simplicity of Locke's argument is evident:

the labour that was mine, removing them out that common state they were in hath fixed my Property in them.¹¹⁵

Private property rights are acquired not by occupation, appropriation or consent, but by the labour-mixing argument. Locke builds on the labour theory by criticising the consent theory as unworkable – it would be nonsense to seek every single person's consent to each and every act of appropriation. For Locke the labour-mixing theory is found in the law of nature, natural law, where certain moral truths existed outside of the civil world and free from posited laws. They were able to be determined through right reason and God's guidance.¹¹⁶ Private property is a natural right held under natural law.¹¹⁷ Private property rights are pre-political in nature.

Locke identifies two main and one related limitations to this right to private property. The first is that whatever is appropriated from the commons there must be "enough, and as good left in common for others."¹¹⁸ As long as one does not worsen another's position, then no objection can be made to the appropriation. The other limitation is a prohibition on spoilage: taking no much more than is necessary or no more than one's fair share. In taking an amount beyond that which is required leads waste, contrary to what God intended of the Earth's resources: "Nothing was made by God for man to spoil or destroy".¹¹⁹ Waste is a violation of the laws of nature. Locke sees equal rights for all to access the commons but acknowledges that inequality will emerge depending upon how much effort each applies to the mixing of their labour with the resources of the common. He then reflects on the invention of money, which came

¹¹⁴ *Second Treatise*, Chapter 5, 28, lines 20 to 21.

¹¹⁵ *Second Treatise*, Chapter 5, 28, lines 25 to 26.

¹¹⁶ See especially, John Locke, *Essay on the Law of Nature and Associated Writings*, W von Leyden, Oxford University Press, Oxford, 1988, see especially the introduction section.

¹¹⁷ The progress from commons to private property is part of natural law, God did not mean for resources to remain uncultivated. It was incumbent upon man as part of his sustenance and self-preservation that he should take and cultivate from the commons.

¹¹⁸ *Second Treatise*, Chapter 5, 27, line 13.

¹¹⁹ *Second Treatise*, Chapter 5, 31, line 11.

about by tacit agreement.¹²⁰ Money negates the spoilage proviso – instead of hoarding goods, man may sell them and hold on to the coin received – money does not waste.

Related to the main provisos on appropriation (leaving enough for others) and spoilage is the limitation that has been described by commentators such as Shimokawa¹²¹ as the non-injury proviso or prohibition. It has been acknowledged that this proviso is often overlooked or has not been noticed too frequently.¹²² This is a proviso that prohibits any and all appropriators of things from the common stock of resources from injuring others.

Accordingly, we see the three provisos as the sufficiency proviso, the spoilage proviso and the non-injury limitation. We will revisit these three limitations in due course.

Labour is also the justification for a troubling aspect of Locke's theory: by mixing one's labour with a resource taken from the commons, one obtains an exclusive use not only to the product of that labour but to the item removed from the commons.¹²³ Locke believes that is the proper outcome because:

tis Labour then which puts the greatest part of Value upon
Land, without which it would scarcely be worth anything.¹²⁴

For Locke, labour marked the beginning of the right to private property, which, once acquired led to the formation of communities, agreements between people to live in society and for property rights to be encapsulated in posited law. He concludes¹²⁵:

¹²⁰ Possibly a curious view, given Locke's comments on issues of consent within Grotius and Pufendorf's views on *pactum*.

¹²¹ See Kiyoshi Shimokawa, "*The Origin and Development of Property: Conventionalism, Unilateralism, and Colonialism*", in Anstey, *Op cit* at page 572.

¹²² Shimokawa, *Op cit, ibid*.

¹²³ For example: if one takes a portion of undeveloped land and clears and cultivates it, one obtains title not just to the cultivation but also to the whole of the land so taken and improved.

¹²⁴ *Second Treatise*, Chapter 5, 43, lines 7-9.

¹²⁵ Note that the *Two Treatises* were published anonymously and in August 1703 Locke wrote to Richard King wherein he noted that "*and [property] I have no where found more clearly explained than in a book intituled Two Treatise of Government.*" See Mark Goldie (editor), *John Locke: Selected Correspondence*, Oxford University Press, Oxford, 2007, at pages 314 to 315, Letter 3328 in the E S de Beer Clarendon Collection.

And thus, I think, it is very easie to conceive without any difficulty, how Labour could at first begin a title of Property in the common things of Nature.¹²⁶ [sic]

Accordingly, in the context of a political tract Locke has provided a robust theory of how property rights came about¹²⁷ prior to the formation of society.

Locke demolishes Filmer's views.¹²⁸ He does not accept that God gave the Earth solely to Adam and his successors-in-title but to all in common.¹²⁹ He also negates Grotius and Pufendorf. In relation to *occupatio*, it is labour that underpins the legitimacy of private property rights and answers the problem of how common goods may be appropriated by one to the exclusion of all others. Consent plays no role.

What was the impact of Locke's theory on private property rights after the *Two Treatises* was released? The work was widely read.¹³⁰ Locke was well known and relatively popular following his return from exile.¹³¹ As Mossoff notes, the labour theory resonated with the times¹³², the labour themes of making, knowing, being owner of one's own body and of one's own creative works, and the overriding the sense of individualism ran through contemporary thought¹³³.

¹²⁶ *Second Treatise*, Chapter 5, 51, lines 1-2.

¹²⁷ See Richard Ashcraft, *Revolutionary Politics & Locke's Two Treatises of Government*, Princeton University Press, Princeton, 1986.

¹²⁸ Peter A Schouls, *Reasoned Freedom: John Locke and Enlightenment* (Cornell University Press, 1992), 53.

¹²⁹ Such a view on absolute and unrestricted sovereignty meant by implication that the monarch, such as Charles II, could do whatever he so wished without any consent – and Locke appreciated the danger in this in the age of Restoration and like his main supporter, the Earl of Shaftesbury (for whom the work may have been written) was clearly in favour of limited government. Locke also argued with conviction against Filmer's contention that scripture provides support for God's giving of the Earth to Adam to the exclusion of all others.

¹³⁰ Bertrand Russell, *History of Western Philosophy* (Routledge, 1996), 584 and chapter 15: Locke's Influence.

¹³¹ It is important to remember that the work was first issued anonymously. Tim Blanning, *The Pursuit of Glory: the Five Revolutions that Made Modern Europe: 1648 to 1815* (Penguin, 2007), 443-444.

¹³² In his private residence in Stow in the very early 1700s Lord Cobham had installed a Temple of Modern Virtues as part of an overall garden design for his estate. Contained within the Temple of British Worthies was, inter alia, as a tribute to liberty and property rights, a memorial to John Locke. See, Adam Mossoff, 'Saving Locke from Marx: The Labour Theory of Value in Intellectual Property Theory' (2012) 29(2) *Social Philosophy and Policy* 283.

¹³³ James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge University Press, 2006), 112.

There is also no denying the strong undercurrent of then contemporary political issues within the theory. As writers such as Shimokawa and Arneil have noted¹³⁴, Locke's unilateralist theory on property served liberal purposes in England and colonial purposes in America.

The theory also resonated with the emerging economic interest in the labour theory of value, and Locke influenced Smith's later work *The Wealth of Nations*¹³⁵:

The property which every man has in his own labour as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this ... is a ... violation of this most sacred property.¹³⁶

As Damstedt, Drahos and others note, Locke's theory had an immediate intuitive appeal.¹³⁷ Locke's theory was widely accepted¹³⁸ and his major works became well read and widely discussed. *An Essay Concerning Human Understanding* was contained within the Collections of Oxford University from 1703 and became the main work in the ethics and metaphysics curricula in 1744.¹³⁹

Most significant here, Locke's writings on property would also come to have an almost immediate impact upon the law. There is a direct line of influence from Locke to the lawyers involved in the cases¹⁴⁰, culminating in *Millar*. A specific line can also

¹³⁴ See Kiyoshi Shimokawa, "The Origin and Development of Property: Conventionalism, Unilateralism, and Colonialism" in Anstey, *The Oxford Handbook of British Philosophy in the Seventeenth Century*, supra at page 563 to 586 and Barbara Arneil, *John Locke and America: The Defence of English Colonialism*, Clarendon Press, Oxford, 1996.

¹³⁵ Adam Smith, *The Wealth of Nations* (Prometheus Books, 1991), 36 - "labour is the real measure of the exchangeable value of all commodities".

¹³⁶ See the connection made between Locke and Smith in Deirdre Nansen McCloskey, *Bourgeois Equality: How Ideas Not Capital or Institutions Enriched the World* (University of Chicago Press, 2016), 178.

¹³⁷ Benjamin G Damstedt, 'Limiting Locke: A Natural Law Justification for the Fair Use Doctrine' (2003) 112(5) *Yale Law Journal* 1179.

¹³⁸ Peter Drahos, *A Philosophy of Intellectual Property: Applied Legal Philosophy* (Routledge, 2016), 28.

¹³⁹ Edward Geoffrey Watson Bill, *Education at Christ Church, Oxford, 1660 to 1800*, (Oxford University Press, 1988), 299-300.

¹⁴⁰ Especially Blackstone.

be drawn from Locke to Mansfield. Examining these lines of influence is an important task in respect of the matters now under consideration.

Locke's writings on politics had a direct influence on the legal system. Blackstone issued *Commentaries on the Laws of England* in 1765. It became a highly influential work.

In Volume II of *The Commentaries, Of the Rights of Things*¹⁴¹, Blackstone acknowledged that property rights are based on certain limited indicia. Blackstone noted that there are twelve methods by which property can be acquired and he expressly stated that a right of property acquisition:

is supposed by Mr Locke ... to be founded on the personal labour of the occupant¹⁴²

and by footnote Blackstone expressly cites *The Second Treatise* and its Chapter V. Blackstone continues:

the right of occupancy itself is supposed by Mr Locke and many others to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases [and] the identity of a literary composition consists intirely in the sentiment and the language.¹⁴³[sic]

When the footnote on the reference to "and many others" is followed back to the introductory chapter in Volume II, Blackstone notes that in order to insure the

¹⁴¹ Sir William Blackstone, *Commentaries On the Laws of England – A Facsimile of the First Edition of 1765-1769: Volume 2: Of the Rights of Things*, (University of Chicago Press, 1979).

¹⁴² Blackstone, *Op Cit*, at page 405.

¹⁴³ Blackstone. *Op Cit*, at pages 405 to 406.

protection of property rights, “recourse was had to civil society”.¹⁴⁴ Blackstone goes on to acknowledge that the only question remaining is how property came to be originally vested¹⁴⁵. He noted that Grotius and Pufendorf asserted that the right of acquisition was based on tacit agreement but that others, such as Barbeyrac, Titius and Locke, held that there was no such consent. This was written only 77 years after the release of the *Two Treatises*. Locke had clearly influenced Blackstone, counsel in *Millar*. Locke also influenced Mansfield and his fellow judges in that case and, again, the route of influence was directly and explicitly through Blackstone.

The case immediately before *Millar* that dealt with the question of perpetual common law copyright was *Tonson v Collins*. Blackstone appeared as counsel for the plaintiff in that case. The law report to *Tonson*¹⁴⁶ notes that Blackstone submitted in argument that the natural foundations of property were invention and labour and that property may equally be acquired by mental as well as by bodily labour. Blackstone in argument makes specific reference to Chapter V of the *Second Treatise*. *Tonson* was argued before Mansfield. Blackstone again appeared for the plaintiff in *Millar*, where he made submissions on the existence of authors’ rights and of a perpetual right to common law copyright on the express basis of Locke’s writings, in particular, the *Second Treatise*. The case note in respect of *Millar* shows that Blackstone made two main submissions in support of his argument that copyright existed at common law in perpetuity: one based on the general principles of property, the other based on certain moral rights.

The judgments in the case have been reviewed in detail above in the preceding chapter in relation to the critical legal issues at play; the review that follows is now more focused on philosophical and rights issues considered within the judgments.

In his dissenting judgment, Yates noted that Blackstone had submitted in argument that under principles of property law, property rights can arise as much due to mental as to physical labour:

¹⁴⁴ Blackstone, *Op Cit*, at page 8.

¹⁴⁵ The *occupatio* problem.

¹⁴⁶ *Tonson v Collins* (1761) 1 Black W 321; 96 ER 169.

literary compositions being the produce of the author's own labour and abilities, he has a moral and an equitable right to the profits they produce; and is fairly intitled to these profits for ever; and that if others usurp or encroach upon these moral rights, they are evidently guilty of injustice, in pirating the profits of another's labour, and reaping where they have not sown.¹⁴⁷ [sic]

Yates, however, was not swayed by the submission. He accepted that "every man is intitled to the fruits of his own labour"¹⁴⁸ [sic], but was adamant that such entitlements must be subject to the general rights of mankind. Yates could not accept a perpetual right to common law copyright, it was contrary to society's interests; the statute had limited the term of copyright for this very reason.

Willes would not be drawn on Blackstone's submissions:

I have avoided a large field which exercised the ingenuity of the Bar. Metaphysical reasoning is too subtle; and arguments from the supposed modes of acquiring the property of acorns or a vacant piece of ground in an imaginary state of nature, are too remote ... ¹⁴⁹[sic]

This is a clear reference to Locke¹⁵⁰ and thus Locke provides reasons for Blackstone's argument.

Furthermore, despite Willes's protestation on the strength or otherwise of the philosophical justification for appropriation of property rights, Willes accepted that "he who engages in laborious work" has a right to the profits of his work and property in his produce.¹⁵¹

¹⁴⁷ *Millar v Taylor* (1769) 4 Burr 2303; 98 ER 201, 231.

¹⁴⁸ *Millar v Taylor*, *ibid.*

¹⁴⁹ *Millar v Taylor*, at 2334, page 218.

¹⁵⁰ Locke refers to the gathering of acorns in several instances in Chapter 5, at paragraph 28 and 31, and references to vacant land within the commons are innumerable (see paragraphs 26, 27, 30 for example). Therefore it is highly probable that the reference to acorns in the judgment is linked to the reference to the picking of acorns from under the oak that appears in the opening passages of Chapter 5 of the *Second Treatise* and perhaps appeared in Blackstone's arguments.

¹⁵¹ *Millar v Taylor*, at 2335, page 218.

Aston makes express reference to *The Second Treatise* and the key passage in Chapter V.¹⁵² He noted that a man has property in his own body and his labours.¹⁵³ He also touches upon Locke's provisos stating that property when acquired should ensure that:

enough was ... left for others. As much as anyone could use to an advantage ... before it spoiled..¹⁵⁴

Aston dismissed the defendant's arguments that the property under consideration was:

"quite ideal and imaginary; not reducible to the comprehension of man's understanding; not an object of law, nor capable of protection."¹⁵⁵

Aston agreed that the labours of a person are theirs as much as their limbs and faculties and that it is unjust to deprive a man of the fruit of his own cares and sweat. To base property rights on such a concept as incorporeal as literary expression is correct under right reason, which is the great law of nature.¹⁵⁶ Aston (like Locke) acknowledges property rights as being pre-political and as natural law rights:

A man may have Property in his Body, Life, fame, Labours, and the like; and in short, in anything that can be called His: That it is incompatible with the Peace and Happiness of Mankind, to violate or disturb, by Force or Fraud, his possession, Use or Disposal of these Rights; as well as against the Principles of Reason, Justice and Truth.¹⁵⁷

And, of course, Mansfield gave the final judgment. Mansfield agreed with Willes and Aston's judgments that there was a common law right to perpetual copyright, outside of and independent from the term under the statute, stating that it should be taken as if

¹⁵² As per its paragraph 27 as set out above in full.

¹⁵³ Compare the statement in Chapter 5, paragraph 27 at lines 2 to 4.

¹⁵⁴ *Millar v Taylor*, at 2339, page 220.

¹⁵⁵ *Millar v Taylor*, at 2337, page 219.

¹⁵⁶ *Millar v Taylor*, *ibid.*

¹⁵⁷ *Millar v Taylor*, 2338, at page 220.

he had “spoken the substance of them, and fully adopted them.”¹⁵⁸ Mansfield does touch upon Locke. He states when speaking in favour of perpetual copyright that:

the single opinion of such a man as Milton speaking ... upon the very point is stronger than any inferences from gathering acorns and seizing a vacant piece of ground; when the writers, so far from thinking on the very point, speak of an imaginary state of nature before the invention of letters.¹⁵⁹

This is not a rejection of Locke’s writings on rights of acquisition and appropriation. Contemporaneous issues more immediately swayed Mansfield. Most importantly, he did not reject or dispute any of the propositions that form the basis of Locke’s theory of private property and first acquisition. *Millar* established a new legal right of private property over copyright with a term in perpetuity. The decision relied in large part on the theory of property rights set out in the *Second Treatise*. It is notable how apt the theory was to the intellectual property rights inherent in copyright.

Exactly how suitable is Locke’s labour theory in the context of copyright – how much of a ‘fit’ is there, with what problems or limitations? Problems and issues do arise, several of which appear to have not previously been considered. Let us now take each element of Locke’s theory in turn.

Labour is at the heart of the theory and is justified on the basis of mankind’s natural right of self-preservation: by mixing one’s labour with external things owned in common, individuals come to own those things to the exclusion of others. The labour to which Locke refers is physical labour. The creation of a literary work requires, in general, no real physical labour¹⁶⁰ but instead what could be styled intellectual labour. Labour of this type satisfies the requirements of a Lockean theory of property for two reasons.

¹⁵⁸ *Millar v Taylor*, 2396, at page 251.

¹⁵⁹ *Millar v Taylor*, 2399, at page 253. As we have seen above, here again the language of the gathering of acorns is directly from the spirit of Chapter 5 of the *Two Treatises* and in all likelihood was taken from Blackstone’s argument in this regard.

¹⁶⁰ Other than say the application of pen to page.

At the very heart of the labour theory are God as creator and man as maker. This workmanship model, man as an active worker, an improver of the resources provided by God, extends to mental labour – it is part of God’s message to mankind and part of man’s duty to God to labour, and this must include physical and mental labour:

God, when he gave the World in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his Reason commanded him to subdue the earth, i.e. improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour.¹⁶¹

Locke never fully explains the special ‘right-conferring power’ that labour holds, but there is a strong theological tone to the ‘property-bestowing’ power of labour: man’s labour is analogous to God’s creation of the world.¹⁶² Human labour is of value and given significance because it is God-like in its creativity.¹⁶³ The notion that labour can give an entitlement to the product seems fair and reasonable and so it would seem inappropriate to exclude mental labour from the labour ingredient.

This view is also in keeping with what Locke has to say about consciousness in *The Essay* and, in particular, in relation to how ideas come into one’s mind by sensation, by the ideas of perceiving, thinking, reasoning, and reflection, each of which requires a degree of mental exertion.¹⁶⁴ Locke acknowledges that labour requires a degree of action and exertion¹⁶⁵ and involves the “*taking of pains*”.¹⁶⁶ Logically, such action must include mental labour, the taking of an idea and by creative processes and intellectual exertion turning it into the unique expression of the idea.¹⁶⁷ Taken overall,

¹⁶¹ See *The Second Treatise*, Chapter 5, 32, lines 10-15.

¹⁶² Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke’s Political Thought* (Cambridge University Press, 2002), 162-167.

¹⁶³ Waldron, *Op Cit, ibid.*

¹⁶⁴ Edwin McCann, “Locke on Substance” in Lex Newman (ed), *The Cambridge Companion to Locke’s “Essay Concerning Human Understanding”* (Cambridge University Press, 2007), 168; Galen Strawson, *Locke on Personal Identity: Consciousness and Concernment* (Princeton University Press, 2011), Chapter 6: *Consciousness Is Inseparable from Thinking*; Etienne Balibar, *Identity and Difference: John Locke & the Invention of Consciousness* (Verso, 2013), see Chapter 3 *Mind, Consciousness and Identity* and Chapter 4 *The Subject Consciousness: The Self or Responsibility*.

¹⁶⁵ Picking, cutting, mining, cutting, catching, collecting, hunting and so on.

¹⁶⁶ See *The Second Treatise*, Chapter 5, 30, at line 10 to 12.

¹⁶⁷ See, for example, J Hughes, *The Philosophy of Intellectual Property* in 77 *Georgetown Law Journal* 287 (1988), see at page 300 and on.

the labour part of Locke's theory implies a purposive universe: God intends mankind to do something, to improve the undeveloped commons. This teleological reading of the labour requirement can extend to mental labour. Finally, in his essay on labour, Locke does appear to see a distinction between "bodily labour" and "studious" work, but this seems to be for the reason that he is advocating manual labour as a way of keeping in good physical health. He does not seek to exclude mental labour from a definition of labour *per se*.¹⁶⁸

There would seem to be no reason why the references to labour should not encompass intellectual labour, the taking of an idea and, by the creative process and mental exertion, executing that idea into a particular form of expression. In the case of literary property, the property right only protects the author's unique expression - not the idea.¹⁶⁹ Also, there is a degree of equality in this. It is a compelling argument that the 'labour-mixing' requirement encompasses any human action whereby certain objects are altered for the better satisfaction of human needs and wants; labour, both physical and mental, is a natural mode of appropriation¹⁷⁰ and the conferring of property rights is a just reward for the industrious, in whatever way that industry has come about.¹⁷¹ As Mossoff notes, Locke's notion of labour captures the essence of 'production', which has intellectual and physical characteristics.¹⁷² Such production is part of human flourishing, encompassing products of the mind and the hand.

In Locke's theory there is a clear connection between the 'property-giving' power of labour and certain fundamental rights. Labour is justified on the basis of natural law rights of self-preservation and subsistence. How do these rights align with intellectual property and associated ideas? Do ideas need to be developed into expression necessary for the preservation and sustaining of mankind? This is arguably so. Intellectual creativity makes for a richer, more rewarding, existence. Our own creativity parallels God's status as Divine Creator¹⁷³ and the dissemination of ideas allows for an increase and development of man's knowledge of the world, which can

¹⁶⁸ See John Locke, *Political Essays*, Mark Goldie (editor), supra, at pages 326 to 328 for Locke's short essay *On Labour* written in 1693.

¹⁶⁹ See further below on this before the discussion on the application or otherwise of Locke's three provisos to copyright and intellectual property generally.

¹⁷⁰ See J Waldron, *Op Cit*, at page 165.

¹⁷¹ See Drahos, *Op Cit, ibid* and on.

¹⁷² See Mossoff, "Saving Locke From Marx", supra, at page 3.

¹⁷³ Coming back to the workmanship model.

be used for our continuing preservation¹⁷⁴ - and surely literary works can nurture the mind. As Berlin has noted, it was in this period that the view took hold that originality, genius and direct expression in the great literary works, such as the Bible and Shakespeare fashion the colour and shape of our universal view of the world.¹⁷⁵ Recorded knowledge was now no longer mere opinions in endless dispute¹⁷⁶, but recorded empirical facts and intellectual expression.

The issue of the commons will now be considered. The labour-mixing theory applies to those things that mankind takes from the common stock of resources held in a state of nature. When Locke refers to items that make up the commons all are tangible and most references concern cultivation of land. In the context of intellectual property rights¹⁷⁷, can ideas be part of the commons and can ideas be appropriated from the commons? Abstract objects can be part of a commons of intellectual ideas, albeit a commons made up of the discoverable and discernible¹⁷⁸ – some of which are held in a permanent commons and are never permitted to be appropriated.¹⁷⁹

Intellectual items are uniquely different from tangible objects in that they are non-exclusive, an idea can be located in many places at one time and ideas are not consumed by their use. Critically, the use or possession of an individual intellectual item by one person does not preclude others from using it or possessing it as well.¹⁸⁰

In an intangible commons, goods are at once both unlimited and singular. They also differ in characteristics from tangible goods in a way that is directly relevant to Locke's approach to the commons. Locke restricts himself to tangible goods and these have the uniform characteristic of being 'undeveloped'. Goods in the intangible commons are more ideally characterized as 'uncomprehended'.¹⁸¹ It can be difficult to

¹⁷⁴ One thinks of patents and medical discoveries.

¹⁷⁵ Isaiah Berlin, "The History of Ideas: Counter Enlightenment" in Isaiah Berlin, Henry Hardy and Roger Hausheer (eds) *The Proper Study of Mankind* (Pimlico, first published 1997, 2001), 25.

¹⁷⁶ George Makari, *Soul Machine: The Invention of the Modern Mind* (W R Norton & Co, 2015), 48.

¹⁷⁷ Such as copyright and ownership of literary property.

¹⁷⁸ In this regard, both Grotius and Pufendorf agreed that only objects with definite limits could be owned and occupied – in this way one could never own something as boundless as the sea. Locke appears to accept this limitation.

¹⁷⁹ Such as the alphabet (or the scales of music or the periodic table perhaps): see J Hughes, *Op Cit*, at page 298 in relation to the notion of a permanent set of objects in the intellectual property commons.

¹⁸⁰ Edwin C Hettinger, 'Justifying Intellectual Property' (1989) 18 *Philosophy and Public Affairs* 31.

¹⁸¹ Uncomprehended that is until the idea reveals itself in expression. In regard to the characteristics of the tangible and the intangible commons see Damstedt, *Op Cit, ibid*.

determine what items make up a commons of intangible objects. Such a commons could be made up of a perceived universe of facts, perhaps all languages, vocal and grammar, or mankind's cultural heritage, or the set of ideas not yet owned by anyone¹⁸², or all 'probable' ideas.¹⁸³ The last two descriptions appear to be the most fitting paradigms for a commons of intellectual intangible ideas.¹⁸⁴

There seems no reason why the Lockean notion of appropriation from the commons should not apply to the intangible commons. Indeed, the Lockean commons implies an almost inexhaustible supply of resources¹⁸⁵ and a commons of ideas suits such an embarrassment of riches. Ideas 'fit' the notion of what may make up the commons, even a commons of intangible objects.¹⁸⁶

As Bracha notes¹⁸⁷, this consideration of such matters was in keeping with the times. By the 1760s courts and society had formulated the boundaries of what ideas were suitable of 'demarcation' and had an attachment to or gave an entitlement to a universal right in the underlying abstract object. These objects, recognised ultimately in the law as copyright and patent, were objects based on ideas, information, expression and products of the mind. It would seem that a commons of intangible resources is much more suitable to Locke's theory than a commons of tangible resources.

In this way, it is worth acknowledging that later in the *Second Treatise* when dealing with 'paternal power' Locke states:

By Property I must be understood here, as in other places to mean that
Property which Men have in their Persons as well as Goods.¹⁸⁸

¹⁸² Shades of Pufendorf's negative community.

¹⁸³ William Fisher, *Theories of Intellectual Property, in New Essays in the Legal and Political Theory of Property* (2001), Semantic Scholar, Cambridge University Press
<<https://pdfs.semanticscholar.org/173d/8747f2faaa06805dfd64a556fa2d776431f9.pdf>>.

¹⁸⁴ By taking intellectual property rights generally into account and matters of intellectual property law and copyright law.

¹⁸⁵ *Second Treatise*, Chapter 5, and see for example paragraphs 33 and paragraph 36: "since there is Land enough in the World to suffice double the Inhabitants ..."; a distinctly seventeenth century colonial view of the resources of the world.

¹⁸⁶ See Hughes, *Op Cit*, *ibid*.

¹⁸⁷ Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property: 1790 – 1909* (Cambridge University Press, 2016), Introduction.

¹⁸⁸ *Second Treatise*, at Chapter 15, 173, at lines 4 to 6. Again, my emphasis.

This quote lends support to the argument that Locke does not exclude intellectual expressions from his concept of property and that the roles of person and personality are important ingredients in any creative activity.¹⁸⁹ The created work is the product of the creative mind, and idea set in the unique expression set down by the author *qua* author. This is possessive individualism at work; here is Locke in support of notions of individuals having rights both of and in themselves (the self sovereign realm and their creations as extensions of themselves); the author acting on his skills as an extension of himself, applying his own talents to bring about the text which sets out a formulation of a universal idea but in his own unique individual form of expression or sentiment.

Locke was strongly supportive of the notion of self-ownership¹⁹⁰, a thesis which evolved into the modern notion of what Shimokawa and others have described as possessory rights or the subjective rights of individuals, which can be assimilated to the powers and portable possessions of an actor or agent. Here is a strong synthesis of the notions of claim-rights and right bearers contained within the emerging theory of natural rights and the concept of the individual *qua* individual, being by nature free and equal, each having by nature a sovereign realm, and each being able to create obligations, moral bonds by means of willing or creating it.¹⁹¹

These natural rights as vested in the individual, concerning life, liberty, health and limb are followed by goods, acquired through acts of acquisition or by agreement. For Locke, these rights are not optional but are derived from the duties imposed by God. As Condron has identified, absolute is due to omnipotent divinity alone and all rights stem from duties to God¹⁹² but vest in the individual, that is the natural sovereign realm of every individual. Locke reflected the emerging views on natural rights that every individual is sovereign in their own realm.

¹⁸⁹ See especially in this regard the argument set out at Zemer, *Op Cit*, at page 907.

¹⁹⁰ See for example Mautner, *Op cit ibid*, throughout on individualism.

¹⁹¹ See Mautner, *Op cit* at pages 485 to 486.

¹⁹² See C Condren, *George Lawson's Politica and the English Revolution*, (Cambridge University Press, 1989).

Linking back to the *Essay*, writing is a physical manifestation of man's individual self-consciousness; it is an articulation of our own idea of what we are, an issue that LoLordo¹⁹³ recognised is at the heart of *The Essay* and also at the heart of personality, consciousness and our notion of the moral man. The expression of ideas in writing is the personification of ourselves acting as fully-fledged moral agents.

There is a further element of Locke's theory to be considered. It relates to a matter that is often a key criticism of Locke's theory in its general application. One outcome that Locke contends applies to his theory of property rights is that by mixing one's labour with collectively owned objects entitles the 'mixer-labourer' to the whole of the product:

For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to.¹⁹⁴

As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property.¹⁹⁵

Locke's repeated statements on this outcome, that by mixing one's labour with any property that was once part of the common stock of resources secures exclusive ownership not only of the property so produced but also the underlying raw or undeveloped material, indicate that he fully accepted this proposition.¹⁹⁶ It is, however, counter-intuitive that an individual labourer should obtain rights over the whole of the product and not simply to that part of the object that reflects the value that has been added and that one's labour has produced¹⁹⁷. Accepting a commons of intangible ideas¹⁹⁸, it would seem that by executing a unique form of expression of that idea in written form certainly establishes ownership by the author in that expression. However, it is illogical to say that the development of that idea into a

¹⁹³ Antonia LoLordo, *Locke's Moral Man* (Oxford University Press, 2012), Chapter 2 *Personality*.

¹⁹⁴ *Second Treatise*, at Chapter 5, 27, lines 10-12.

¹⁹⁵ *Second Treatise*, at Chapter 5, 32, lines 4-6.

¹⁹⁶ See discussion in Hughes, *Theories of Intellectual Property*, supra, on this at page 26, especially as to term of ownership.

¹⁹⁷ Damstedt, *Op Cit, ibid*; Lior Zemer, 'The Making of a New Copyright Lockean' (2006) 29(3) *Harvard Journal of Law and Public Policy* 891; Robert Nozick, *Anarchy, State, and Utopia* (Blackwell Publishing, 1974), 174-182.

¹⁹⁸ As to which, see above and especially see Fisher, *Theories of Intellectual Property*, supra, at page 25.

form of expression gives the author ownership of that idea to the exclusion of all others. Indeed, this is the case in general in copyright law – there is no ownership in an idea.¹⁹⁹ The idea must be transformed into a unique expression²⁰⁰

So, how suitable is Locke’s theory of property to copyright and literary property? It needs to be acknowledged that there is an issue with an application of Locke’s theory to literary property. The theory is suitable to the issues-at-hand but is not a perfect ‘fit’.

While concerns with Locke’s theory has been identified as a general issue²⁰¹ by Nozick, Rickless, Lowe, Mossoff and others as to how Locke’s theory sits with intellectual property, the point has not been identified or explored as to how it sits with respect to literary property and the development of an idea to a form of literary expression.²⁰² The provisos identified above may be helpful here, with regard to literary property.

¹⁹⁹ Mark J Davison, Ann L Monotti, and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press, 2008), 179.

²⁰⁰ This is the case though the idea might become so associated with the author as to render it possibly barren or fruitless for other authors to seek to put into a form of expression. If, for example, I wrote a novel set in contemporary Australia where the plot concerned an elderly wealthy man who had three daughters and he chose to leave his wealth to only two of those daughters to the detriment of the third and most deserving daughter, and then entered rapidly into depression and ill health and even madness, one would imagine the immediate reviews would refer to *A New King Lear for Modern Times!* Perhaps, but I hope the point while inelegant is understood.

²⁰¹ See above (especially commentary by Nozick on this issue - and Nozick’s famous question “*why doesn’t mixing what I own with what I don’t own away of losing what I own rather than a way of gaining what I don’t*”); Samuel Charles Rickless, *Locke* (Wiley Blackwell, 2014), 182-184; Ernest Jonathan Lowe, *Locke* (Routledge, 2006), 179-181; John Dunn, “The Politics of Locke in England and America”, in John Yolton (ed), *John Locke: Problems and Perspectives* (Cambridge University Press, 1969), 68 and 72; A J Pyle, *Locke* (Polity Press, 2013), 162-172; Edward Feser, *Locke* (Oneworld Press, 2007), 123; Koen Stapelbroek, “Property” in Sami-Juhani Savonius-Wroth, Paul Schuurman and Jonathan Walmsley (eds), *The Bloomsbury Companion to Locke* (Bloomsbury, 2014), 201-203; Timothy Stanton, *The Two Treatises*, in Sami-Juhani Savonius-Wroth, Paul Schuurman and Jonathan Walmsley (eds), *The Bloomsbury Companion to Locke* (Bloomsbury, 2014), 249-256; Paul Kelly, *Locke’s Second Treatise of Government*, supra, *ibid*; Kiyoshi Shimokawa, “Locke’s Concept of Justice”, in Peter R Anstey, *The Philosophy of John Locke: New Perspectives*, (Routledge, 2003), 61-71; Richard Ashcraft, ‘Locke’s Political Philosophy’, in Vere Chappell (ed), *The Cambridge Companion to Locke* (Cambridge University Press, first published 1994, 1999), 226; James Tully, *Rediscovering America: The Two Treatises and Aboriginal Rights*, in Graham Alan John Rogers (ed), *Locke’s Philosophy: Content and Context* (University Press, 1996), 165-196; Eric Mack, *John Locke* (Bloomsbury, 2013), 58-60 and 145-147; James Tully, *A Discourse on Property*, supra, at pages 95 and on – indeed, see whole of Chapter 5 on exclusive rights; Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford University Press, 1995), Chapter 3.

²⁰² The authorities referred to in the footnote appearing immediately above have all been reviewed in this regard.

Locke puts three provisos in place in respect of his unilateral theory of appropriation: one can take from the commons of their own free will but must leave enough and as good for others²⁰³; one must not take so much as beyond what one can use and whatever is taken must not be of such an extent that it will spoil²⁰⁴; and no one who takes from the commons can injure any other person.²⁰⁵

As Damstedt notes²⁰⁶, there is an intuitive appeal in relation to intellectual property and the notion of ideas in respect of the framework established by the three provisos. This intuition would seem to be due to the relative simplicity of the application of each of the provisos to literary property.

Dealing with the sufficiency proviso first.

Damstedt and others have identified the sufficiency proviso as being difficult to apply to goods that are scarce - how does one deal with the allocation of resources that are scarcely distributed throughout the commons.²⁰⁷ The scarcity problem can never be of concern in respect of the appropriation of intangible ideas. The commons of ideas is potentially universal, limited only by notions of accessibility. The Lockean concept of an inexhaustible commons²⁰⁸ may have its best application to a commons of intangibles.

As to sufficiency generally, as Hettinger notes, intellectual ideas by their very nature are non-rivalrous.²⁰⁹ Individuals cannot be excluded from use of ideas and the use by one individual of the idea does not exclude or reduce availability to others. Ideas can be at many places at once and are not consumed by their use or application.²¹⁰

The issue is not so clear-cut with respect to the waste proviso.

²⁰³ 'The sufficiency proviso'.

²⁰⁴ 'The waste proviso'.

²⁰⁵ 'The no injury proviso'.

²⁰⁶ See Damstedt, *Op cit, ibid*.

²⁰⁷ See, for example, Damstedt, *Op Cit, ibid*.

²⁰⁸ As dealt with above.

²⁰⁹ Non-rivalrous, non-exclusive and non-excludable. See, for example, Hettinger, *Justifying Intellectual Property*, supra, at page 34 and on.

²¹⁰ Hettinger, *Op cit, ibid* and also Damstedt as per above. . The possession or use of an intellectual object, such as idea that might found the basis of a literary work, by one person does not preclude others from possessing it or using it as well.

Does the waste proviso have an application to intellectual property and, in particular, literary property?

The issue appears difficult to determine. Can ideas spoil? Commentators²¹¹ are divided on the point. Hughes maintains that ideas do not breach the waste proviso²¹², they are non-perishable; whereas Drahos²¹³ maintains that ideas can at least go stale.²¹⁴ Zemer²¹⁵ states that abstract ideas may not spoil but that the opportunities they confer *might* - they may not be fully realised or acted upon. In relation to literary property, the view of Zemer is preferred but even his position requires further reflection.

Taking all this into account, if one looks closely at the waste proviso, the items with which Locke is concerned about wasting are those that have been developed, those that have had labour mixed with them, *not* the raw undeveloped resource. Locke's attention is upon the product:

But how far has he given it to us? To enjoy. As much as anyone can make use of to any advantage of life before it spoils; so much as he may by his labour fix a Property in.²¹⁶

So Locke is not referring to the hoarding or spoilage of ideas but to the hoarding of the product subsequently obtained when one mixes one's labour with that resource. In the commentaries on the application of Locke's theory to intellectual property rights and, more specifically, literary property rights, all commentators²¹⁷ restrict their

²¹¹ as identified immediately below.

²¹² See Hughes, *Op Cit, ibid* and at 329.

²¹³ See Drahos, *Op cit, ibid*; Adam D Moore, 'Intangible Property: Privacy, Power, and Information Control' (1998) 35(4) *American Philosophical Quarterly* 365.

²¹⁴ By 'stale' it is assumed that what Drahos means (and what his commentary implies) is that failure to act on an idea in a particular period or by a particular time might mean that the opportunities or benefits afforded by an appropriation of the idea might be lost due to either advances in, say technology, or that another has seized on the idea and the expression to the detriment of the earlier though unpublished producer.

²¹⁵ See Lior Zemer, "*The Making of a New Copyright Lockean*", *supra, ibid*.

²¹⁶ *Second Treatise*, at Chapter 5, 31, lines 7-9.

²¹⁷ See in this regard, Zemer, *Op cit*; Hughes, *Op cit*; Moore, *Op cit*; Hettinger, *Op cit*; Fisher, *Op cit*; Nozick, *Op cit*; Damstedt, *Op cit*, see especially at 1181; Harry Ransom, *The First Copyright Statute*, *supra*; Drahos, *Op cit*; L Ray Patterson, "*Copyright and the Exclusive Right of Authors*", *supra*; Lewis

consideration of the waste proviso to the undeveloped idea. It is the notion of an idea that is considered in relation to waste: “*can ideas spoil?*” is the question posed. This is an incorrect reading of Locke. Zemer, therefore, is preferred but not on the basis that the opportunities that ideas provide can go ‘stale’ but that the opportunities that the literary work provide can, in an analogous way, go unrealised, or perhaps more accurately, are lost or superseded.²¹⁸

And, finally, the non-injury proviso. How does this seldom-considered proviso sit with literary property?

This third proviso has been described by Shimokawa²¹⁹ as the clause that prohibits any appropriator from injuring others. For Locke, the primary function of natural law is to prohibit injury to any other:

Hyde, *Frames from the Framers, How America’s Revolutionaries Imagined Intellectual Property* (Berkman Centre, 2005); Fisher, *Theories of Intellectual Property*, *supra*; Tom G Palmer, ‘Are Patents and Copyright Morally Justified? The Philosophy of Property Rights and Ideal Objects’ (1990) 13(3) *Harvard Journal of Law and Public Policy* 817; Adam Mossoff, ‘Rethinking the Development of Patents: An Intellectual History, 1550-1800’ (2001) 52 *Hastings Law Journal* 1255; Sivaramjani Thambisetty, “*The Evolution of Sufficiency in Common Law*”, LSW Working papers, 6/2013 <www.lse.ac.uk/collections/law/wps>; Matt Flannagan and Madeline Flannagan, *Property Rights: Blackstone, Locke and the Legislative Scheme* (2010) Mandm.org.nz <<http://www.mandm.org.nz/2010/02/property-rights-blackstone-locke-and-the-legislative-scheme-part-i.html>>; Horacio M Spector, ‘An Outline of a Theory Justifying Intellectual and Industrial Property Rights’ (1989) 11(8) *European Intellectual Property Review* 270; Adam D Moore, ‘A Lockean Theory of Intellectual Property’ (1997) 21 *Hamline Law Review* 65; Lawrence C Becker, ‘Deserving to Own Intellectual Property Rights’ (1993) 68(2) *Chicago-Kent Law Review* 609; Joan E Schaffner, ‘Patent Preemption Unlocked’ (1995) *Wisconsin Law Review* 1081; E Wyndham Hulme, ‘On the History of Patent Law in the Seventeenth and Eighteenth Centuries’ (1902) 18 *Law Quarterly Review* 280; Benjamin G Paster, ‘Trademarks – Their Early History’ (1969) 59 *Trademark Reporter* 551; L Ray Patterson, ‘Free Speech, Copyright, and Fair Use’ (1987) 40(1) *Vanderbilt Law Review* 1; Howard B Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright* (1983) 29(3) *Wayne Law Review* 1119, 1120; Mark Rose, ‘The Author as Proprietor’ (1988) 23 *University of California Press: Representations* 51; Wendy J Gordon, ‘A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property’ (1993) 102(7) *Yale Law Journal* 1533; James Tully, “The Framework of Natural Rights in Locke’s Analysis of Property: A Contextual Reconstruction” in Anthony Parel, and Thomas Flanagan (eds), *Theories of Property: Aristotle to the Present* (Wilfrid Laurier University Press, 1979), 115-140; Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: the British Experience 1760 to 1911*, Cambridge University press, Cambridge, 1999, see especially at pages 9 to 76; Richard J Arneson, ‘The Shape of Lockean Rights: Fairness, Pareto, Moderation and Consent’ (2005) 22(1) *Social Philosophy and Policy* 255; Leif Wenar, ‘Original Acquisition of Private Property’ (1998) 107(428) *Oxford University Press: Mind* 799; Jeremy Waldron, ‘Nozick and Locke: Filling the Space of Rights’ (2005) 22(1) *Social Philosophy and Policy* 81; Jeremy Waldron, *The Right to Private property*, *supra* at pages 137 to 252.

²¹⁸ If for example, the author chooses not to publish, print or circulate the written work, which is the written expression of that idea.

²¹⁹ Shimokawa, *Op cit, ibid.*

No one ought to harm another in his Life, Health, Liberty, or Possessions.²²⁰

Injury therefore involves a transgression of another's right – his life, his health, ultimately his possessions or goods and so on. In relation to literary property, two issues support the notion that in this realm the non-injury proviso is not transgressed.

First, in relation to the creation of literary property it is clear that there is no infringement of any other individual's existing rights. The creation of literary works does not transgress or violate any of the existing property that others might have in any external goods or possessions. Literary creations are based on ideas and expressions. Acts which may so transgress other's property rights, such as plagiarism and misattribution, are readily apparent but of course are not in themselves an act of literary creation. They are manifestly a transgression of literary property rights.

Secondly, and critically, the non-injury proviso is not breached in relation to the creation of literary property because as we have seen above, this type of property is based upon the taking of ideas from the universal commons of intangible ideas and that tis commons is effectively infinite. Therefore, being a resource that is almost incapable of depletion or diminution, the act of taking cannot injure any other person. There is no act of taking which significantly diminishes another's right to the commons of ideas. Ideas are analogous perhaps to water as a resource in abundance and without possible diminution:

No Body could think himself injured by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left him to quench his thirst.²²¹

In short, the non-injury proviso is not breached because there is no harm caused by the taker to any other, due in large part to the universal commons of ideas and the fact that any taking of an idea does not result in a diminution of that stock of common

²²⁰ See *The Second Treatise*, at II, 6, Laslett edition at page 271.

²²¹ *The Second Treatise*, at II and see 33 and 36, see at Laslett, *Op cit*, at page 291 and 292.

resources. No other person's rights in this regard are transgressed or violated, no other is harmed in their person or their goods.

Having undertaken this review of Locke's theory generally, it is of utility to the matters under consideration to overlay the theory across the judgments in *Millar* to consider if the judgment was 'Locke' or 'Lockean'.

Locke's theory is a suitable 'fit' for the matters under consideration, but not completely. Some adaption of Locke's theory is required. Literary property does satisfy several key aspects with some fine-tuning.

The essence of Locke's theory was labour. It is uncontroversial that there is no reason why mental labour should not fall under the rubric of labour. Locke's ultimate focus is upon labour as a means to production, for him, cultivation. There seems no reason why this should not be extended to intellectual labour. Locke's theory also dealt with the appropriation of resources out of a universal commons, with tangible items take from a worldly set of resources. Literary works relate to the expression of undeveloped ideas. Can the commons be made up of ideas? It would seem that there is no reason why not. Indeed, intangible items are more suited to the notion of the universal commons of inexhaustible resources.

On the basis of the review undertaken above, it is more appropriate to say that the theory of the way in which legal property rights in respect of literary property arises, at least under the law as captured within *Millar*, is more correctly styled as "Lockean" in nature rather than unadulterated "Locke"²²² – an important philosophical distinction and a categorization of literary works which appears not to have been previously fully identified.

Commentators, such as Deazley, Loewenstein and Rose²²³, have been content to note the direct influence of Locke's theory upon the acknowledgement of literary property

²²² See, for example, and for a philosophical discussion of the distinction between Locke and Lockean property rights, Gopal Sreenivasan, *The Limits of Lockean Property Rights*, supra, at throughout the work.

²²³ Deazley, *On the Origin of the Right to Copy*, supra, Loewenstein, *The Author's Due*, supra, and Rose, *Authors and Owners*, supra.

by the Court, but there appears to have been no direct analysis to see how the theory may fit with the property rights under consideration.²²⁴

What shines through the judgments in *Millar* is how ‘modern’ and timeless Locke’s writing on property rights were, entirely apposite for the times.²²⁵ Not only was it a theory of modernity but it was also a transitional theory. Locke’s relatively simple theory of property rights allowed for a fundamental development in property law. It was a development that depended not upon pre-existing legal case law but drew instead for its legitimacy in large part upon Locke’s theory. Locke was a modern philosopher. His theory on the appropriation of private property still resonates²²⁶. It is striking how appropriate the theory was to intellectual property rights, which were only really starting to be developed.

By contrast, it is difficult to see how the consent theories of Grotius and Pufendorf could apply in such a situation. As Buckle, Garnsey, and Waldron note²²⁷, there is the sheer impracticality of obtaining all persons direct consent and in any regard, by seeking another’s consent as to the formulation of an idea into an expression, one reveals or gives away that expression by the process of consent: the person to the bargain would wish to know to what it was they were being asked to consent.

Locke’s theory also suited the growing commercialization, as trade, colonial and mercantile²²⁸ activity increased exponentially. *Millar* and its application of Locke’s theory allowed not only for an evolution in the notion of what objects could be recognized as property, it also saw an evolution in what was meant by ‘ownership’. Earlier notions of *dominium* had been limited to matters of ‘claim’, ‘dispose’, ‘exchange’, ‘inherit’ and ‘use’.²²⁹ With the legal rights under review in *Millar*, the Court added ‘exploitation’ to this list.

²²⁴ Private literary property rights.

²²⁵ See especially Mautner, *Op cit, Ibid*

²²⁶ Lee Ward, *John Locke and Modern Life* (Cambridge University Press, 2010), 93.

²²⁷ See Buckle, *Natural Law and the Theory of Property*, supra, Garnsey, *Thinking About Property*, supra, and Waldron, *The Right to Private Property*, supra.

²²⁸ Kieron O’Hara, *The Enlightenment* (Oneworld, 2010), 78-82.

²²⁹ See, for example, Garnsey, *Op cit*, at pages 177 to 180.

The scope of objects to be included under the rubric of ownership now also broadened. The case clearly saw an acknowledgement of ownership over both corporeal and incorporeal objects. This right of ‘exploitation’ also shows how the theory as it was applied in *Millar* was more Lockean in nature than an application of Locke’s ‘pure’ theory.

One of the main criticisms of the judgment was that it established or more correctly continued the monopoly rights over literary works in perpetuity.²³⁰ Locke’s view on monopoly rights can be identified through an examination of some of his writings. In *On the Liberty of the Press*²³¹, written expressly in respect of the Licensing Act, Locke is vehemently against monopoly rights over published works.²³² The notion of a perpetual right to copyright²³³ sat uneasily with Locke.

There is one further point to consider in relation to the recognition of literary property and copyright as a new legal property right. *Millar* not only recognised literary property as a legal right, it also had a direct bearing on the notion of the author. The decision gave full dignity and recognition to the role of the author within the literary creative process. The right that was recognised in the judgment in respect of the author *qua* author was a right that was lodged in a human subject, no longer derived or located from position or status held within society.²³⁴ It was by its very nature aligned with or reflective of material subjective rights, rights secured in the individual due to their ability to think, reason, and create.²³⁵ *Millar* gave centrality to these material subjective rights recognising the self-sovereignty that existed in each and every person.

Having considered private property as a legal right, it is appropriate to consider private property as a specific moral right within the family of natural rights, rights which were then only really starting to be considered and on which Locke had had a

²³⁰ See, for example the appendix in William Coke’s commentary, *supra*.

²³¹ See Locke, *Political Essays*, *supra*, Cambridge University Press edition, at pages 329 to 339.

²³² It is interesting that within this essay, while touching upon author’s rights, Locke chose not to discuss the nature of the property in issue and the concept of literary property.

²³³ Either under statute or, presumably, under common law – Locke commented on the former, never on the latter.

²³⁴ See in this regard, and discussing rights of this nature in Garnsey, *Op cit*, at Chapter 7, page 177 and on.

²³⁵ Garnsey, *op cit, ibid*.

large influence; of how the judgments *Millar* dealt with this issue, and the influence that Locke specifically had in this specific regard, something that has never been fully appreciated by commentators.²³⁶ It is then of benefit to review what commentaries have said in this regard.

‘Moral rights’²³⁷ can be seen as certain natural rights that authors have to be acknowledged as the creator of the work, for that work to be treated with respect, and for authors to be given control over their works. They are rights which cannot be assigned and exist beyond posited law. They are a type of natural right, being human rights as defined within a moral theory of natural law, and were only starting to be acknowledged as according a sense of power and liberty to an individual.

Such rights were at this time beginning to be recognised as based on a claim relationship between persons articulated from the standpoint of that relationship’s beneficiary. Inherent within this paradigm is an acknowledgment of the wrong in the abuse or slighting of one person by another, in failure of one person to accept the dignity of the other.²³⁸ *Millar* marks an important step in the evolution of natural rights theory, which should be acknowledged.

Turning now to a consideration of how the issue of authors’ moral rights in respect of literary property were considered in *Millar*.

Yates, in the minority, was of the view that a literary work was no longer private property after publication; at that time the work became common to all. He did not accept that an author had a claim to a perpetual copyright that can be based on general principles of property. He found no such principles in relation to ideas. Yates accorded literary property no moral right. His judgment, however, is of significant importance; it highlights an issue that appears to have never been appreciated.

²³⁶ In relation to the acknowledgment of private property as a moral right within the context of literary works and a right which vests in the author.

²³⁷ In the context of literary property and copyright.

²³⁸ See, especially, John Finnis, *Natural Law & Natural Rights*, supra; John Finnis, “Natural Rights”, in Ted Honderich (ed), *The Oxford Companion to Philosophy* (Oxford University Press, 2005), 643; Jonathan Wolff, *An Introduction to Political Philosophy* (Oxford University Press, 1996, 2006), Chapters 4 and 5.

Yates's judgment is important²³⁹ because a close analysis of it reveals the argument put forward by Blackstone in acting as the barrister for the London booksellers. Blackstone's arguments are the key to unlocking and thereafter understanding the moral rights issue at play in *Millar*.

In his judgment, Yates makes specific reference to the submissions that Blackstone makes to the Court, noting that there are two main arguments: Blackstone makes his first submission concerning private property as a legal right. This has previously been acknowledged. Yates also notes, however, that Blackstone made a submission on a further ground: that copyright existed "as a moral and equitable right".²⁴⁰ Yates stated that counsel put forward detailed arguments to support this second submission.

Accordingly, through the prism of Yates's judgment, we are able to discern the two arguments upon which the Court made its determination, the first submission on private property as a legal right has long been acknowledged; the second submission, on private property as a moral right within a family of natural rights appears not to have been previously appreciated.

In Yates's decision concerning this second submission, he indicates that Blackstone submitted that it was '*just*' that authors are entitled to the financial benefits they obtain from their mental labour, there is a moral and equitable right to profit, and in Blackstone's view:

if others usurp or encroach upon these moral rights, they are evidently guilty of an injustice, in pirating the profits of another's labour.²⁴¹

Yates noted that this argument had a captivating sound but was to his mind fallacious. He found no such injustice, on the grounds that no property right was being infringed.

²³⁹ Each of the judgements is, of course, important in that they set out what the judges determined in relation to the matter, but that determination was directly related to the arguments that had been put before the judges by the lawyers acting for the two respective parties. As is the way in all legal cases, the judges were restricted in making a ruling solely based on the arguments put before them. One of the problems that we have in understanding what was at the heart of *Millar v Taylor* is that we know what the judgements say but we have no direct record or transcript of the arguments the lawyers themselves made in support of their respective cases.

²⁴⁰ *Millar v Taylor* at 2359, page 231.

²⁴¹ *Millar v Taylor*, *ibid.* My emphasis.

He dismissed this submission that the author had any form of moral right in the literary work.

What is important about Yates's judgment is what it evidences about the argument made by Blackstone in relation to authors' 'moral rights'. Blackstone²⁴² in making his submission on moral rights directly linked these rights to the Lockean notion of the acquisition of property rights:

For this purpose, Blackstone observed that the labours of the mind and the productions of the brain are as justly intitled to the benefit and emoluments that may arise from them, as the labours of the body are.
²⁴³[sic]

As will be considered below, Mansfield had the most to say in this regard in the majority judgments but Willes and Aston also touched upon the matter.

Willes's judgment does not explicitly deal with Blackstone's two general submissions, legal rights and then moral rights. His judgment is confined to the issue of common law property rights as a legal construct. In relation to moral rights or equitable issues, Willes simply notes:

It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man's work.²⁴⁴

Aston's judgment commences with what he himself styles an outline of a great theory of property, and then proceeds to review the history of property rights, noting that categories of property have evolved over time:

Since those ... times ... the objects of property have been enlarged, by discovery, invention and arts ... the rules attending property must

²⁴² as was the case in his arguments in respect of his other submission which was purely based in property as a legal right.

²⁴³ *Millar v Taylor*, *ibid.*

²⁴⁴ *Millar v Taylor*, at 2334 – 2335, page 218.

keep pace with its increase and improvement, and must be adapted to every case.²⁴⁵

He sees no reason why property and property rights should now not be extended to literary works:

for I confess, I do not know nor can I comprehend any property more emphatically a man's own, nay, more in capable of being mistaken, than his literary work.²⁴⁶

Furthermore, Aston did not accept that these rights were relinquished or given away at the time of publication or disturbed by the introduction of the statute. Finally, Aston concludes his judgment with language that echoes Blackstone's second submission on moral rights and equity:

Upon the whole, I conclude that upon every principle of reason, natural justice, morality and common law, upon the evidence of the long received opinion of this property ...; upon the clear sense of the Legislature; and of the opinion of the greatest lawyers of their time ...; the right of an author to the copy of his works appears to be well founded, and that the plaintiff therefore is ... intitled to his judgment. And I hope the learned and industrious will be permitted from henceforth not only to reap the fame, but the profits of their ingenious labours, without interruption; to the honour and advantage of themselves and their families.²⁴⁷ [sic]

The language is revealing. Aston speaks of '*reason*', '*natural justice*' and '*morality*'. It is these notions, strongly Lockean in flavour²⁴⁸, that ground the right to private property over the literary work. Otherwise, Aston restricts his judgment to Blackstone's first submission.²⁴⁹

²⁴⁵ *Millar v Taylor*, at 2339, at page 221.

²⁴⁶ *Millar v Taylor*, at 2345, page 224.

²⁴⁷ *Millar v Taylor*, at 2355, at pages 228 to 229.

²⁴⁸ See for example Mautner, *Op cit, ibid*, throughout.

²⁴⁹ That is, restricted to a consideration of the general legal principles of legal property rights.

It is time to turn to Mansfield, who acknowledges that he has read the judgments of Willes and Aston, agreeing with them such that it:

might be understood as if he had spoken the substance of them, and fully adopted them.²⁵⁰

Mansfield then briefly considers the issue of ‘property’ but does not engage with Blackstone’s first submission - that copyright exists under the general principles of property as a legal right.

This must be because he believed that this issue had been sufficiently dealt with by Willes and Aston.

Mansfield does fully engage with Blackstone’s second submission, that the common law recognises an author’s ownership to a perpetual right of copyright based on a moral right to such ownership. This appears to have not been acknowledged by commentators. In fact, Mansfield chose to consider this specific point due to the fact that Willes and Aston were silent on the matter. He appreciated what Blackstone was doing, and gave a judgment which, when coupled with the judgments of Willes and Aston, covered the whole of the two arguments put forward by Blackstone.

In his judgment, Mansfield does find a common law right to copyright and states that the source of this right is based on moral issues, the key passage being:

From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication?

From this argument – because it is just, that an author should reap the pecuniary profits from his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose

²⁵⁰ *Millar v Taylor*, at 2396, at page 251.

care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.

I allow them sufficient to shew it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy before publication.

But the same reasons hold, after the author has published...

... it is agreeable to natural principles, moral justice and fitness, to all [the author] the copy, after publication, as well as before.²⁵¹ [sic]

Mansfield concludes that the statute did not take away any of these rights –that perpetual copyright exists in common law, separate and distinct from the legislation.

Mansfield, therefore, finds not only a legal right to copyright and literary property but also a moral right to literary property, with a validation secured through Locke's theory of property acquisition. As he states, *inter alia*, above:

because it is just, that an author should reap the pecuniary profits from his own ingenuity and labour.²⁵²

This is an acknowledgement of literary property as both a legal right and a moral right, within the family of natural rights, based on principles enunciated some 70 to 80 years previously by Locke.

Locke had made an original and significant contribution to the moral and natural rights debate in a number of his key works, especially the *Second Treatise*, the *Essay* the *Essays on the Law of Nature*, and *A Letter Concerning Toleration*.

This work by Locke on natural rights theory had emerged out of his writings on natural law, where he believed that the law of nature was God's law for all mankind,

²⁵¹ *Millar v Taylor*, at 2398, at page 252.

²⁵² *Millar v Taylor*, *Ibid*.

being a law for beings with reason and free will²⁵³. As stated, for example, in *A Letter Concerning Toleration*:

Natural law is the decree of the divine will discernible by the light of nature and indicating what is and is not in conformity with rational nature.²⁵⁴

This is a right that God had over mankind and an obligation that mankind had to follow and obey the will of God. The laws were universal and external to each person. They concerned each person's own relationship with God. It was a covenant between God and each individual.

As to the content of natural law, it imposed four main duties²⁵⁵ on mankind: the duty to preserve oneself; to preserve others; to not take the life of another; and a duty not to interfere with others in their liberty, health, limbs or goods.

These duties correspond with rights held by others and in these we see the emergence of certain rights specific to and within the individual, regardless of God's will and becoming based on one individual's relationship not with God but with another individual. This, as we have seen, is particularly so in relation to rights in respect of possessions and goods. Accordingly, we see emerging from notions of natural law issues of natural rights, particularly in the *Second Treatise*, and matters of what rights and obligations hold between individuals in certain contexts – one thinks of the three provisos considered above in regards to property rights.

Importantly, certain of these natural rights, as Simmons has acknowledged²⁵⁶ contain a moral element or moral power directly impacting upon not our relationship with God but with our relationship with each other, individual to individual.

In relation to moral rights or powers, this relates to the individual's right to take property to the exclusion of all others and therefore alter the other's own moral

²⁵³ See A John Simmons, *The Lockean Theory of Rights*, (Princeton University Press, 1992) at page 16.

²⁵⁴ *The Letter Concerning Toleration*, at 111.

²⁵⁵ See, for example, within *The Second Treatise*.

²⁵⁶ See Simmons, *Op cit* at page 72.

situation. In this way, through an exercise of moral power – such as creative writing and the creation of literary works, the author has a right to bring action and even punish those who trespass or violate these rights. Through the author’s creativity he has made the very thing his own, to the exclusion of all others and to their particular moral situation.

Such a moral power and a moral right can be categorised²⁵⁷ as a non-consensual special right, exclusive and original to the rights holder over certain specific property. This certainly applies to authors’ rights over literary works – as Pope clearly saw.

These rights are not based on promises or consent but do derive from certain relationships: in our case the author to his audience, the reading public. Locke was critical in the emergence of this theory of certain natural rights out of natural law matters. It is a world in which God’s will is now for mankind and less over mankind. Be that as it may, it still has a strong moral content.

It is also a world in which all individuals are seen as equals and so moral relations hold directly between individuals and between mankind and God. Mansfield seems to be intuitively aware of the application of natural rights issues to literary property.

Indeed, this acknowledgment by Mansfield of literary property as not only a legal right but also as a moral right grounded in Locke’s property theory appears to not have previously appreciated. Early biographies of Mansfield discuss *Millar*, but no mention is made of either Blackstone’s two submissions, one based on property principles the other based on moral rights, nor of Mansfield’s significant finding.²⁵⁸

Recent works by Oldham and Poser, as identified below, also do not consider the issue.

Oldham has conducted a detailed review of Mansfield’s judgments and does provide a commentary on Mansfield’s recognition of an author’s moral rights within

²⁵⁷ See, for example, Simmons, *Op cit*, at page 87.

²⁵⁸ John Holliday, *The Life of Lord Mansfield* (General Books, reprinted 2011); Edmund Heward, *Lord Mansfield: A Biography of William Murray* (Barry Rose, 1978).

*Millar*²⁵⁹ but he does not see the connection with Locke. There is no mention of the matter at all in Adam's review of intellectual property cases dealt with by Mansfield²⁶⁰ as a judge. Poser gives a detailed review of *Millar*²⁶¹. He suggests that Mansfield acknowledged the existence of an author's moral right to literary property but does not identify any connection with the acquisition of this right through the portal of Locke's philosophy.

This is at odds with Poser's review of other decisions of Mansfield in the sphere of intellectual property, where Poser identifies the influence of Locke in relation to natural rights and matters to do with patents – but he identifies no direct connection only a possible influence on Mansfield by Locke generally.²⁶² It would seem that no investigation of Mansfield has identified this connection between Mansfield's findings on moral rights with the property theory of Locke.

What of works that have focused on the emergence of author's rights in England over the relevant period? Dealing now with those texts that have reviewed the decision of *Millar* in the context of the emergence of literary property.

The key texts all deal in depth with the decision.²⁶³ Several identify the influence of Locke upon Aston and Willes. None of the works, however, deal in any detail with the judgment of Mansfield and none explore the influence of Locke upon Mansfield in relation to the recognition of literary property as a moral right vesting in the author.

²⁵⁹ James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century – Volume 1*, (University of North Carolina Press, 1992), 723-728; James Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina Press, 2004), 190-197.

²⁶⁰ See John Adams, 'Intellectual Property Cases in Lord Mansfield's Court Notebooks', (1987) 8(1) *Journal of Legal History* 18.

²⁶¹ Norman S Poser, *Lord Mansfield: Justice in the Age of Reason* (McGill-Queen's University Press, 2013), 322-327.

²⁶² Poser, *Op cit*, at page 330.

²⁶³ As per earlier chapters, but especially Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement in Copyright Law in Eighteenth Century Britain: 1695 to 1775* (Hart Publishing, 2004), 169-190; Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright*, Chicago University Press, Chicago, see at pages 243 to 245, Mark Rose, *Authors and Owners*, Harvard University Press, Cambridge, 1993, at pages 78 to 83; Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press, 2014), 35, 63-67 and 85-91; John Feather, *A History of British Publishing* (Routledge, 2006), 66-69; Marjorie Plant, *The English Book-trade: An Economic History of the Making and Sale of Books* (George Allen & Unwin, 1974), 119-120; James Raven, *The Business of Books: Booksellers and the English Book-trade* (Yale University Press, 2007), 158-160; Mark Rose, "Copyright, Authors and Censorship" and Wilfrid Prest, "Law Books", both in Michael Suarez and Michael Turner (eds), *The Cambridge History of the Book in Britain, Vol V: 1695 to 1830* (Cambridge University Press, 2009), 118-131 and 791-806.

What, then, of works that have focused on Locke and on the philosophy of copyright and intellectual property?

Drahos reviews *Millar* in depth, as well as the Lockean theory of property.²⁶⁴ He sees a clear link between Locke and the judgments of Yates, Willes and Aston, ~~but~~ his comments are limited to property as a legal right and not as a moral right – he does not deal in any regard with Mansfield’s comments on ‘fitness’ and ‘justice’ as a justification for literary property as a moral right. Sherman and Bently review *Millar*²⁶⁵ and recognise the influence of Locke but there is only a limited identification and acknowledgment of moral rights in the judgment as a whole and no reference to or connection is made with Locke in this regard.

Merges acknowledges the importance of Locke’s property theory as a source of justification for intellectual property rights, but he does not even consider *Millar*, and deals with copyright in a limited way. He does not discuss copyright as a moral right separate from its position as a legal right.²⁶⁶ Patterson reviews *Millar* in detail.²⁶⁷ He recognises that Mansfield does acknowledge the existence of moral rights over a work as held by the author, but he sees no connection with Locke. Similar reviews²⁶⁸ of the

²⁶⁴ Peter Drahos, *A Philosophy of Intellectual Property: Applied Legal Philosophy* (Routledge, 2016), 22-29.

²⁶⁵ See B Sherman and L Bently, *The Making of Modern Intellectual property law: The British Experience*, Cambridge University Press, Cambridge, 1999, at pages 13 to 14 and pages 19 to 39.

²⁶⁶ Robert P Merges, *Justifying Intellectual Property* (Harvard University Press, 2011), 31-67.

²⁶⁷ L H Patterson, “*Free Speech, Copyright, and Fair Use*”, see supra, and at 28 and on.

²⁶⁸ See especially Justin Hughes, “*The Philosophy of Intellectual Property*”, in *The Georgetown Law Journal*, Vol 77, 287, at pages 296 to 314, Howard B Abrams, “*The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*” (1983) 29(3) *Wayne Law Review* 1119, 1152; Tom G Palmer, ‘Are Patents and Copyright Morally Justified? The Philosophy of Property Rights and Ideal Objects’ (1990) 13(3) *Harvard Journal of Law and Public Policy* 817; Lior Zemer, “*The Making of a New Copyright Lockean*”, in *Harvard Journal of Law and Public Policy*, Vol 29, No 3, at pages 891 to 947; Horacio M Spector, ‘An Outline of a Theory Justifying Intellectual and Industrial Property Rights’ (1989) 11(8) *European Intellectual Property Review* 270; Adam D Moore, ‘A Lockean Theory of Intellectual Property’ (1997) 21 *Hamline Law Review* 65; Lawrence C Becker, ‘Deserving to Own Intellectual Property Rights’ (1993) 68(2) *Chicago-Kent Law Review* 609; Edwin C Hettinger, ‘Justifying Intellectual Property’ (1989) 18 *Philosophy and Public Affairs* 31; Adam D Moore, ‘Intangible Property: Privacy, Power, and Information Control’ (1998) 35(4) *American Philosophical Quarterly* 365; David C Snyder, ‘Locke on Natural Law and Property Rights’, (1986) 16(4) *Canadian Journal of Philosophy* 723; Edward J Damich, ‘The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors’ (1988) 23(1) *University of Georgia Law Review* 1; Harold Demsetz, ‘Toward a Theory of Property Rights’ (1967) 57(2) *American Economic Review* 347; Frank H Easterbrook, ‘Intellectual Property is Still Property’ (1990) 13(1) *Harvard Journal of Law & Public Policy* 108; David Friedman, ‘A Positive Account of Property Rights’ (1994) 11(2) *Social Philosophy and Policy* 1; George Gale, ‘John Locke and Territoriality: An Unnoticed Aspect of the Second Treatise’ (1973) 1(4) *Political Theory* 472; William M Landes & Richard A Posner, ‘An Economic Analysis of Copyright Law’, (1989) 18(2) *The Journal of Legal Studies* 325.

philosophy behind intellectual property acknowledge the use of Locke's theory as a justification of intellectual property rights, especially in respect of copyright, but none identify the connection between Locke and the position taken by Mansfield in respect of moral rights.

It is, however, important to place things in context. There is little doubt that the majority of judges did establish as a matter of law a legal right to property over a literary work, and the existence of a commercial right to exploit that work through copyright: a right independent of statute. It was, however, still a right that was borne out of the legal system. However, Mansfield's judgment also gave rise to a moral or natural right to copyright and literary property. Mansfield's views in this regard were a small part of the emergence and elevation of property rights to the status of natural or moral rights that were occurring over the period under consideration, in the late seventeenth to eighteenth centuries.²⁶⁹

When we talk about human rights – or moral rights, as distinct from legal rights, we are today talking about those basic entitlements that each individual has by virtue of their status as a human being, as distinct from legal rights of individuals which fall due to individuals as full members of society.²⁷⁰ It is a relatively new concept to say that property rights constitute a moral or human right. Certainly today, it is accepted that a right to property is a human attribute and enables one to live with dignity and liberty.²⁷¹ Prior to the mid-fifteenth century, however, private property was regarded simply as a legal right within a civil society.²⁷²

It was through the writings of Grotius, Pufendorf and, especially, Locke that 'property' was elevated to the status of a natural right. For Grotius and Pufendorf this right to property was not a primary natural right but one derived by man in line with God's wisdom and achieved through right reason. For Locke, the right was different. It was a primary right under natural law and one conferred simply by the application

²⁶⁹ See, for example, Garnsey, *Thinking About Property*, supra, at pages 204 to 232.

²⁷⁰ Garnsey, *Op cit*, see at pages 204 to 205.

²⁷¹ *Op cit, ibid.*

²⁷² See references above.

of labour.²⁷³ This was a fundamentally important step in the emergence of the idea of what may constitute a natural right. Prior to their writings, natural rights had been limited to issues such as life, security, liberty and reputation, with property a creation of the civil law system.²⁷⁴ As natural law and natural rights theories began to take hold, the issue of what constituted a primary natural right came into ever-increasing focus.

For Grotius and Pufendorf, property was a natural right, but one which was derivative or adventitious – a secondary right. It was Locke who elevated property in a primary capacity to a basic human right. In the *First Treatise* Locke argument revolves around issues of God’s will, the creation and the teleology of the world’s resources:

God having made Man and planted in him as in all other Animals, a strong desire for self-preservation, and furnished the world with things fit for Food and Rayment and other Necessities of Life, subservient to his design, that Man should live and abide for something upon the Face of the Earth, and not that so curious and wonderful a piece of Workmanship by its own Negligence, or want of Necessaries, should perish again, presently after a few moments continuance: God, I say, having made Man and the World thus, spoke to him and directed him by his Senses and Reason ... to use those things which were serviceable for his subsistence, and given him as means of his Preservation ... And thus Man’s property in the Creatures was founded upon the right he had to make use of those things that were necessary or useful to his Being.²⁷⁵

He picks up this argument again in the *Second Treatise*:

The Earth, and all that is therein, is given to Men for the Support and Comfort of their being. And tho’ all the Fruits it naturally produces, and Beasts it feeds, belong to Mankind in common, as they are

²⁷³ See, D C Snyder, “Locke on Natural law and Property Rights”, supra, at page 729 and especially page 733 to 739.

²⁷⁴ Garnsey, *Op cit*, at page 206.

²⁷⁵ *The First Treatise*, Chapter 9, at 86, lines 2-16.

produced by the spontaneous hand of Nature ...yet being given for the use of men, there must of necessity be a means to appropriate them in some way or other, before they can be of any use, or at all beneficial to any particular Man.²⁷⁶

Locke had elevated property to the status of a natural or human right, under natural law rights and had done so within a political context.²⁷⁷ Critically, in Chapter II, paragraphs 4, 6 and 8 Locke expressly identifies life, health, liberty, goods and possessions as the basic human rights of and inherent in an individual's place in the world²⁷⁸.

This idea of property as a basic or primary human right took hold in post-revolutionary France, and even immediately prior to this property was recognised as an inalienable natural right in the *Declaration of the Rights of Man and Citizen*.²⁷⁹

In Article 2 property was described as one of the “*natural and imprescriptible rights of man*” and in Article 17 property is noted as “*inviolable and sacred*”. This is post-revolutionary France but the influence of Locke is unmistakable, as is the elevation of property to a type of natural right. Certainly, many today believe that property is an important means to human wellbeing²⁸⁰ and can be considered a human right on this basis.

Mansfield's arguments that it is ‘fit and just’ that an author have property over their creation is a small part of the emergence of the influence of this natural right over the Enlightenment, one that has a clear connection to the writings and influence of Locke. Mansfield was correct when he let his two other judges speak on literary property as a legal right; he was unique in his assessment and acknowledgement of literary property as an embryonic form of a natural moral right. In his own way Mansfield made a

²⁷⁶ *The Second treatise*, Chapter 5, paragraph 26, at lines 1-9.

²⁷⁷ See especially Richard Ashcraft, *Revolutionary Politics & Locke's Two Treatises of Government*, *supra*.

²⁷⁸ See Michael Jacovides, *Locke's Image of the World*, (Oxford University Press, 2017) at pages 32 and on.

²⁷⁹ Made on 26 August 1789, see also Jonathan I Israel, *Revolutionary Ideas: An Intellectual History of the French Revolution from the Rights of Man to Robespierre* (Princeton University Press, 2014), 72-103; Simon Schama, *Citizens: A Chronicle of the French Revolution* (Penguin, 1989), 441-445.

²⁸⁰ See Finnis, *Natural Law and Natural Rights*, *supra*, at page 220.

unique contribution to the development of natural rights theory in regards to literary property.

The matters that agitated Mansfield in this regard - the author as the master of his own name, the author's control over the correctness and accuracy of his work, and the power of the author to retract errors, control the look of the work and secure title in the creative expression of his ideas - were certainly emblematic of a natural right that had been recognised in their own unique way by the likes of Milton and Pope. It is in *Millar* that the notion of the author, the literary work and the notion of literary property all coalesce, not only as a legal right to literary property secured through copyright but also as a moral right and a potential human right. The concepts of the author, the literary work and literary property had all been argued into existence by way of the explicit determination of the three judges.

Chapter Ten

Conclusion: the immediate impact and resulting legacy of *Millar v Taylor*: Post 1769

In *Millar v Taylor* the question that had long-remained unanswered was finally addressed. The Court found that perpetual copyright existed at the level of common law. The Court acknowledged literary property as a type of property, not based on the old indicia of occupation or possession, but a new category of property based on the creative labour of the author. The Court found that property rights could exist over incorporeal intangible items - such as the expression of ideas. This new paradigm of property, how it was justified and how it came about, was based upon Locke's property theory. This theory was a new way of looking at private property, allowing for private property to be recognised as not only a legal right but also as a moral right and natural right. A moral right, as one affording the author protection over issues such as attribution, reputation and presentation of the work. A natural right as one subsisting outside of ordinary man made posited law, and one based on reason and the creative individuality of the author. This was a significant development both in the law and in the history of ideas.

One of the difficulties that had faced the courts in their examination of common law copyright was that there was no existing legal precedent. Given this absence of law, the judgment relied upon political and philosophical concepts of property.¹ With *Millar* precedent was established that perpetual common law copyright existed. Surprisingly, a short while after *Millar*, the House of Lords overturned the law established in that case.

Despite the decision of the Lords², the principles that *Millar* had established concerning private property³ remained. Even with the decision in *Donaldson*, notions

¹ Notions that had been addressed in Blackstone's *Commentaries on the Laws of England*. Blackstone himself in that work, as we have seen previously, expressly acknowledged the influence of Locke and his labour theory as giving legitimacy to the new theory of private property and private property rights.

² *Donaldson v Becket* (1774) 4 Burr 2408; 1 ER 837, hereafter '*Donaldson's case*'.

³ How it might be acquired, and what rights were inherent within literary property and private property.

of private property being acquired through the author's creative labour, of the author's natural right to the ownership of his work and of the states' duty and obligation to protect those rights had taken hold. *Millar* marked an explicit determination of the creative individualism of the author, the acceptance of literary property as a legitimate form of property, the acknowledgement of the right of that author to be associated with the work created⁴, and the right of that author to enjoy the commercial exploitation of his created work. For the author, the literary work and the right to copy that work, the world after *Donaldson* was one vastly different to that when printing and the book-trade had first flourished. Locke's views on private property had had a profound effect on notions of property, originality, creativity and personality.

Before *Donaldson's case* is examined, it is of benefit to consider a case that was determined after *Millar* but before *Donaldson*, *Hinton v Donaldson*.⁵ As Deazley acknowledges, in *Millar* the London booksellers had secured an authoritative affirmation of the author's common law right to publish their literary property in perpetuity.⁶ This had been a decision of the country's most senior common law court⁷, where the common law rights of authors over literary property, an issue never fully before considered and answered by the formal institution of the courts, had been argued into existence. Authors' rights now seemed entrenched in law, and could only be abrogated or repealed by an act of Parliament. Three months after *Millar's* executors had been granted a perpetual injunction, Hinton and McKonochie filed a summons in Edinburgh against Alexander Donaldson. They sought an injunction and an account of profits in respect of an alleged unauthorized printing and sale of *The History of the Holy Bible* by Donaldson, a work Hinton claimed had been assigned to him, making him the holder of the copyright in the work.

Hinton pleaded:

⁴ And thereby maintain their dignity and integrity both in their own regard and that of their work.

⁵ *Hinton v Donaldson* (1773) SRO CS 231 H2/4, hereafter '*Hinton's case*'.

⁶ Deazley, *On the Origin of the Right to Copy*, supra, at page 178.

⁷ The Court of King's Bench.

The copy Right belonging to an author in their own work, is understood in the law of England to be the right of property, transferable to assignees, and passing to executors ⁸

The Scottish Court hearing the matter believed that the case raised issues of English law and directed the parties to seek an opinion from the London bar on the issue of common law copyright. Mr Dalrymple and Mr MacDonald provided an opinion on the issues raised in the case, the very issues that *Millar* had considered. In relation to literary property the opinion stated:

Property in Copyright stands now to be determined by the late judgment in the court in the case of *Millar* to be perpetually vested in the author, his heirs and assignees, And it was admitted by the learned judge who differed in opinion from the court that this property could be no other than a personal chattel. Personal chattels are distinguished into choses-in-action and choses-in-possession. The former arise from some contract express or implied; and require the interposition of legal judgment and execution to reduce them to possession; the latter, not requiring such interposition, but so called when the right and occupation are found to concur. Property in copyright can therefore not be called a chose-in-action, because it is a vested exclusive power of printing and publishing such copy; requiring no remedy of law to ascertain.⁹

Dalrymple and MacDonald saw literary property as conferring a legal right and control over all exploitation rights vested in the literary work. They recognised *Millar* as precedent for the legal right of perpetual common law copyright. The case proceeded to trial.

Hinton maintained that being the owner of the copyright he had perpetual property both “*at common law and in the principles of reason and natural justice*”¹⁰ citing

⁸ *Hinton v Donaldson* (1773) SRO CS 231 H2/4.

⁹ *Hinton v Donaldson* (1773) SRO CS 231 H2/4.

¹⁰ *Op cit; ibid.*

Millar in support of his case. Donaldson's response was wholly unique. Donaldson did not join argument on what the law may or may not be in England; he submitted that the summons had been filed in Scotland and that, therefore, the laws of Scotland applied. The common law of Scotland did not recognise the right of perpetual copyright and English law was not binding upon a Scottish court. The Scottish court found in favour of Donaldson on the basis that there was a distinction between Scottish and English law: "*English law, as to us, is foreign law*".¹¹

There was one dissenting judge, Lord Monboddo. He found that "a man should enjoy the fruits of his labours"¹², in all likelihood a reference to Locke's theory as outlined in *Millar*. The Scottish Court held that a common law right of perpetual copyright had no basis in the laws of nature, the laws of nations nor any place in the law of Scotland.¹³ *Millar* had no place in the laws of Scotland as authority for the existence of perpetual common law copyright. The Scottish court had found that property rights were concerned with the tangible and the corporeal Property did not exist over abstract ideas or expression. To hold otherwise, was too revolutionary:

Though supposed to be a common law right, [perpetual copyright] has not been acknowledged in any country except England; and even then it appears to be a modern invention, always disputed, and never settled, till a late decision in the Court of King's Bench, which was not unanimous.¹⁴

There was now a divide between English and Scottish law. *Hinton* was a significant win for Donaldson and the Edinburgh book-trade. The case was soon reported and counsel appearing for Donaldson, James Boswell, prepared a report on the case. That work¹⁵ was widely read.¹⁶ Its relevance soon became understood: there were clear opposing legal views on the issue of copyright between the north and the south of the

¹¹ *Op cit; ibid.*

¹² *Op cit; ibid.*

¹³ See Deazley, *Op cit*, at page 185.

¹⁴ *Hinton v Donaldson, Op cit, ibid.*

¹⁵ James Boswell, *The Decision of the Court of Session, Upon the Question of Literary Property; In the Cause John Hinton of London, Bookfeller Against Alexander Donaldson*, (James Boswell, 1774).

¹⁶ Peter Martin, *A Life of James Boswell* (Yale University Press, 2000), 297.

country. As the most senior appellant body in the United Kingdom¹⁷ it would require the House of Lords to give clarity to the issue.

In 1769 Thomas Becket had purchased the copyright in Thomson's *The Seasons*¹⁸ from Millar's estate. In 1772 Becket obtained an injunction against Donaldson for the unauthorized printing of the work. The injunction that the English court granted was in perpetuity. English common law now recognised a perpetual right to copyright outside of the term provided by the statute.¹⁹

Faced with the injunction and the recognition of *Millar* as good law, Donaldson appealed to the House of Lords. He was of the view that the work was common property and that he was free to publish the work without permission.

The appeal process within the Lords was complex²⁰ and a review of the procedure is not necessary for present purposes. In short, the House of Lords was comprised of both lay Lords and law Lords, those peers who held judicial office.²¹ In matters of law, the lay lords were generally influenced or guided by the law lords.²² It was also common practice in legal appeals to the Lords, that the House would invite all twelve judges of the common law courts to attend and give a non-binding opinion on the matters under appeal. This is what occurred in *Donaldson's case*.

The matter first came before the House in January 1774 and in February the twelve common law judges were requested to attend the House and opine on the issue. Counsel for the parties made opening arguments. Having heard these arguments, which pitted the English position against the Scottish one, Lord Apsley formulated three questions for consideration²³, which he believed summarised the issues at play.²⁴

¹⁷ Following the *Act of Union* in 1707.

¹⁸ This was the very work that had been in contention in *Millar v Taylor*.

¹⁹ Loewenstein, *Op cit*, at pages 13 to 22.

²⁰ See for example T Bevan, 'The Appellate Jurisdiction of the House of Lords' (1901) 17(2) *Law Quarterly Review* 155.

²¹ In addition to the Lords Temporal, the House was also made up of the Lords Spiritual, those members of the House who took their seat by virtue of their clerical status, such as the Archbishop of Canterbury.

²² See Deazley, *Op cit*, at page 193 and Rose, *Authors and Owners* at page 97.

²³ See Deazley, *Op cit*, at page 195.

²⁴ Q1: Whether at Common Law, an author of any book or Literary Composition, had the Sole Right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent?

These questions were similar to the ones that Yates had posed in *Millar*. They focused on authors' rights. The House accepted the three questions for the purposes of debate.

Lord Camden, however, sought to add a further two questions to the original three and these were agreed.²⁵ These questions were essentially focused on the rights of booksellers and, as Patterson, Deazley and Loewenstein have noted, were more political than legal in nature.²⁶ With the five questions agreed, the issue before the Lords had effectively become an appeal from the decision not of *Donaldson* but of *Millar*. Would a common law right to copyright in perpetuity and an acknowledgement of incorporeal and intangible objects as property survive the review by the Lords?

The five questions were addressed by each of the judges with the notable exception of one. For reasons that remain unclear, Mansfield was the only judge who chose not to proffer any opinion on the questions. There was an apprehension that Mansfield would instead speak as a peer of the House.²⁷ There then follows much confusion as to how each of the judges 'voted' on the five questions. As Rose and Deazley have noted²⁸, the records of the Lords offer no guide on the issue and seem to have been incorrectly recorded. It does appear, however, on balance that the judges did favour the notion of perpetual common law copyright. After the discussion on the eleven opinions offered by the law lords²⁹ the matter then moved to general debate in the Lords. Lord Camden, Mansfield's great rival, led the debate.

Camden was against the notion of a perpetual common law copyright. He was also against the notion that property right existed over incorporeal and intangible objects.

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- Q2: If the author had such Right originally, did the Law take it away upon his printing and publishing such Book or Literary Composition, and might any person afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author?
- Q3: If such Action would have lain at Common Law, is it taken away by the Statute of Anne?; and is an Author, by the said Statute, precluded from every remedy except upon the foundation of the said Statute, and on the Terms and Conditions prescribed thereby?
- ²⁵ Q4: Whether the Author of any Literary Composition, and his Assigns, had the Sole Right of printing and publishing the same, in Perpetuity, by the Common Law? And
- Q5: Whether this Right is in any way impeached, restrained, or taken away, by the Statute of Anne?

²⁶ Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, 1968), 176; Deazley, *Op cit*, 195; Loewenstein, *Op cit*, 17.

²⁷ See Deazley, *Op cit*, at page 196.

²⁸ See Deazley, *Op cit*, at page 198, and Rose, *Op cit*, at page 98.

²⁹ With the notable exception of Mansfield.

He sought to move the debate away from a consideration of authors' rights to one focused on the trade:

If there be any thing in the world, my Lords, common to all Mankind, Science and Learning are in their nature *publici juris*, and they ought to be as free and as general as air or water. They forget their creator, as well as their fellow-creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter Society at all, but to enlighten one another's minds, and improve our faculties for the common welfare of the species?³⁰

For Camden, what was important was the social benefit of public access to knowledge and information. Knowledge had to be communicated and should not remain locked up in the hands of the authors.³¹ As to the right of authors to enjoy the commercial exploitation of the works, Camden saw no economic rights at play and insisted that 'true' authors sought only the spread of ideas³², notoriety should suffice:

Glory is the reward of science, and those who deserve it scorn all meaner views; I speak not of scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press. When the bookseller offered Milton five pounds for his *Paradise Lost*, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price was immortality and that posterity would pay for it.³³

The only member of the House who spoke against Camden was Apsley. Mansfield again remained silent.

³⁰ *Donaldson v Becket*, *Op cit*, at 999.

³¹ See Peter Baldwin, *The Copyright Wars*, *supra*, at pages 68 to 71.

³² See Rose, "*Nine Tenths of the Law*", *supra*, at page 81.

³³ *Donaldson v Becket*, *Op cit*, at 1000.

Apsley argued against Camden's submission that authors only create for fame and glory, supporting Mansfield's long held view that the law should evolve. Camden could not agree:

the business of the judiciary is to tell the suitor how the law stands, not how it ought to be, ... and otherwise each judge would have a distinct tribunal in his own breast ... and caprice, self-interest and vanity would by turns hold the scale of justice and the law of property be indeed most vague and arbitrary.³⁴

Camden was the personification of judicial conservatism, in marked contrast to the judicial activism of Mansfield. Having heard these closing speeches, the Lords moved to a final vote on the issue. The House, apparently swayed by Camden, moved against the view put forward by the common law judges³⁵ and found for the Scottish booksellers. In short, the House found that copyright would be limited to the term as prescribed by the statute – this was a narrow although significant outcome.³⁶ Within five years the law established in *Millar* appeared to have been overturned. But vestiges of *Millar* did survive.

In relation to the issues currently under consideration, it would seem that while *Donaldson* rendered otiose the notion of perpetual common law copyright, it did not disturb the acknowledgement of private property over literary works, the acceptance that property rights could be held over intangible and incorporeal objects, and that private property rights could be obtained not only through occupation or possession but also through the act of creative labour. Locke's contribution to property law remained intact. Most importantly, the Lords did not seek to overrule the issue within *Millar* that creative labour gave the holder of private property in literary property both a legal right and a moral right. Much remained preserved from *Millar* and would remain influential within the common law.

³⁴ *Donaldson v Becket*, *Op cit*, at 998 to 999.

³⁵ See Rose, *Op cit*, at page 102.

³⁶ See Rose, *Op cit*, *ibid*.

In 1970, the High Court of Australia acknowledged this:

Copyright today is entirely the creature of statute. It is no longer an emanation of the common law. It extends to both published and unpublished works. The old controversies are now dead. But although the debate has died, much that was said lives on, to guide us in reading the statutes.³⁷

In the same year that the Lords handed down its decision, a number of pamphlets addressed the notion of literary property. These pamphlets evidenced the impact of Locke upon the subject.

In 1774, Francis Hargrave issued the pamphlet³⁸ *An Argument in Defence of Literary Property*. Hargrave was an acknowledged lawyer and author of the period, he was recognised by commentators such as Prest as a writer who used the pamphlet system for airing or advancing personal causes and to publicise grievances.

The pamphlet's contents show the emergence of the modern proprietary author within a liberal culture of creative individualism, with the author asserting natural rights of a kind considered by Locke. In his examination of literary property, Hargrave noted that every man has a mode of combining and expressing his ideas peculiar to himself, so that the same doctrines never come from two persons, or even from the same person at different times:

there is such an infinite variety in the modes of thinking and writing, as well as in the extent and connection of ideas, as in the use and arrangement of words, that a literary work really original, like a human face, will always have some singularities, some lines, some features, to characterize it, to fix and establish its identity.³⁹

³⁷ *Pacific Film Laboratories Pty Limited v The Commissioner of taxation of the Commonwealth of Australia* (1970) 121 CLR 154, per Windeyer J at 166.

³⁸ See Wilfred Prest, "Law Books", in Suarez and Turner (editors), *The Cambridge History of the Book in Britain, Vol V*, supra, at page 801.

³⁹ Hargrave, *Op cit*, at 7.

Here we see the modern proprietary author fully formed, with literary property secured through the application of artistry and industry. Hargrave explores the notion of literary property and its subject matter, finding that:

the identity of a literary composition consists intirely in the sentiment and the language, the same conceptions, cloathed in the same words, must necessarily be the same composition.⁴⁰ [sic].

He moves from a consideration of the work to a consideration of the author, moving from a consideration of property to a consideration of the proprietor, collapsing the category of the 'work' into that of the 'author' and his creative personality.⁴¹

As in *Millar*, Hargrave finds that the right of the author rests on principles of natural justice and reason. He dismisses the idea that only corporeal things can be property, holding that anything that is susceptible of an exclusive enjoyment may be property and that such exclusivity confers rights on the creator of that property. He acknowledges that the categories of property are open to evolution:

Upon the whole therefore it seems very clear that exclusive rights may subsist in law and be transmissible as property without the aid of anything corporeal to hold them.⁴²

Hargrave concludes with a consideration of the origin of the author's title to the work, stating that title is secured through the author's labour in composing the work:

the industrious and painful application of the mental faculties.⁴³

This is based upon the incontrovertible principal that:

every man has a right to appropriate to himself the fruits of his own industry, so far as is practicable in the nature of things, and is at the same time consistent with the rights of others.⁴⁴

⁴⁰ Hargrave, *Op cit, ibid*, see also Rose, *supra*, at pages 123 to 129.

⁴¹ See Rose, *supra*, in this regard.

⁴² Hargrave, *Op cit*, at page 15.

⁴³ Hargrave, *Op cit*, at page 21.

This language is strikingly similar to Locke's. Having found that the author's right over literary property can only spring from the labour exerted by the author in composing his work, Hargrave then examines if publication of the work renders these rights void. Hargrave finds that publication does not vary such rights, because publication is not an express renunciation of the rights. Hargrave concludes:

the primary cause of the author's claim is his labour in the composing of his works; and this, combined with his consequential power over and interest in the manuscript is the foundation of the author's sole and exclusive right; which is allowed to be entitled to the protection of the common law of England before a voluntary and general publication.⁴⁵

Hargrave's pamphlet is modern in its sentiments and views. His argument that a literary work is like a human face with singularities and unique features helped found his view that it was individuality that secured authors' claims to the expression of ideas as found in their works, as Baldwin has noted.⁴⁶ For Hargrave, it was all about property, personality and originality, all other arguments disappeared as being irrelevant.

As Rose notes, with the release of pamphlets such as Hargrave's in the advanced marketplace of the time where coinage was being replaced with bills of exchange and paper banknotes and property was identified in abstract concepts, "the solidity of apparently concrete referents was dissolving, replaced in many different but connected spheres by the circulation of signs".⁴⁷ Here are the fully formed notions of the author, the literary work and the right of exploitation of that work secured through the paradigm of copyright⁴⁸.

⁴⁴ Hargrave, *Op cit*, at page 22.

⁴⁵ Hargrave, *Op cit*, at page 39.

⁴⁶ Baldwin, *The Copyright Wars*, supra, at page 87.

⁴⁷ Rose, supra, at page 129.

⁴⁸ Albeit a right now limited to term.

Two other pamphlets are worth consideration. Shortly after *Donaldson*, William Enfield⁴⁹ released *Observations on Literary Property*.⁵⁰ Interestingly⁵¹, key commentators have overlooked Enfield's contribution to the discussion. Rose, Loewenstein, Deazley or Baldwin have not considered Enfield's pamphlet in any regard. Enfield's pamphlet is important in two respects. It shows that while the Lords had rendered void the notion of perpetual copyright, the concepts of literary property and private property acquired through labour remained undisturbed. Second, Enfield evidences a modern view of the notions of the author, the literary work, and copyright. Enfield insisted that authors should receive the profits and honorary fruits of their labour. Authors had a natural right to these fruits, and the state had a duty to protect these claim-rights: "that Authors have a natural right to their fruits and a reasonable claim from the state in the enjoyment of them".⁵² There was no reason why literary works should not be acknowledged as a form of property, even though they were incorporeal in form, consisting only of a "series of thoughts and expressions produced by the continued exertion of the powers of the mind".⁵³ While it was a type of property that was invisible and intangible, it was nevertheless 'real' and identifiable.

Enfield maintained that authors had a 'natural right' of property in their work. The fundamentally important question was whether this right was founded on the general laws of nature and takes place prior to the institution of society or whether it is the consequence of mutual consent.

The question was important for Enfield because he said if the answer was that the right came about through agreement and consent, then those rights could be truncated and annihilated. If the right, however, came through the general laws of nature, then civil government has a sacred duty to protect it: the governors are bound by the nature of their office to preserve and defend. This sounds very much like a rights-based argument in support of the notion of private property, of a kind advocated by Locke,

⁴⁹ Enfield was a Unitarian minister and philosopher and was reasonably well known for his book reviews, religious articles and pamphlets.

⁵⁰ William Enfield, *Observations on Literary Property* (Joseph Johnson, 1774).

⁵¹ See Isabel Rivers, "Religious Publishing", in Suarez and Turner (editors), *The Cambridge History of the Book in Britain, Vol V*, supra, at page 582.

⁵² Enfield, *Op cit*, at page 8.

⁵³ Enfield, *Op cit*, at page 10.

as has been recognised by commentators such as Waldron and Nozick⁵⁴, but with direct application to literary property.

Having considered arguments made by Pufendorf and Grotius, Enfield concludes that the answer to his question is to be found “*in the writings of .. Locke*” and that it is the act of occupancy of the idea in a state of nature that gives the right of property. There is no need for consent; the right is natural and prior to civil society:

a right of property being necessary to that use and consumption of the gifts of nature without which could not have subsisted.⁵⁵

But it is not occupancy alone that grounds the right; it is labour as performed upon the natural asset so occupied.

Enfield intuitively identifies the property-conferring power of labour in a way analogous to God’s own creative and workmanship model:

A man’s labour ... is originally, naturally, and independently his own: whatever therefore is added to the value of any subject by labour, must originally belong to the labourer. Labour has a kind of creating power, bringing in to existence something of real value ...; the property of which must reside in the person who gave it existence.⁵⁶

Labour gives a clear and natural right of property, independent of social agreement and any civil authority. Enfield dismisses the notion that property cannot exist in relation to intangible goods: “but surely nothing more peculiarly belongs to a man than his own ideas.” Enfield holds that literary property rests on natural law rights:

⁵⁴ See, especially, Jeremy Waldron, *The Right to Private Property*, supra, at pages 62 to 105 and especially pages 137 to 252, and Robert Nozick, *Anarchy, State, and Utopia*, supra, at pages 174 to 182.

⁵⁵ Enfield, *Op cit*, at page 16.

⁵⁶ Enfield, *Op cit*, at page 17.

Labour gives a man a natural right of property in that which he produces; literary compositions are the effect of labour; authors have therefore a natural right of property in their works.⁵⁷

He thereby draws on Locke's property theory. He does, however, have one problem with the application of Locke's theory to his own argument.

While Enfield endorses the labour theory of founding a legitimate claim to private property rights in literary works, he takes issue with an important component of Locke's theory. That is in respect of the notion of the commons or the common stock. Enfield does not accept that a literary work can ever have belonged to the common stock of natural resources. This does not prevent the author from claiming exclusive ownership of what he has created.

It would seem that Enfield has not considered that ideas may be the commons of resources out of which particular ideas may be removed and fashioned into sentiment and expression to give rise to literary works. There is no reason why we may not admit of a commons of intangibles such as ideas, which are non-exclusive and non-rivalrous. The particular difficulty with the application of Locke's theory of property to ideas is that once fashioned into expression, it is the expression not the idea that is owned by the author. Copyright, like all forms of intellectual property rights, even in its modern sense does not give ownership over the underlying idea, only over the expression of that idea.

Enfield then considers the rights that may accrue to authors in respect of their literary works. Enfield finds that private property gives rights that are both legal and natural or moral. He then reviews the duty and obligations that fall upon civil government to protect authors in this regard:

authors may justly expect the interposition of the civil power to secure them the full and permanent possession of their literary property.⁵⁸

⁵⁷ Enfield, *Op cit*, at page 21.

⁵⁸ Enfield, *Op cit*, at page 36.

Enfield also addresses Camden's contention that authors should write for fame and prestige. Enfield finds such a proposition unsatisfactory and nonsensical. He holds that patronage or general public generosity is insufficient for the endeavours of the author and that authors have a clear right to the commercial exploitation of their works. For Enfield the author has as much right to the sale of his works as does the farmer or husbandman. Enfield holds that the right of authors to the exclusive possession of their work is founded in nature, and that such a right ought to be secured and guarded by law. To allow for such exclusivity is for the benefit of all, in that it encourages learning and literary pursuits.

Enfield concludes that the right to copy should be perpetual:

When authors desire permission to communicate their thoughts to the public with freedom on every subject which is of importance to individuals or society, and the secure possession of the fruits of their own genius and labour, they ask nothing of government but what every Englishman has a right to expect from it, LIBERTY and PROPERTY.⁵⁹

Again, this is an expression in modern terms of what it meant to be the author, of what was meant by literary property and what rights were vested in the author in respect of the work. Here is the author as an integral part of the creative process, with a right to maintain the integrity of the work but also with a right to enjoy the commercial exploitation of the work. Here too is a world in which the rights of the author are to be balanced against the duty of the state to safeguard and to protect these rights, which being natural in nature could not be restricted or curtailed. Most importantly, here is an essay that embraced the Locke's labour theory to give legitimacy and justification to private property rights over incorporeal and intangible objects.

In the same year that Hargrave and Enfield published their pamphlets, Catherine Macaulay published *A Modest Plea for the Property of Copyright*⁶⁰ expressing similar

⁵⁹ Enfield, *Op cit*, at page 52.

⁶⁰ Catherine Macaulay, *A Modest Plea for the Property of Copyright* (self published, 1774).

views to Hargrave and Enfield. Macaulay argued in favour of perpetual copyright and saw literary property as no different from any other commodity, bringing with it a right to commercially exploit the object. There was no social or economic impediment to the notion of the professional author. For an author to sell his literary work was no more degrading than for a rich landowner to sell his grain and cattle.⁶¹ Macaulay was critical of the position that Camden had taken, that authors should find sufficient reward in honour and glory:

literary merit will not purchase a shoulder of mutton, or prevail with sordid butchers and bakers to abate one farthing in the pound of the exorbitant price which met and bread at this time bear.⁶²

She championed authors in their own right, finding that they were engaged in the improvement of the human mind – an endeavour more rewarding than mere invention.

Together, all three pamphlets evidenced what Rose has described as a Lockean representation as developed by these defenders of authors' rights.⁶³ Each made an argument in favour of a perpetual right to copyright over a literary work.

Unfortunately, after *Donaldson* the law was against them on this. The term of copyright was now limited to the provisions of the statute.

Nonetheless, all three pamphlets acknowledged the professional author, recognised the need for authorial integrity and dignity, understood the nature of the text as literary property, and accepted the notion that creative labour, through industry and application, could fashion an idea into a unique and original expression that in an intangible form did amount to a private property right. The pamphlets carry a feel of literary property and the author's rights in that property as being both legal and moral. *Donaldson* may have rendered void the notion of perpetual copyright but in no way did it alter what the court had had to say in *Millar* concerning matters of the author, literary property and rights in that property.

⁶¹ See Rose, "Copyright, authors and censorship" in Suarez and Turner (editors), *The Cambridge History of the Book in Britain*, Vol V, supra, at page 125.

⁶² Macaulay, *Op cit*, at pages 14 to 15.

⁶³ See Rose, *Authors and Owners*, supra, at page 107.

By 1774, the modern notions of the author, literary property and the rights inherent in that property had been given an explicit determination and were now fully formed.

In 1969 Michel Foucault asked the question: “*What Is An Author?*”.⁶⁴ In addressing this issue, Foucault noted:

The coming in to being of the notion of the ‘author’ constitutes the privileged moment of individualization in the history of ideas, ... [and] philosophy ...

Certainly it would be worth examining how the author became individualized in a culture like ours, what status he has been given, at what moment studies of authenticity and attribution began ... in what kind of system of valorisation the author was involved, at what point we began to recount the lives of authors rather than heroes.⁶⁵

These questions relate and touch upon the concepts that have been under consideration. At no one specific time did the modern notions of the author and his individualization, the literary work, and private property rights in literary works suddenly come about. It was a slow process in the history of ideas.

With the advent of paper and print, the new economy of the book-trade soon developed and copy was required in ever-greater amount, but even then the author was not centrally tethered to the work; he was but one in the process of book production. Property rights and the associated right to commercially exploit the work vested not in the author but in the publisher and the bookseller.

Gradually though, through public discourse and through the actions of writers such as Milton and Pope and due to economic tensions between the English and Scottish book-trade, the balance would swing in favour of the author. The notion of the literary

⁶⁴ See Michel Foucault, *The Foucault Reader*, supra. See also Chapter 1 above.

⁶⁵ Foucault, *Op cit* at page 101.

work too would also change over time, as would notions of how the work should be regulated and controlled. Initial government action was through the Crown by way of license and privilege; with the establishment of a robust parliamentary system after the Restoration, the law came to play the leading role in relation to regulation.

In 1709 the Statute of Anne recognised the notion of the author and granted a limited term as to copyright. The statute was critical in respect of the matters under current consideration. It recognised a legislative right of copyright, a unique concept in itself, and an idea borne of the times. It showed that Parliament had no difficulty with the abstractness of literary property and it acknowledged that the author was *the* owner of the work in issue. It showed too that the notion of the author is a recent cultural formulation. It also allowed for the imprinting of the author's identity upon his own work. The statute required that each author be acknowledged and identified on each printed version of the work.

The passing of the statute was an important step in the history of ideas. There is no more fundamental institutional embodiment of the author-literary work relationship than that of copyright. Copyright affirms the author as owner and it legitimizes the practice of securing marketable rights in literary texts that can be categorised as modern commodities. It is a specifically modern institution.

Moreover, while the notion of copyright is an important element within the economic fabric of intellectual property rights as economic rights, it is also deeply rooted in our own conception of ourselves as individuals with a marked degree of singularity and personality.⁶⁶ Copyright is closely associated with our own sense of self, personality, singularity, privacy and creativity.

Even with the introduction of the statute, one critical question remained: was there a corresponding but unlimited term in common law? It would take some time for this question to be explicitly determined by the courts – but the modern notions of the author and the literary work were argued in to existence through this legal process.

⁶⁶ See Rose, *supra*, at page 125.

When courts came to consider the legal status of the author and the work, there was no pre-existing case law on the point. It was to the writings of John Locke that they turned and how apposite these writings would prove to be. Literary property required a new theory of property and Locke's private property through labour served as the bedrock in *Millar* and it was not overturned in any subsequent case.

The approach of the judges in *Millar* was more Lockean than 'pure' Locke but the theory had direct and intuitive application to the notion of ideas being taken from the commons and through creative industry turned into expression and sentiment and that process affording a right of property – and rights not only in a legal sense but also in a moral sense based not only in legislation and court precedent but subsisting in natural law and reason.

Locke has long been recognised as providing the basis for claiming literary property as legal form of private property but little has been said of his theory underpinning literary property as a moral right or a natural right. That it does so as has been considered above, shows how robust and extremely important the theory was in the history of ideas – and remains so today.

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