Simon Stern*  FROM AUTHOR’S RIGHT TO PROPERTY RIGHT†

Though copyright is usually categorized as a property right, efforts to justify copyright on other grounds have persisted since the eighteenth century. The Lockean defence, based on the author’s labour, is usually seen as conducive to a property right but is sometimes linked instead (or in addition) to a personality right. I explore another approach that has been analysed in the doctrinal literature, but that has received less attention from historians of English copyright law. This approach focuses on the author’s dignitary rights, including communicative rights (bearing on who controls the public presentation of the text), and reputational rights (bearing on the text’s appearance and its status as a reflection of the author). By contrast with the labour theory, the dignitary view of copyright is harder to reconcile with a property right although, as I show, eighteenth-century advocates of strong copyright protection sought to assimilate this view into the property framework. The Statute of Anne (1710) sought to accommodate the competing needs of authors, publishers, and the public. Its protections did not affiliate copyright with a property framework, as the publishing industry would have liked. In the course of the eighteenth century, dignitary concerns jostled with property claims as litigants argued over statutory protection. To explore the relations among these arguments, I re-examine the Statute of Anne and four of the major contemporary copyright judgments: Burnet v Chetwood (1721), Pope v Curll (1741), Millar v Taylor (1769) and Donaldson v Becket (1774). Each of these cases reveals new dimensions when examined through the lens of dignitary concerns. By studying these materials, we can gain a better understanding of how the property-based view took hold during a vital period in the formation of copyright law. This development, in turn, helps to explain two of the most distinctive features in the recent history of copyright law: the ever-widening reach of derivative rights and the ever-lengthening term of protection.

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Introduction

Wit . . . is a sort of property: it is the property of those that have it, and too often the only property they have to depend upon.1

Since the eighteenth century, copyright has usually been regarded as a form of property. Even in systems that protect moral rights, infringement is typically described in property-based metaphors such as ‘theft’ and ‘appropriation.’2 At the same time, a persistent refrain in debates over the basis and scope of copyright has emphasized the importance of authorial rights that turn on notions of dignity rather than property. By a ‘property’ right I mean a right to exclusive use, including the right to control commercial use and the right to alienate.3 In this context, the right being conceived in property terms is the exclusive right to publish and distribute a text. By a ‘dignitary’ right, I mean a right to control one’s image and reputation, including the right to control how others present one’s writings.4 If we take for granted the rights currently protected by

1 Lord Chesterfield, speaking in the House of Lords, as cited in The London Magazine 6 (August 1737), online: <http://books.google.ca/books?id=WwcoAAAAYAAJ&printsec=frontcover&q=London+Magazine+1737&hl=en&ei=PPPYTty3NOrt0gGa7LSIDg&sa=X&oi=book_result&ct=result&resnum=1&ved=0CDEQ6AEwAA#v=onepage&q=wit&f=false).
2 See e.g. Richard Fine, ‘American Authorship and the Ghost of Moral Rights’ (2010) 13 Book History 218 at 219, discussing press accounts of unauthorized sequels to Gone with the Wind and Les Misérables and noting that ‘[s]ome misappropriation, some “theft” was alleged in both, although it was difficult for journalists to articulate exactly just what the loss—financial or otherwise—had been.’
copyright, it makes little difference whether property is assumed to provide the defining framework,\(^5\) however, if we ask how the modern Anglo-American approach to copyright developed, the classification of copyright as property plays a significant role and helps, in particular, to explain the expansion of derivative rights and the extension of the copyright term during the last century. A regime that regards copyright primarily in the light of property will be readier to treat a wide variety of affiliated works (imitations, retellings, sequels, parodies) as derivative infringements and will be likelier to justify term extensions as an uncontroversial means of protecting the owner’s natural entitlement. By contrast, a regime that focuses on dignitary rights will be less hostile to affiliated works except when they present themselves as coming from the original author and, as I explain below, may find it harder to justify a term of protection that persists long after the author’s death.

In what follows, I do not argue that a dignitary approach is the preferable one, nor that the property and dignitary frameworks are so mutually inconsistent as to be irreconcilable. Rather, I seek to understand how property became the default category for copyright and how the dignitary arguments were managed in the course of the evolving debate. I suggest that if eighteenth-century jurists had given more attention to dignitary rights, as conceived at the time, the modern approach that understands copyright primarily in terms of property would likely have been significantly qualified, with the result that users’ rights, today often cast as ‘derivative rights,’ would have been seen as more central to the structure of copyright.\(^6\)

A crucial motive for the argument supporting the property approach involved the concern to ensure that copyright would be readily assignable, like a chattel. Transactions between authors and publishers in the eighteenth century usually involved a one-time transfer of copyright,


\(^6\) For notable recent examples of imitations and retellings that are more readily challenged within a property framework (even if they are ultimately deemed non-infringing), see John David California [Fredrik Colting], Sixty Years Later: Coming through the Rye (London: Windupbird Press, 2009) and Salinger v Colting, 607 F 3d 68 (2d Cir 2010); Alice Randall, The Wind Done Gone (New York: Houghton Mifflin, 2001) and Suntrust Bank v Houghton Mifflin Co, 268 F 3d 1257 (11th Cir. 2001); Pia Pera, Lo’s Diary (New York: Foxrock, 1999) and the settlement described in Peter Applebome, ‘Pact Reached on US Edition of “Lolita” Retelling,’ The New York Times (June 17, 1999) E1; and Alan Katz & Chris Wrinn, The Cat NOT in the Hat! A Parody by Dr Juice (New York: Penguin Books, 1995) and Dr Seuss Enters, LP v Penguin Books USA, Inc, 109 F 3d 1394 (9th Cir 1997).
with no royalties or other provisions related to the book’s success.7 This essential feature of literary commerce was generally ignored in theoretical justifications of copyright, which took great pains to rationalize authors’ rights as a premise and then glossed over the question of how the rationale applied to publishers. Advocates of this approach correctly understood that it commanded more support than would a justification that conceptualized copyright as a publisher’s right from the outset.

Hence the need for an assignable property right: once a persuasive explanation could be found to show why authors had such a right, no further work would be needed to show why publishers should enjoy the same protection after assignment of the copyright. Conversely, if the right were not assignable – as would usually be true for dignitary rights – the exercise in justification would achieve nothing for the publishers. Even a hybrid approach to copyright, seeking to integrate dignitary rights and property rights, would likely diminish the power of the latter. The point is a simple one, but it may be hard to discern in the legal arguments frequently rehearsed by publishers, acting as plaintiffs and presenting explanations that speak to the rights of authors who were not parties to the litigation. The shift from author’s right to property right is a shift from a view of copyright that may include protections available only to the author, to a view in which there is no room for personal protections and all rights may be transferred along with the copyright.

Dignitary rights, in this context, generally take two forms. Reputational rights focus on readers’ perceptions of the author and the message; from this perspective, the most salient harms involve bad texts (which distort the author’s message) and improper audiences (whom the author did not seek to address).8 Communicative rights focus on the social aims of authorship and the author’s control over the message; these rights are violated by forms of copying that undermine the author’s position as the person entitled to present the work to the public.9 The two kinds of

8 For discussion of authors’ reputational rights, see e.g. Piotraut, supra note 4; Pfister, ibid; Kwall, ibid.
dignitary rights are distinguishable because, under the communicative view, a well-edited text marketed to a desirable audience could nevertheless offend the author’s autonomy by virtue of being unauthorized. Both dignitary and property-based justifications have been circulating since the advent of statutory copyright in England, in the Statue of Anne (1710). However, the property-based view came to predominate and was firmly established by the time of Donaldson v Becket (1774).

Despite the forces that drew copyright into the ambit of property rights in eighteenth-century England, there was a significant amount of space for thinking about copyright as a right of persons, a right that included communicative and reputational aspects. If these considerations had received more emphasis, they might have generated doctrinal principles that necessitated modification of the property-based view of copyright. Instead, the dignitary accounts were transformed into justifications for the property-based view and became better known in that form than as freestanding justifications for copyright. As copyright was placed on the footing of property, arguments involving dignitary rights became props in that structure.

Another means of elucidating the property right, and one that has been studied more intensively, is grounded in the author’s labour. Arguably, this approach might also include a dignitary aspect, because unauthorized copying may be seen as a violation of the author’s autonomy, an abuse of the author’s investment of self in the work. Nevertheless, acts other than copying – such as simply claiming to be the true author of a work for which the ostensible author is taking credit. The harm enacted by plagiarism might thus be understood to include two aspects: an effort to profit commercially from another’s work and an assertion of the right to control the work. We usually encounter both aspects together. For an example that presents only the non-commercial aspect, see Simon Stern, ‘Sentimental Frauds’ (2011) 36 Law & Soc Inquiry 83 at 97–101.

10 Statue of Anne, 1710 (UK) 8 Anne, c 19 [Statute of Anne].
12 For discussions of Locke that associate ‘mixing’ labour with the investment of selfhood, see e.g. Edward J Hundert, ‘The Making of Homo Faber: John Locke between Ideology and History’ (1972) 33 Journal of the History of Ideas 3 at 9; Karl Olivecrona, ‘Locke’s Theory of Appropriation’ (1974) 24 Philosophical Quarterly 220 at 226. This
unlike the other dignitary approaches, the labour theory has been readily associated with a property-based view, most obviously because of a mutual affiliation with economic concerns. Further, those who turned to labour as a justification for copyright rarely dwelt on the dignitary aspect; instead, they assumed that the raison d’être for this approach was to support a property right and that the affront posed by infringement lay primarily in the misappropriation of profits due to the original author. Here, I focus instead on dignitary theories whose historical development has received less attention, and that were seen as less conducive to the property right. The translation of authorial labour into literary property poses its own problems and has been widely criticized, but it is easy to see why legal thinkers would have linked these two concepts. The reputational and communicative views of copyright pose a more significant challenge to the property framework. For example, while it is arguable whether the labour theory can explain why the property right is assignable to others, this feature is even harder to explain under a dignitary theory, which describes rights that relate specifically to the author. Despite its critics, the labour theory has had a generally enthusiastic reception; in contrast, a view that associates the dignitary theories with a property right requires more explanation.

As noted, dignitary justifications for copyright still endure. However, their re-characterization as a means of bolstering the property argument marks an important step in the generation of modern copyright doctrine. This development reflects the success of the London publishers’ efforts to inculcate the view of copyright they had taken for granted in the

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13 Jeremy Waldron has argued that Locke’s theory of ‘mixing’ labour cannot be used to ground a property right: “[I]t would be impossible to explain how property rights thus acquired could be alienable – how they could be transferred . . . without offense to the personality of the original acquirer”; Jeremy Waldron, ‘Superseding Historic Injustice’ (1992) 103 Ethics 4 at 17. See also Waldron, ‘Two Worries about Mixing One’s Labour’ (1983) 33 Philosophical Quarterly 37; Waldron, The Right to Private Property (Oxford: Clarendon Press, 1988) at 171–94. Advocates of a common-law copyright occasionally flagged this concern but then dismissed it cursorily. A pamphlet from the 1730s, for example, explains that, before the Statute of Anne, ‘Authors were deemed to have an absolute Right in their Compositions, as the Product of their Labour and Ingenuity,’ and later observes that ‘[w]hether the Author prints [the] Work himself, or sells it to another upon such Terms as he voluntarily thinks fit, is equally the same; and the Purchaser . . . ought to be considered as the Author himself’; Further Reasons Humbly Offered to the Consideration of the Honourable House of Commons, for Making More Effectual . . . An Act for the Encouragement of Learning (London: no publisher [nd]) at 1, 2. References to pending legislation show that the pamphlet was published in 1735 or 1737.
period before copyright was protected by statute. The London members of the Stationers’ Guild were the primary beneficiaries of the scheme of ‘copy’ ownership, described below, a system that disadvantaged printers and publishers in the provinces. Intent on re-establishing the perpetual rights they had enjoyed until the late seventeenth century, the London publishers argued forcefully for an understanding of copyright as property at common law. While the Statute of Anne afforded only twenty-eight years of protection, a common-law basis for copyright could justify the right to an injunction long after this term expired. One of the ironies of the decision in Donaldson v Becket (1774) is that, although the publishers lost the dispute over perpetual protection, they won the argument over the premise for such protection – the premise that copyright was a form of property. To an observer, it might have seemed that a victory for statutory copyright over its shadowy common-law counterpart was also a victory for the view that copyright was a personal right, lacking the hallmarks of property. That assessment would have been mistaken. By 1774, the understanding of copyright as ‘literary property’ had become well-entrenched, and the question of perpetuity – which the publishers had sought to present as an essential concomitant in linking those concepts – had been hived off as a separate concern that could be jettisoned without vitiating this conceptual point.

The argument here proceeds as follows: in the remainder of the introduction, I briefly sketch out contemporaneous legal analogues of reputational and communicative rights that find some resonance in the eighteenth-century copyright cases. The legal background helps to show why these rights might have found a footing in the context of copyright, even if only occasionally and inconsistently. Part I takes up the Statute of Anne and the publishers’ role in its passage and delineates the structure of the property-based interpretation of a statute that did not present itself as dedicated to the protection of property. Part II examines four cases, from the 1720s to the 1770s, through the lens of dignitary and property-based arguments, showing how the latter came to predominate. The conclusion examines the expanding scope of protection of derivative works and the extension of the copyright term, arguing that both modifications have been greatly facilitated by the view that frames copyright as a property right. A dignitary view of copyright would be less likely

14 Statute of Anne, supra note 10, s 11. The term limits are discussed in more detail below, in the text accompanying notes 56–68.
15 (1774) 4 Burr 2408, 98 ER 257 (HL). The case is also reported as Donaldson v Beckett (1774), 2 Bro PC 129, 1 ER 837 (HL) [Donaldson]. The defendant usually spelled his name with only one ‘t’. I draw here on Burrow’s report and use his spelling throughout.
to support these developments. If the current doctrinal landscape is taken for granted, it makes little difference whether we characterize copyright in terms of property, but the history of copyright’s propertization can help to explain how this landscape came into being.

To understand how communicative and reputational rights might have gained any traction in the early development of copyright, it is useful to consider their kinship with other extant legal rights. In the course of the copyright debate, dignitary views often remained implicit or only partially articulated, and so the harms arising under these models generally cannot be specified with precision. Accepting that the comparisons are only approximate, these harms are best understood by analogy to libel and forced self-incrimination. If the analogies were fully developed, the communicative offence would come closer to compelled speech and the reputational offence would look more like libel. In the eighteenth century, libel was a well-established criminal and civil offence, arising from malicious statements that exposed a person to public hatred, ridicule, or contempt. Truth was not a defence, and an action could be brought on behalf of a deceased person, but only by a relative. Thus, while a libel claim could survive the plaintiff’s death, it was a personal right that could not be assigned to a third party. In general, legal claims for personal injuries were available only to the plaintiff and were not capable of assignment to third parties. Libel was not unusual in this respect, but it stands as a paradigmatic example of a personal action because it responds to assertions about the plaintiff’s character.

The right against self-incrimination, on the other hand, was still developing in the eighteenth century. Insofar as English law recognized such a right, it had a limited scope and was better recognized in the civil law than the criminal law. Where available, the right could be exercised only by the person whose testimony was being solicited; thus, it hardly even makes sense to speak of assigning the right. The Latin maxim that

16 See e.g. John Rayner, A Digest of the Law Concerning Libels (London: Woodfall & Strahan, 1765) at 1–2.
17 See e.g. Anonymous (case 96) (1586), Godbolt 81, 78 ER 50 (KB): ‘[D]amages which are to be recovered for trespass, battery, &c. cannot be assigned over, because they are as yet uncertain’; William Blackstone, Commentaries on the Laws of England (Oxford: Clarendon Press, 1766) bk 2 at 468 [Blackstone]: ‘[T]he general rule of the common law [is] that no chose in action is assignable.’
today is seen as the basis of the right against self-incrimination – *nemo tenetur prodere seipsum* – entered English law from the *ius commune*. The maxim was often invoked by English jurists in the sixteenth and seventeenth centuries, but not as a basis for protecting criminal defendants against impermissible questions. In the Restoration, courts began to recognize a right of witnesses in civil cases not to answer questions that would render them liable to criminal prosecution. MRT MacNair notes that by the close of the seventeenth century, the right had been ‘extend[ed] to defamatory questions as well as incriminating ones.’

This account is consistent with RH Helmholz’s observation that the *nemo tenetur* maxim served in the *ius commune* ‘not [as] a defendant’s unqualified right to refuse to answer any and all questions about his past conduct, [but as] a protection against intrusive questioning into one’s private conduct and opinions by officious magistrates.’

Helmholz notes that ecclesiastical commentators, justifying the related principle in canon law, ‘endorse[d] something akin to the modern right of privacy. There was a sphere of life into which the public authorities, whether from church or state, were not entitled to enter.’ As John Langbein has shown, it was not until the end of the eighteenth century, with the rise of criminal defence counsel and a new conception of the criminal trial as a forum for testing the strength of the prosecutor’s case, that *nemo tenetur* began to justify the silence of criminal defendants as a general matter.

To the extent that this right finds any resonances in contemporaneous rationales for copyright protection, I suggest that in both instances, we are seeing early and tentative expressions of the privacy principle that would find fuller articulation in the nineteenth century, particularly in Warren and Brandeis’s famous article on the right to privacy, which draws on several of the cases discussed below.

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19 MacNair, ‘Early Development,’ ibid at 79.
20 Helmholz, supra note 18 at 44. Peter Brooks has also discussed ‘the private realm of belief and thought’ in relation to Helmholz’s account; see Peter Brooks, *Troubling Confessions* (New Haven, CT: Yale University Press, 2000) at 75.
21 Helmholz, supra note 18 at 27 [footnote omitted]. This idea is also explored in Robert Gerstein, ‘Privacy and Self-Incrimination’ (1970) 80 Ethics 87.
22 John Langbein, ‘The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries’ Helmholz et al, supra note 18 at 82–108. In relation to criminal defendants, it appears that the right had been evolving since the early eighteenth century. Geoffrey Gilbert’s *The Law of Evidence*, probably written at the beginning of the century but not published until 1756, asserts that a confession ‘must be voluntary and without Compulsion; for our Law . . . will not force any Man to accuse himself’; Sir Geoffrey Gilbert, *The Law of Evidence* (London: Lintot, 1756) at 140. See also MacNair, ‘Early Development,’ supra note 18 at 84.
23 Samuel Warren & Louis Brandeis, ‘The Right of Privacy’ (1890) 4 Harv L Rev 193; see e.g. ibid at 198 and 198, n 2, citing Yates J in *Millar v Taylor* (1769), 4 Burr 2503, 98 ER
Before examining the interplay between the dignitary and property-based views of copyright in the eighteenth century, it is worth asking whose interests were most closely aligned with the latter perspective. One of the primary motives for classifying copyright as property arose from the London publishers’ monopolistic conventions. In the sixteenth and seventeenth centuries, members of the Stationers’ Guild were already treating publication rights as a kind of property. By virtue of its charter, the guild had a monopoly on printing. Among booksellers (as the publishers called themselves), the ‘copy’ of a book, established by entry of their name and the title in the guild Register, created an exclusive right of publication that lasted in perpetuity. For those who relied on this prototypical form of copyright, the right to restrain others from printing a book was readily seen as a kind of property because it amounted to a permanent and exclusive right to profit from the text. Financial concerns were the main – and usually the sole – basis for the protection of copies. Because guild members were the only persons entitled to use the register, copies were a kind of professional asset. The amount paid for a copy was an investment, and unauthorized editions could only be seen as competition for profits. As John Feather has shown, by the late sixteenth century, guild members had begun to treat

201 (KB) [Millar v Taylor]; equally, ibid at 199–200 and 200, n 1, citing Duke of Queensberry v Shebbeare (1758), 28 ER 924 (Ch) [Duke of Queensberry]; ibid at 210 and 210, n 1, also citing Shebbeare. For a helpful recent discussion that discusses the role of eighteenth-century poetry in the genealogy of ‘the right to privacy,’ see David Rosen & Aaron Santesso, ‘Inviolate Personality and the Literary Roots of the Right to Privacy’ (2011) 23 Law and Literature 1.

24 ‘By the beginning of the eighteenth century a “bookseller” could, in common parlance, be a publisher and retailer of books, or a retailer acting as an agent for a wholesale publisher. The “topping” bookseller undertook the financing, printing, and distribution of books to other booksellers or directly to the public’; Raven, supra note 7 at 15.

25 As John Feather puts it, ‘Here we have, in all but name, the concept of copyright’; John Feather, ‘From Rights in Copies to Copyright’ in Marsha Woodmansee & Peter Jaszi, eds, The Construction of Authorship (Durham, NC: Duke University Press, 1994) at 197 [Feather, ‘Rights in Copies’]; see also JA Downie, ‘Periodicals, the Book Trade, and the “Bourgeois Public Sphere”’ (2008) 14 Media History 261 at 262: ‘[C]opyright was [not] invented . . . with the passing of the [statute] which came into force in 1710’; rather, ‘copyright had [previously] resided with members of the Stationers’ Company.’

26 Some publishers might also have reputational concerns, concerning the quality of their list and the elegance of the books they produced, for example; thus, unauthorized reprints of low quality, issued by someone associated with scurrilous texts, might pose more than simply a financial threat to a literary bookseller like Andrew Millar or Robert Dodsley.
copies as property, using them ‘as security for a debt’ and engaging in practices such as ‘transfers by purchase, inheritance and gift, [and] subdivision into shares.’  

When the Licensing Act lapsed, in 1695, guild members lost the regulatory basis for enforcing the prohibition on unauthorized printing, and they spent the next fifteen years fighting to restore it – and found themselves forced to articulate a rationale for the property right they had been taking for granted. This is not to say that booksellers alone had an interest in a property-based view of copyright. However, writers and jurists also had reasons for considering the needs of users and the public, and tended to have more complicated and even contradictory views that did not simply categorize copyright as property.

A THE STATUTE OF ANNE
To make sense of the property-laden arguments that flourished in the eighteenth century, we must disentangle three concepts that were often blended: property, perpetuity, and the common law. For the booksellers, perpetuity was the key. Until 1695, they had enjoyed a perpetual right, and so they regarded the limited term of protection in the 1710 statute as illegitimate. Their preferred approach was to show that copyright had existed at common law before the statute was passed. This was most easily achieved by affirming what they already knew from experience: that copyright was a form of property. From that premise, the booksellers argued that the statute complemented the common-law right by adding penalties during the specified time frames but did not cancel the pre-existing right.

Under slightly different conditions, this argument might not have seemed so appealing or even necessary. Claims about property and the common-law right were mutually reinforcing but potentially severable: property may be created by statute, and a common-law right other than a property right might have fit the bill. Given the booksellers’ perceptions and practices, however, it seemed obvious to them that the right in dispute was a property right; moreover, it was well understood that


28 As De Grey LCJ noted in Donaldson, supra note 15, the London booksellers did not promote ‘the Idea of a Common Law Right in Perpetuity, . . . till after [their] Failure in procuring a new Statute’ for the extension of the copyright term in the 1730s. These failed attempts, De Grey explained, led the booksellers to reason that ‘if . . . the Legislature will not do it for us, we will do it without their Assistance,’ and only then did anyone ‘begin to hear of this new Doctrine, the Common Law Right’; cited in The Cases of the Appellants and Respondents in the Cause of Literary Property, before the House of Lords . . . with the Genuine Arguments of the Council, the Opinions of the Judges, and the Speeches of the Lords (London: Bew, 1774) at 47 [Cases of the Appellants].
property was assignable, and this feature was a crucial requirement for the booksellers’ purposes. If understood as a personal entitlement, the exclusive right to print would not be assignable; further, that way of characterizing the right makes it seem more *sui generis* and less likely to find a familiar basis in the common law. Again, if the statute had given a perpetual right of protection, the booksellers would have had little reason to search for its common-law origins, and any occasion for relating copyright to property would have reflected different motives and might have focused on narrower doctrinal questions. The booksellers’ attempts to reinstate the perpetual protection they had once enjoyed led to a complex array of justifications welded to ideas about property. Given the contrast between the limited statutory term and the perpetual protection that the booksellers had formerly enjoyed, the arguments for a property right and for a common-law origin seem closely aligned. The concepts need to be disaggregated, however, partly because they were often condensed and conflated in arguments whose thrust today would no longer be self-evident, and partly because contemporaries did not always approach the issues with the same assumptions as the booksellers. Critics who objected to a certain move in the argument were not necessarily aiming to dismantle the whole structure but might instead be concerned about particular aspects of the equation that had been overlooked in the booksellers’ outcome-driven approach to the problem.

To register the booksellers’ effect on the debate, we may contrast the case of copyright with two other forms of protection now also regarded as intellectual property: patents and rights over visual designs. In the volume of his *Commentaries* devoted to property, Blackstone says nothing about the rights of visual artists, and devotes only two sentences to patents for inventions, which he describes as ‘privilege[s] . . . granted for fourteen years to [an] inventor,’ vesting a ‘temporary property . . . in the patentee.’ Patents were sometimes categorized in this fashion, but from a modern perspective, eighteenth-century discussions of the subject are notable for their lack of concern with the role of property. Advocates for a property-based view of copyright found themselves constrained to explain why patents and copyrights were different, much to the amusement of those who took an opposing view. Doubtless there are many

29 Blackstone, supra note 17, bk 2 at 407.

30 Compare e.g. William Warburton, *A Letter from an Author to a Member of Parliament, Concerning Literary Property* (London: Knaplock, 1747) at 8–9 [Warburton] and also Catherine Macaulay, *A Modest Plea for the Property of Copy Right* (Bath, UK: Crutwell, 1774) at 17–8 [Macaulay], both striving to distinguish patents from copyrights, with *An Enquiry into the Nature and Origin of Literary Property* (London: Flexney, 1762) at 26–9 [Enquiry] and Alexander Donaldson, *Some Thoughts on the State of Literary Property* (London: Donaldson, 1764) at 8, both arguing that limited-term protection for
reasons for the lack of discussion about patents as property at common law, but one factor involved the absence of an organized group of professionals who had a shared interest in retaining patent rights in perpetuity.

Several decades after the *Statute of Anne*, rights would be afforded to visual artists under the *Engravers’ Act*, which covered prints and engravings for a single term of fourteen years.31 In this case, ‘it was the artists themselves . . . who directly petitioned parliament for protection on their own terms’ and their complaints were directed at ‘the established print dealers.’32 The statute’s title referred to its subject matter as ‘propert[y],’ but the term does not reappear in the text.33 The preamble spoke to the protection of prints created by the artists’ ‘genius, industry, pains, and expence’ and lamented the proliferation of ‘base copies of such works . . . to the very great prejudice and detriment of the inventors, designers, and proprietors.’34 The detriment here is at least threefold, encompassing financial concerns about sunk costs, a justification based on labour, and a concern to ensure that works of genius are not debased by poor imitations. In explaining its goals, the statute refers to proper compensation for the artist and protection of the art work’s integrity. A twenty-eight-year term of protection might have seemed the obvious choice, given the available model, but the statute provided for only fourteen years, a term that was apparently thought to be consistent with the blend of rationales prompting this legislation. The focus on reputation did not justify an extension of the term of protection and may even have helped to justify the more limited term.35 The artists, in any

patents justifies similar treatment of copyrights; see also discussion in note 139 infra. Given this view of patents, it is not surprising that historians date the emergence of modern patent law to the early nineteenth century; see Brad Sherman & Lionel Bentley, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (Cambridge: Cambridge University Press, 1999) at 105–10.


32 Ibid at 90.

33 It did, however, refer to the rights-holders as ‘proprietors,’ as did the *Statute of Anne*, supra note 10; see text after note 49 infra. The statute’s sequel, the *Engravers’ Copyright Act*, 1767 (UK) 7 Geo 3, c 38, which extended protection of Hogarth’s prints for twenty years after 1767, at several refers points to his prints as ‘property.’

34 *Statute of Anne*, supra note 10.

35 Such a view must remain speculative, but the idea that reputational rights might have justified a shorter term is consistent with the provision in an unsuccessful copyright bill proposed in 1737 that would have protected authors for three years after a book’s initial publication from being ‘injured by . . . hasty and incorrect Abridgements’ that could ‘lessen the Sale . . . [and] sink the Reputation of the original Composition’; *An
case, do not seem to have sought a longer term. Thus for somewhat different reasons, neither patents nor visual rights provided a desirable analogy for advocates of copyright as a property right.

In the course of the effort to restore the status quo, the booksellers had to offer publicly persuasive justifications, and some of these involved claims about the author’s right to speak to the public. Historians have noted that, during the fifteen-year struggle for legislation recognizing an exclusive right to print, the booksellers shifted from censorship-oriented regulatory rationales of the kind that had been persuasive in the seventeenth century, to arguments emphasizing authors’ interests. The idea of an author’s right to decide when to publish obviously helped to buttress this new emphasis, and indeed, some commentators remarked cynically on that motivation. The arguments drawing on authors’ rights rely on a similar structure, which would be repeated in many of the legal justifications of a property-based conception of copyright. A common feature of these arguments is that while the author’s dignitary rights might seem at first glance to provide the basis for a property right, closer scrutiny reveals that they do not actually serve that function. Rather, these accounts either treat the property right as a given or rely on labour as its foundation and then bring in dignitary concerns as a means of cementing the argument. Dignitary concerns are presented as consonant with the property right, perhaps even valuable reinforcements for it, but not as its fundamental basis. In that way, the proponents of the property approach were spared the need to confront the disparities between a dignitary view and the one they preferred. Because dignitary concerns were assigned a supporting role rather than a central one, they could be

Act for the Encouragement of Learning, by the More Effectual Securing the Sole Right of Printing Books to the Authors thereof . . . during the Times therein Mentioned (British Library shelfmark 357.c.7(41)) at 13 [Act for Encouragement of Learning]. Where the aim was to guard against inaccurate renderings of a work, it was evidently thought that a few years of control over distribution of the work would be sufficient. For more on this bill, see infra note 76.

On the rhetorical shift, see John Feather, ‘The Book Trade in Politics: The Making of the Copyright Act of 1710’ (1980) 8 Publishing History 19; Mark Rose, Authors and Owners: The Invention of Copyright (Cambridge, MA: Harvard University Press, 1992) at 34–7 [Rose].

For example, in his argument as counsel for the Edinburgh booksellers in Donaldson, supra note 15, Attorney General Edward Thurlow observed that ‘[t]he [London] Booksellers . . . have not, till lately, ever concerned themselves about Authors, but have generally confined the Substance of their Prayers to the Legislature for the Security of their own Property; nor would they probably have, of late Years, introduced the Authors as Parties in their Claims to the Common Law Right of exclusively multiplying Copies, had they not found that necessary to give a colourable Face to their Monopoly’; cited in Cases of the Appellants, supra note 28 at 20.
cited to ratify the view of copyright as property and there would be no need to probe the fault lines of a justification that was, after all, merely supplementary.

A version of this argument, featuring the property right as a premise rather than as a conclusion, appears in an anonymous broadside probably issued a year or two before the 1710 statute. The author begins by explaining that ‘[w]e have always esteemed [the exclusive right to print] a Just and Legal Property,’ and ‘we conceive, this Property is the same with Houses and other Estates.’ 38 The opening move is to assert that copies have traditionally been seen this way, and that provides a sufficient reason for assuming that they deserve protection as a form of property. Next, ‘according to common law . . . [a]n Author is absolute Master of his own Writings’ and ‘has certainly a Right to choose the Hand by which he will convey his Work to the Publick.’ 39 The author’s dignitary right to decide when and how to publish (a right here tacitly assumed to last in perpetuity) then becomes a perpetual right of booksellers against reprinters: ‘[A]n Author, who has the original indisputable Right of Publishing [the] Work, does undoubtedly give the Bookseller the Sole Power of Printing it the first time,’ and when this power has been conveyed, ‘[t]he Bookseller . . . has the sole Right of

38 The Case of the Booksellers Right to their Copies, or Sole Power of Printing their Respective Books, Represented to the Parliament (London, [nd]) (British Library shelfmark 1887. b.58(3)) [Case of the Booksellers]. Given the comments about perpetual protection, this broadside might seem to be a response to the threat of a limited term, proposed in 1710. However, the other responses refer expressly to the term limit, and they also refer to the bill by its title, while this broadside does neither (compare e.g. the titles of More Reasons Humbly Offer’d to the Honourable House of Commons, for the Bill for Encouraging Learning (London: no publisher, 1710) [More Reasons], and The Booksellers Humble Address to the Honourable House of Commons, in Behalf of the Bill for Encouraging Learning, &c. (London: no publisher, 1710) [Humble Address]). Further, the tone suggests that the broadside was not a reaction to a legislative proposal but was instead a call for legislation; for example, the author writes that the ‘[l]iberty now set on foot of breaking thro’ this ancient and reasonable Usage, is no way to be effectually restrained but by an Act of Parliament’; Case of the Booksellers, ibid. The broadside was probably published before the bill that Wortley introduced in January 1710 and may have been published a year or two earlier. Rose dates it to 1710; Ronan Deazley to 1709; and the English Short Title Catalogue proposes ‘1708?;’ see Rose, supra note 36 at 44; Ronan Deazley, ‘What’s New about the Statute of Anne? Or Six Observations in Search of an Act’ in Lionel Bently, Uma Suthersanen, & Paul Torremans, eds, Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace (London: Edward Elgar, 2010) 26 at 47 [Deazley, ‘What’s New’]; English Short Title Catalogue, online: British Library (ESTC no T20156) <http://estc.bl.uk/F/?func=file&file_name=login-bl-estc> [ETSC]. The dating in the ETSC apparently comes from The Guildhall Miscellany (London: Library Committee of the Corporation of London, 1960) vol 2 at 114, which voices the same doubt.

39 Case of the Booksellers, ibid.
Authorial control has not been described as property in this account, but as the next step shows, that correspondence has been tacitly assumed: booksellers are entitled to perpetual protection because ‘[e]very man that buys a Property is in all other Cases allow’d to enjoy it for ever.’ These are not steps in a proof that copies are property; instead, we are given descriptions of the security that is needed for a right already defined at the outset as property. To allow only a limited protection would be to impose an unfair distinction between printing and ‘all other Cases,’ including ‘Houses and other Estates.’ In this early form of the argument, the equation between ‘the sole right of printing’ and a property right must be inferred because it is not set out explicitly. The argument asserts that (1) the booksellers have a property right; (2) this right serves the same ends as the author’s common-law ‘sole right of printing,’ which is also implicitly treated as a property right; (3) because the author’s right lasts in perpetuity, so must the bookseller’s. Later versions would use similar logic but would do more to make it seem that the property right was being produced in the course of the argument.

Given that the Statute of Anne was the result of many years of lobbying by the publishing industry, it is hardly surprising that the first version of the bill framed the object of protection as an object of property. As Benjamin Kaplan notes, those who drafted the bill in its original form were thinking about the rights involved ‘as a printer would.’ As the bill was revised, however, other perspectives were brought to bear, however imperfectly. The stationers’ monopoly on printing and on copy-owning was eliminated and a limited term of protection was created. The result, in
the final form of the statute, was an uneasy compromise among the needs of booksellers, authors, and the public.\footnote{This compromise has been discussed variously in Lyman Ray Patterson, Copyright in Historical Perspective (Nashville: Vanderbilt University Press, 1968) at 143–50; Rose, supra note 36 at 48–9; David Saunders, Authorship and Copyright (London: Routledge, 1992) at 54–6; Feather, Publishing, supra note 27; Deazley, Origin, supra note 31 at 45–50; Joseph Loewenstein, The Author’s Due (Chicago: University of Chicago Press, 2000) at 218–9; Oren Bracha, ‘Owning Ideas: A History of Anglo-American Intellectual Property’ (SJD thesis, Harvard Law School, 2005) [unpublished] at 184–5 [Bracha, ‘Owning Ideas’].}

The draft initially submitted in 1710 was thoroughly drenched in the language of property.\footnote{Sir John Dalrymple noted the stationers’ fondness for the rhetoric of property, in his argument against the common-law right as counsel for the plaintiffs in Donaldson, supra note 15. According to the newspaper reports, he observed that ‘the Stationers Company, conscious that no [common-law property right] existed, took especial care in all their bye law and resolves, to introduce the words PROPERTY and PROPRIETERS as frequently as possible’; Morning Chronicle and London Advertiser (11 February 1774) 2; see also Tonson v Collins (1761), 96 ER 169 at 172 [Tonson v Collins 1761]: ‘The Word Property in the Statute of Queen Anne arises from the Wording of the Orders of the Company of Stationers in 1691; who were fond . . . of asserting such a right’ (argument of Edward Thurlow for the defendants). Lord Mansfield did not issue a ruling during the first round in this litigation but instead ordered that the dispute ‘stand over for farther argument’ while the counsel looked more carefully into the cases involving Chancery injunctions; ibid at 173. The case was re-argued the following year by Blackstone for the plaintiff and Joseph Yates (later Yates J) for the defendant; Tonson v Collins (1762), 96 ER 180 (further proceedings) [Tonson v Collins 1762].} In petitioning for a bill, the booksellers announced matter-of-factly that ‘it has been the constant usage for the writers of books to sell their copies to booksellers or printers, to the end [that the latter] might hold those copies as their property.’\footnote{UK, Journal of the House of Commons, vol 16 (12 December 1709) at 240. Reviewing the statute’s origins half a century later, a commentator noted that ‘[t]he Narrative does not allege, that, at common Law, [anyone] had any Right of Property; but only sets forth, that there had been a constant Usage of selling Books, to be held as a Property; which is a plain Acknowledgment by the Petitioners themselves, that there was here no real Right of Property, but only something which they had been pleased to view as a Sort of Property, or compare to a real Property. But the Subsumption immediately infers from this, that they actually had a real Property . . . which, however artful, is plainly inconsistent and inconclusive’; John Maclaurin, Lord Dreghorn, Considerations on the Nature and Origin of Literary Property: Wherein That Species of Property Is Clearly Proved to Subsist no Longer Than for the Terms Fixed by the Statute 8vo Anne (Edinburgh: Donaldson, 1767) at 7 [Dreghorn].} The Commons responded to the petition by granting leave for Edward Wortley to bring in a bill ‘for securing to [the petitioners] the Property in Books.’\footnote{UK, Journal of the House of Commons, vol 16 (11 January 1710) at 260.} The initial version, presented on 11 January 1710, was titled ‘A Bill for the Encouragement of Learning, and for the Securing the Property of
Copies of Books to the Rightful Owners thereof.’ The title finally adopted, however, 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.’ The word ‘property’ is gone and the limited term is featured prominently in the title. Gone, too, are the other references in the initial draft to books as property, such as the assertion that authors have an ‘undoubted property [in their] Books and Writings.’ The Statute of Anne, as finally passed, often refers to the copy-owning booksellers as ‘proprietors,’ a term that evidently seemed distant enough from ‘property’ to avoid raising the same worries.

Mark Rose speculates that this pattern of revision reflects the legislators’ response to a broadside in which the booksellers insisted that there could be no limitation on the copyright term because ‘if we have a Right for Ten Years, we have a right for Ever.’ Citing this argument, Rose suggests that the effort misfired: ‘[P]erhaps some of the legislators became uneasy about including a statement that might be taken to imply that authors had a common-law right’ in copies that preceded the statute.

While this explanation registers the force of the booksellers’ zest for common-law origins, it overlooks other possible reasons for the change. The legislators’ resistance may also have reflected their uneasiness about the language of property itself. The term ‘property’ might have seemed to resolve prematurely a variety of questions about the rights and duties that flow from copyright when those questions were still inchoate. The idea of perpetual copyright, for example, might be based on a common-law right or might be regarded as inherent in the status of property, even when created by statute. Similarly, disputes about the treatment of copyrights in bankruptcy, forfeiture, trusts, and other contexts might seem to be prejudged, or at least misleadingly illuminated, by characterizing copyright

49 Cited in Deazley, Origin, supra note 31 at 41. Commentators drew conflicting conclusions from this pattern of alteration. Dreghorn, supra note 46 at 10, took the changes as evidence against a common-law theory. Justice Willes, in Millar v Taylor, supra note 23 at 217, observed that the preamble was ‘infinitely stronger in the original bill,’ and concluded that the earlier draft revealed the true nature of the property involved. Justice Aston took the same view in Donaldson; cited in Cases of the Appellants, supra note 28 at 40.
50 More Reasons, supra note 38, quoted in Rose, supra note 36 at 44. The comment about ten years of protection appears to be merely illustrative; later the broadside talks of ‘Ten or Fourteen Years.’
51 Rose, supra note 36 at 45. The claim about the common-law origins of the protection being sought is raised even more directly in another leaflet, which asserts that the bill ‘only Tends to confirm a Right which has been Enjoyed by Common Law above 150 Years’; Humble Address, supra note 38.
52 See e.g. the text accompanying note 38 supra.
The question of perpetuity is indicative of a barrage of issues that the legislators may have wished to leave alone. Given the overhaul they performed, we can only speculate as to whether the statute was meant to include its only remaining use of the term ‘property,’ in section II, which speaks of the need to make ‘provision . . . whereby the property in every . . . book . . . may be ascertained.’ This language appears in a subordinate clause involving the notice function of the registration requirement. It is an unlikely place for a provision aimed at identifying the common-law basis for the whole statutory scheme. Others have noted that the statute is not a model of careful drafting; perhaps this phrase is simply an overlooked remnant from the original version.

The statute also introduced a two-term arrangement that was ignored in practice, but that, if honoured, could have modulated the copy’s status as property by associating it with other interests. Protection was to last for fourteen years and was to ‘return to the Authors . . . if they are then Living, for another Term of Fourteen Years.’ This clause was one

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53 E.g. in *Millar v Taylor*, supra note 23 at 245, Yates J challenged the property classification because he could not see how copyrighted material could be ‘taken in execution for a debt,’ or could ‘be forfeited’ if the author ‘commit[ted] treason or felony.’ Willes J disagreed with Yates J’s conclusions, but similarly posed ‘the case of an unpublished manuscript taken in execution by creditors, or claimed by assignees under a commission against a bankrupt-author’ and added that ‘[w]hen a question of that sort arises, the Court will consider what is right’; ibid at 205. See also *Cases of the Appellants*, supra note 28 at 40: ‘If Literary Property is a Chattel, then upon the Death of the Possessor of a Manuscript, any simple contract Creditor may oblige his Family or Assigns to give it up, and suffer him to print it’ (Perrot B); and *Enquiry*, supra note 30 at 34–5: if copyright is ‘Establish[ed] [as] Property,’ an author who takes ‘the Benefit of the Insolvent Act’ may be required to ‘discove[r] his Manuscripts,’ and ‘Creditors [may] have an Interest in all the Ideas of their Debtors.’

54 *Statute of Anne*, supra note 10, s 2. The Scottish Court of Session, interpreting the statute in *Midwinter v Hamilton*, (1748), cited in *Remarkable Decisions of the Court of Session* (1730–1752) (Edinburgh: Kincaid, 1766) 154 at 157 [*Midwinter*], took a very sceptical view of copyright as property and presumably had this section in mind when observing that if the ‘exclusive privilege [of publishing] is named a property in the statute,’ that could only be ‘because it is proper or peculiar to those to whom it is given by the statute.’

55 On drafting problems, see Deazley, *Origin*, supra note 31 at 46–9; see also John Trusler, *An Essay on Literary Property* (London: Printed for the Author, 1798) at 19: ‘Whoever looks over this Act of Parliament, will find it very imperfect, obscure, and incorrectly drawn.’

56 *Statute of Anne*, supra note 10, s 11. The fourteen-year period was evidently modelled on the term of protection for patents. Lord Hardwicke, when declining in 1750 to hear the appeal in *Midwinter*, supra note 54, reportedly said that the *Statute of Monopolies*, 1624 (Eng), 21 Jac 1, c 3, ‘gave the King a Power to grant Patents . . . for a Term of 14 Years’ and that ‘[t]he Statute of Queen Anne, as to the Property of Authors and Books, might [analogously] be considered as a general standing Patent to Authors’; cited in Dreghorn, supra note 46 at 26. See also Blackstone, supra note 17, bk 2 at
of the statute’s most innovative provisions. In a system that treats copyright as lasting indefinitely and that typically involves a single transaction between author and publisher, the copy is readily attached to the category of property. The right to exclusive publication is, in effect, equated with the manuscript, so that both change hands together. The new owner is a commercial actor for whom the property function exhausts the significance of the copy. For an author, questions about when to print, in what format, and in what quantity, might bear on communication or reputation; for the publisher these are commercial calculations. But while the publisher’s view may be the definitive one if the copy is sold in a one-time transaction, in a reversion system, the copy may not be equivalent to an object of property because the copy has other aspects that it may retain or regain once the initial term of protection is concluded. When the second term begins, the author might consider revisions in format or editorial changes, along with financial matters. Alternatively, the author might forsake the second term, preferring to let the text circulate widely by making it available for anyone to print. Without the reversion, none of these options associated with renegotiation or abandonment of the copyright are likely to arise and, accordingly, the proprietary aspect of the copy is heightened.

If this provision complicates the copy’s status as property, that is not because of the reversion itself; rather, the change is associated with the effects flowing from the reversion. The reversion of title had been a well-established feature of the law of real property since feudal times and can hardly, by itself, have diminished the power of the property framework.

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407, noting that the limited-term provisions in the Statute of Anne and the Engraving Copyright Act ‘appear to have been copied from . . . the statute of monopolies.’

57 Renewal requirements are usually seen as claims-clearing devices, aimed at affording protection only for works that a copyright-holder cares to claim; see Robert Spoo, ‘Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses’ (2004) 6 Joyce Stud. 1 at 6–7: ‘the renewal requirement . . . served as a valuable clearinghouse for unwanted copyrights.’ Yet if failure to renew may reflect apathy about unprofitable books, it may also reflect a desire to make the work more readily available. Willes J raised this possibility in Millar v Taylor, supra note 23 at 205, distinguishing James Thomson’s sale of The Seasons from ‘cases, where the author may be supposed to have relinquished the copy, and consequently to have given a general licence to print.’ For Yates J, this scenario provided another argument against a common-law copyright. He wondered, ibid at 235, how ‘it [can] be known, when such a sort of property is abandoned,’ and asked, ibid at 249, what would happen if ‘an author should drop all design of making further gains to himself,’ noting that without a basis for determining abandonment (such as a registration requirement), ‘[s]o obscure a property (especially after the work has been a long while published) might lead many booksellers into many litigations’ because it would be impossible to tell ‘whether the author . . . intend[ed] it as a gift to the public’; ibid at 250 [internal quotation marks omitted].

58 Thanks to Jim Phillips and Lisa Austin for pressing me on this point.
The model offered by real property suggests that, in the context of copyright, the author was identified as the underlying, ongoing owner in the same sense as the king or a feudal lord in the case of real property. (Notably, that view of the author was taken up not by those who defended the statute’s reversion scheme but by advocates of perpetual copyright.)

The underlying claim might never be reinvigorated, just as the author’s claim would expire if the author died before the end of the first fourteen-year period (and just as a residuary beneficiary’s claim might not arise under a will), but at least conceptually, by designating the author as the person to whom the copy reverts, the statute ensures that someone other than the bookseller can step in after the first term of protection ends. Yet the statute does more than that by giving this role to the author, whose interests might include dignitary concerns when the question of renewal arose, and by setting a deadline for the reversion, unlike the usual arrangement for real property. Those interests thus remain lingering in the background along with the author’s claim – not certain to be asserted, but capable of being promoted under a plan that anticipates the copy’s return to the author according to a predictable schedule.

The reversion scheme also reflected an anti-monopolistic impulse. L. Ray Patterson has thoroughly explored this rationale and has shown that

59 See e.g. Sir Frederick Pollock & Frederic William Maitland, History of English Law before the Reign of Edward I, 2d ed (Cambridge, UK: Cambridge University Press, 1968) vol 1 at 232–40, 351; ‘Origins and Development of Modern Escheat’ (1961) 61 Colum L Rev 1319. This view of the author as feudal lord has strong affinities with literary critical attitudes toward authorial authority that would emerge in the nineteenth century – particularly the idea that the author’s intention always remains an essential constraint that governs the possible interpretations of a work. The legal conditions bearing on this view probably have more to do with the extension of the copyright term than with the reversion arrangement, which the English eliminated in 1814 (though it persisted much longer in US law); see Bently & Ginsburg, supra note 7 at 1541–8.

60 One commentator, for example, saw the author as a feudal lord who might allow others to make use of his land but could always reassert his superior right to the property: ‘If a Cottager, who has a Right of Common in the Waste of a Manor, should offer to build or plant upon it, those Improvements would belong to the Lord of the Manor’; A Letter from an Author to a Member of Parliament, Occasioned by a Late Letter Concerning the Bill Now Depending in the House of Commons, for the Encouragement of Learning, &c. (London, no publisher, 1735) at 2. The booksellers applied this image to themselves in 1774, when lobbying for renewed protection after Donaldson, supra note 15: ‘The Copy-holder, like the lord of a soil, is sensible that his emolument must be estimated by the cultivation’; General Observations on the Expediency of Granting Relief in Literary Property (London, no publisher, 1774) at 2.

61 A leasehold, of course, sets a deadline for reversion to the owner, who has an ongoing interest in the way that this account contemplates. Arguably, the reversion provision may be seen as setting out a standard term during which the author leases the printing rights. However, according to the conception of the original owner as a feudal lord, reversion according to a set schedule is neither required nor expected.
Parliament sought to promote competitive pricing of books and access for both editors and readers. On this view, the limited term of protection might be analogized to the use of termination dates in non-competition agreements, reconceived around this time to ensure that a contract effecting a restraint of trade would be permitted only if the restraint was limited to a reasonable time. But while this explanation accounts for the limited term, it does not account for the reversion. That feature combines the anti-monopoly goal with the effects already described, promoting authorial interests not only in the text as property, but also in the dignitary possibilities that flow from renewed control.

If the two-term arrangement was a late addition to the statute, as some have thought, this suspension of proprietary status, signalling an openness to other ways of regarding the copy, would seem to be a happenstance complement to the drafting revisions that weeded out the language of property. There is, however, evidence to suggest that the scheme was introduced in the Commons around the time of the bill’s second reading, and not in the Lords, after the bill’s third reading. On 15 February 1710, the Observator, a London political journal, devoted the second of two issues to the pending legislation. The matter is canvassed in the journal’s usual fashion, in a dialogue between the ‘Observator’ (the editor’s persona) and a ‘Countryman.’

64 Observator (11–5 February 1709/10) at 1. (This issue of the Observator is dated ‘Saturday, February 11 to Wednesday, February 15, 1709’; i.e. 1710; until 1752 the new year began on 25 March). Information from other issues suggests that the Observator was published on the last date in the masthead, not the first date; e.g. Henry Sacheverell was sentenced on 23 March 1710 and the Observator reported on the event in the issue dated 22 March to 25 March. In 1710, the paper was being operated by George Ridpath, the successor to John Tutchin, who had revived it as a Whig paper in 1702 (in its first series, published in 1681–7, the Observator was a Tory paper run by Roger L’Estrange). For more on the journal’s politics, see William A Speck, ‘Politics and the Press’ in Michael Harris & Michael Lee, eds, The Press in English Society from the Seventeenth to Nineteenth Centuries (Rutherford, NJ: Fairleigh Dickinson University Press, 1986) at 48, 52–6. For other discussions of Ridpath’s essay in relation to the reversion scheme, see Bently & Ginsburg, supra note 7 at 1486–7; Deazley, ‘What’s New,’ supra note 38 at 48; and Simon Stern, ‘Common Markets: Henry Fielding, Sarah Fielding, and the Proprietary Author’ (PhD thesis, University of California-Berkeley, 1999) 37, n 62.
65 On the dialogue format, common in Restoration and eighteenth-century political newspapers (and used by L’Estrange as editor of the original Observator), see Lois G Schwoerer, The Ingenious Mr Henry Care, Restoration Publicist (Baltimore, MD: Johns
the ‘Kindness [meant for] us Authors . . . *viz.* That the Bookseller shall have a Property in the Copy only for a limited Time, after which it shall revert to the Author or his Assignees.’ This provision, he adds hopefully, will serve ‘as an Encouragement to Learning, and a Security to Authors against being ill treated or impos’d upon by Booksellers, who run away with the Profits of their Labours, which sometimes happens to be very considerable, when Books . . . admit of several Impressions in a little Time . . . so that Authors not being able to foresee this . . . they have nothing more than their first Copy-Money, let the Book sell ever so well.’ The Observer corrects this error, explaining that the shorter the term, the smaller the advance and the print run, so that authors would be ill-served by any such imagined kindness. This discussion occupies both columns on the paper’s first page. While the dialogue does not explain the contours of the proposed reversion, it sounds like the two-term scheme in the final version of the statute. There would be no ‘kindness’ in providing for a single term of protection that ended when the copy reverted to the author. The talk about letting authors profit from their labours and from the experience of a good sales record makes sense only if the reversion is followed by a new term of protection.

The paper does not identify the proposal’s source; the Countryman says only that he has ‘hear[d] of an Objection which is design’d as a Kindness,’ and that ‘they say’ the new scheme will benefit authors. However, this was evidently a new proposal, because the Observer had already argued for the legislation (in emphatically property-based terms) on 4 February, and in the issue of 15 February, the Countryman

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66 Observer (11–5 February 1709/10).
67 Ibid at 1.
68 Ibid.
69 Observer (1–4 February 1709/10) at 1. This issue appeared two days after a petition was presented to the Commons by ‘poor distressed printers and booksellers,’ supporting the three-week-old bill, which may have seemed to be in danger of languishing from neglect, like numerous other attempts since 1695. On 14 January 1710, the Commons set the bill’s second reading down for 19 January, but that date, and the rest of month, passed with no further action. On 4 February after the new petition and the Observer’s first editorial, the second reading was rescheduled for 9 February. Progress then continued slowly but steadily until the statute’s enactment. Defoe also editorialized on the subject, complaining on 2 February that the bill was ‘depending in the House [of Commons], [but] I do not find [that it] goes on . . . currently’; and yet, ‘this being so clear a Case, as containing nothing, but a Law to prevent Barbarity and
begins by asking for his friend’s ‘farther Thoughts,’ prompting the Observator to wonder ‘[w]hat new Objections’ could have arisen on the bill, when ‘we ha[ve] said enough before . . . to sh[o]w its Reasonableness.’ The records are too spotty to show whether the scheme had been formally added to the bill at this point, but given the extensive critique in the Observator, the proposal was apparently receiving enough attention to require a vigorous rebuttal. These objections appeared six days after the bill’s second reading in the Commons (on 9 February), one day before the bill was committed to a committee of the whole house (on 16 February), and a month before the bill was sent to the Lords (on 16 March). The record of the third reading in the Commons (on 14 March) notes the addition of the phrase ‘during the Times therein mentioned’ to the bill’s title. Because the record does not show what limits were added to the bill’s text, efforts to explain this change have compared the initial version (11 January) and the final version sent back from the Lords (5 April). Thus, it has been thought that the two-term scheme was added in Lords, after the Commons proposed a single term limit. But the Observator’s comments show that the reversion scheme was raised in mid-February – perhaps at the bill’s second reading in Commons – and was likely part of the discussions that informed the overall understanding of the statute for the following six weeks.

It is possible, of course, that this provision was discussed in the Commons in February but not actually inserted until later, but in any case, it evidently was not a last-minute idea, contemplated only at the bill’s final stage.

It is worth pausing to ask how ideas about copyright might have developed if the statutory term limits had been taken as definitive. The search for a property-based theory would most likely have occurred in the context of disputes that prompted the analogy (involving collateral, inheritance, or bailments, for example), with the result that the analysis of a property framework would have proceeded by way of a discussion focused on the issue at hand. This would probably have produced common-law judgments of the incremental, context-specific variety, rather than the

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Pyracy, I cannot see, how it can miscarry’; Daniel Defoe, Review of the State of the British Nation (2 February 1709/10) at 515. Defoe returned to the issue on February 11 and 18. These lobbying efforts in the press and by industry members, a time when members of Parliament seem to have lost interest in the legislation, may have made the crucial difference that produced a result after fifteen years of failure.

70 Observator (15 February 1709/10) at 1.
72 See Rose, supra note 36 at 43–4.
73 If the scheme was proposed in Parliament at this time, it was probably introduced by a member of the subcommittee charged with overseeing the bill.
wide-ranging, foundational analyses, blending philosophical and natural-rights arguments, for which the major copyright decisions of the era are distinctive.\textsuperscript{74} If reversion and renewal were regular features of the landscape, authors would likely have figured more regularly as plaintiffs, seeking to enforce the reversion when booksellers ignored it, seeing themselves as more directly affected by piracies and partial uses in anthologies, and feeling better positioned to negotiate and enforce contracts in which payment was related to sales.\textsuperscript{75} The term limits might have been revamped in response to these other concerns.\textsuperscript{76} Authors

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\textsuperscript{74} Whereas the early Chancery judgments, such as \textit{Burnet v Chetwood} (1721), 2 Mer 441, 35 ER 1008 (Ch) \textsuperscript{[Burnet v Chetwood]} and \textit{Pope v Curll} (1741) \textsuperscript{[Pope v Curll]}, 2 Atk 342, 26 ER 608 (Ch), are cursory and elliptical, the later judgments, such as \textit{Millar v Taylor}, supra note 23, and \textit{Donaldson}, supra note 15, are notable for their scope and elaborateness. (Atkyns, supra note 42, misspells Curll’s name as ‘Curl’; to avoid confusion, I spell it ‘Curll’ throughout.) The care lavished on these later disputes, by counsel and judges, may have led them to misread the earlier Chancery cases – rarely even a page long – as reflecting a similar degree of thought and attention and hence to derive justifications that these judgments cannot support; see e.g. notes infra 121 and 131 and accompanying text. Commentators on the later cases often remarked on the high quality and sophistication of the lawyers’ arguments and the judges’ opinions; see e.g. \textit{A Vindication of the Exclusive Right of Authors to Their Own Works: A Subject Now under Consideration before the Twelve Judges of England} (London: Griffiths, 1762) at 1 [\textit{Vindication}], explaining that the question of a common-law right ‘hath exercised the talents of some of our ablest advocates’; \textit{Millar v Taylor}, supra note 23 at 218–9 (Aston J): ‘This case has been . . . often, . . . fully, and . . . ably argued’ and ‘has been ingeniously, metaphysically, and subtly argued on the part of the defendant’; \textit{Cases of the Appellants}, supra note 28 at sig A2r, stating that the arguments in \textit{Donaldson}, supra note 15, reveal ‘an incredible Fund of Learning and Knowledge’; Francis Hargrave, \textit{An Argument in Defence of Literary Property}, 2d ed (London: Otridge, 1774) at 2, stating that the arguments in \textit{Donaldson}, ibid, show ‘extraordinary learning, talents, and industry.’

\textsuperscript{75} Authors did appear as parties in eighteenth-century disputes, as noted below, but most disputes involved booksellers as both plaintiffs and defendants, with authors’ interests back-derived from the booksellers’ interests, just as the common-law right was back-derived from the statutory right. Out of the seventy reported and unreported English copyright cases dating from the eighteenth century included in Deazley’s account, ten feature authors (or their heirs) as plaintiffs and four have the same plaintiff – Alexander Pope; see Deazley, \textit{Origin}, supra note 31 at vii-ix.

\textsuperscript{76} In 1737, Parliament attempted unsuccessfully to reduce the reversion period to ten years and to make the copyright renewable until the author’s death. This provision would also have voided any contractual provision that waived the right of renewal or assigned the copyright for more than ten years; see \textit{Act for Encouragement of Learning}, supra note 35 at 5. For further discussion, see Ronan Deazley, ‘Commentary on Booksellers’ Bill, United Kingdom (1737)’ [nd] at n 59, online: Primary Sources on Copyright (1450–1900), <http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22uk_1737%22>; Simon Stern, ‘Speech and Property in \textit{David Simple}’ (2012) 79 ELH (forthcoming). Jonathan Swift has been credited with devising this clause, on the basis of a notation in a contemporary copy of the draft legislation labelling this provision ‘Dean Swift’s Clause’; see Donald Cornu, ‘Swift, Motte, and the Copyright Struggle: Two Unnoticed Documents’ (1939) 54 Modern Language Notes
would have had good reason to emphasize their communicative and reputational rights, not only because these have a more dignified air than the financial concerns behind the property-based arguments, but also because the associated harms and remedies would have been directly at stake for the writers, rather than being raised collaterally as merely a premise for the rights actually being litigated. Questions about duration, attribution, and the permissible extent of borrowing would probably have been litigated in ways that brought in non-economic concerns as well as property rights, with significant consequences for the shape in which these issues developed. Because authors are typically recyclers, their presence in the courtroom would also have resulted in more attention to users’ rights. Any such exercise must remain speculative, but it is fair to say that on its face, the statute suggests a very different trajectory for the development of copyright law than the path that emerged.

BURNET V CHETWOOD

The Statute of Anne does not set out a dignitary basis for its protections, but in de-emphasizing the role of property and providing for the reversion of copyright, it created the space for such a view to develop. That view is also discernible in the judgment in Burnet v Chetwood (1721), one of the first cases to be tried after the act’s passage. Historians have not neglected this case, but an examination through the lens of dignitary issues can shed new light on the significance of Burnet, which is almost unique as a dispute in which property was not a factor in the plaintiff’s argument. In 1692, Thomas Burnet published Archaeologia Philosophica, writing in Latin to present his views on geological history, including ‘a...
distinctly earthbound dramatization’ of Eve’s seduction (in which the serpent concludes with the parting, ‘Farewel happy young Woman’).79 According to the bill of complaint, when ‘a certain Scribler’ (namely Charles Blount) sought to ‘make [his] Trash saleable’ in 1693 by translating part of Burnet’s book into English for a collection of ‘Irreligious peices [sic],’ Burnet had ‘so great an Indignation that he did all he could to prevent’ any repetition.80 He sought ‘a Declaration of Trust’ from his bookseller, Walter Kettily, providing that the text could not be ‘Reprinted Abridged or Translated without [Burnet’s] leave & approba-
tion.’81 This document served as a vehement statement of Burnet’s intentions, but not as an effective bar on translations, because it could bind nobody except for Kettily or someone in privity with him.

Not long after Burnet died, William Chetwood made plans to publish a new translation. Burnet’s executor, his brother George, went to Chancery for an injunction, arguing that ‘the . . . Book was only intended to the Learned & for that reason was writ in Latin.’ He also complained that the translation garbled the book’s meaning: ‘[T]he sense & words of the Author . . . [are] utterly mistaken & represented after a most absurd & ridiculous manner.’82 He added that Chetwood was planning to translate another Latin text by Thomas Burnet, De Statu Mortuorum et Resurgentium, which had been printed privately but was copied ‘surreptitious[ly]’ by ‘the Person who was Intrusted . . . to Print [it].’83 This argument captures two aspects of the author’s dignitary concerns, involving his choice of audience and his right to control the integrity of his message, and also hints at a breach of trust although, in the absence

80 Plaintiff’s Bill of Complaint, Burnet v Chetwood (Public Record Office, C11/242, f 45), online: Primary Sources on Copyright (1450–1900) [Plaintiff’s] <http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showTranscription/%22uk_1721a%22/start/%22yes%22>. The English translation appeared in Oracles, supra note 79, an anonymous book by Charles Blount advocating deism (and according to some, athe-
81 Plaintiff’s, supra note 80.
82 Ibid.
83 Ibid. This book was available in English translation within a few decades; see infra note 95.
of any fiduciary relationship, to modern ears that claim sounds more like invasion of privacy. The defendants did not respond to any of those arguments but instead maintained that the Statute of Anne did not apply because ‘the . . . Statute doth no where prohibit or forbid the translating of . . . Books’ and their translation was ‘not . . . the same Book with that whereof the Complainants Testator was Author or Proprietor.’

Lord Macclesfield found some merit to this argument about the statute’s scope, and this is one of the grounds on which the judgment has been cited in recent scholarship. He observed that ‘a translation . . . in some respects may be called a different book, and the translator may be said to be the author,’ because ‘some skill in language is requisite’ and in the course of rewriting, ‘the translator dresses [the original text] up and clothes the sense in his own style and expressions.’ This was a promising argument for the defendants, and its force may help to explain why translations generally were not regarded as infringements until well into the nineteenth century. Nevertheless, Macclesfield ruled for the plaintiff, remarking that Archaeologia Philosophica ‘contained strange notions, intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it.’ This support for the author’s effort to conceal his notions from the vulgar was justified because, as Macclesfield saw it, the court ‘had a superintendency over all books, and

84 Defendant’s response, Burnet v Chetwood (Public Record Office: C11/242, f 45), reprinted in Burnet’s Bill of Complaint and Chetwood’s Answer, The National Archives (1721), online: Primary Sources on Copyright (1450–1900) <http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showTranscription/22uk_1721a_im_001_0002.jpg%22>.


86 Burnet v Chetwood, supra note 74 at 1008. Similarly, in an unpublished case report, Lord Chancellor Hardwicke is quoted as saying that ‘a fair abridgment’ cannot be regarded as a copyright violation because ‘an Abridgm[en]t is a Book of Labour & Art & is as much a new Work as the Translation of a Book from one Language into an other’; Gyles v Wilcox (Ch 1740) (English Legal Manuscripts, Stage II, Lincoln’s Inn, H-1787, microfiche B217 at 50).


88 Burnet v Chetwood, supra note 74 at 1008.
might in a summary way restrain the printing or publishing of any that
contained reflections on religion or morality.’

*Burnet* may be read as a censorship case in which the court continued
the tradition of the seventeenth-century licensing acts that empowered
the Stationers’ Company to patrol the print marketplace by refusing to
permit registration of sacrilegious, treasonous, and immoral books. The
judgment certainly affords this interpretation, but it is notable that,
in enjoining the translation, Macclesfield specifically invokes and defers
to George Burnet’s account of his brother’s intentions concerning the
book’s readership: because Thomas Burnet wished to keep his ‘strange
notions . . . concealed from the vulgar,’ he published the book in a lan-
guage that would limit his readership to ‘the learned [who were] better
able to judge of it.’ By enjoining Chetwood’s efforts, Macclesfield re-
spects the author’s publication plan, limiting the text to the form in
which Burnet meant to publish it, and refusing to let others force him to
speak in a different language, to a different audience. The author’s right
to decide how to communicate may not have been the primary impetus
for this judgment. Perhaps Macclesfield would not have respected Bur-
et’s wishes if the book had not contained the ‘strange notions’ that
merited the court’s superintendence. An author whose shyness was
prompted by eccentricity, rather than due concern for established reli-
gion, might not have had his wishes honoured. The court’s willingness
to act as a censor was doubtless an important factor in explaining this
solictude for the author’s desires. Yet Burnet’s own efforts to control
access to his text were clearly relevant to the decision, which required
some basis for enjoining the English translation without holding that the
book was ineligible for protection in the first place (as would have been
true for an obscene text). If *Burnet* cannot be explained solely on the
ground of deference to the author’s communicative intentions, that con-
cern nevertheless plays a significant role in the judgment, which seems
to suggest that, regardless of the translation’s accuracy, it would be unac-
cetable to direct the author’s words to an audience he did not choose.

*Burnet* stands as an intriguing extension of the bar on publishing
manuscripts without the author’s consent. Courts would later directly
address the author’s right to control unpublished material and would

89 Ibid.
90 See Garrard Glenn, ‘Censorship at Common Law and under Modern Dispensation’
(1933) 82 U Pa L Rev 114 at 119; Roscoe Pound, ‘Equitable Relief against Defamation’
(1916) 29 Harv L Rev 640 at 645; Rose, supra note 36 at 50–1; Venuti, supra note 85 at
55–6; Jody Greene, *The Trouble with Ownership: Literary Property and Authorial Liability in
91 For a helpful discussion, see David Saunders, ‘Copyright, Obscenity and Literary His-
tory’ (1990) 57 ELH 431.
defend the right of others to print abridgements of published books. Abridgers often argued that they were making the work available to new audiences by reducing the length (and the cost), and courts generally agreed, concluding that abridgers provided a useful service.\footnote{Deazley, Origin, supra note 31 at 79–85; Simon Stern, ‘Copyright, Originality, and the Public Domain in Eighteenth-Century England’ in Reginald McGinnis, ed, Originality and Intellectual Property in the French and English Enlightenment (London: Routledge, 2008) 69 at 77–8 [Stern, ‘Copyright’]; Mark Leeming, ‘Hawkesworth’s Voyages: The First ‘Australian’ Copyright Litigation’ (2005) 9 Australian J Legal Hist 159 [Leeming].} Navigating between these two positions, we can see that Burnet’s books were closer to unpublished manuscripts than to the books that figured in the abridgement suits. *Archaeologia Philosophica* had been more effectively sequestered from the ‘vulgar’ than even an expensive book published in English could be, while *De Statu Mortuorum* had never been publicly available for sale. Further, the plaintiff did not argue about harm to the market for the original book (as the plaintiffs usually did in abridgement cases); rather, he objected to the public (and inaccurate) presentation of material that was meant to be reserved. Burnet could potentially have been the first step toward a clear articulation of the rights of authors over their manuscripts, and this is how Lord Hardwicke later described it, saying that *De Statu Mortuorum* was ‘never made *publici juris*, but [was] as much the author’s as any thing else in his closet.’\footnote{*Tonson v Walker* (1752), 3 Swans 672, 36 ER 1017 at 1020 (Ch) [*Tonson v Walker*]. This seems to be the only eighteenth-century judgment that cites *Burnet* for any purpose.} Yet Macclesfield did not develop this point; he did not compare either of Burnet’s books to an unpublished manuscript and he made no reference to the plaintiff’s trust-based arguments.

Nevertheless, the court’s comments about the harm wrought by a translation take on a new significance in light of those arguments. Just as the author was saved from being made to speak against his will, he was also saved from reputational damage. The judgment refers to irreligious or immoral books, but as noted above, Macclesfield does not rule that Burnet’s books belong in either category. In emphasizing that Burnet ‘intended to . . . concea[l] [his theories] from the vulgar’ and sought to ensure that his writings ‘could not do much hurt,’ the court protected the author as well as the public. Some people were fit audiences for Burnet’s work, and the court accepted the author’s views on that matter. The judgment says nothing directly about privacy, but according to George Burnet, the ‘hurt’ posed by a translation threatened his brother’s reputation as well as the potentially incompetent readers whom Chetwood meant to reach.
The question of standing helps to clarify this point. Without a pre-print licensing scheme, anyone opposing a book’s publication must have the capacity to seek an injunction. Edmund Curll would soon be prosecuted by the Crown for obscenity,94 but Burnet was a private suit. The Statute of Anne made it possible for a plaintiff to sue for infringement, but Macclesfield rejected the infringement claim, leaving the dignitary arguments as the only basis on which George Burnet had standing to sue. Insofar as those arguments did not arise under the statute, they resemble the personal actions discussed above, such as libel. George Burnet could seek a hearing only because, as his brother’s executor, he inherited the claims that Thomas Burnet had standing to raise. Any other private party, no matter how offended by Chetwood’s plans, would have lacked standing to represent Thomas Burnet’s interests. The judgment addresses this issue only implicitly, but the court’s decision to grant relief rather than dismiss the case necessarily depends on a concern to shield the author from unwanted exposure. This detail helps to explain the hitherto unobserved aftermath of the judgment: despite the court’s superintendence, two translations each of Archaeologia Philosophica and De Statu Mortuorum would appear within a few decades, and no one sought to bar their publication.95 Perhaps George Burnet was no longer present to raise any objections.

C. POPE v CURLL

Because the judgment reflects a concern to protect the author’s name rather than the author’s property, Burnet is perhaps even more important than others have thought in regarding it as an early ‘author’s case,’ newly possible under the 1710 statute.96 At the same time, it must be said

94 R v Curll (1727), 25 Str 789, 93 ER 849 [R v Curll].
95 Dr. Burnet’s Theory of the Visible World; by Way of Commentary on His Own Theory of the Earth. Being the Second Part of His Archaeologia Philosophica (London: Curll, 1729); Archaeologia Philosophica: Or, the Ancient Doctrine Concerning the Originals of Things (London: J Fisher, 1736); Of the State of the Dead, and of Those That Are to Rise (London: Curll, 1727) (translated from Latin by Matthias Earbery); A Treatise Concerning the State of Departed Souls before, and at, and after the Resurrection (London: Hooke, 1730). The last title was reprinted twice by other publishers in the 1730s. George Burnet presumably would have been especially dismayed by the editions offered by the ‘unspeakable’ Edmund Curll, notorious for such publications as Cases of Impotency and Divorce, Onanism Display’d, Eunuchism Display’d, A Treatise of the Use of Flogging in Venereal Affairs, and The Case of John Atherton, Bishop of Waterford in Ireland: Who Was Convicted of the Sin of Uncleanliness with a Cow. Curll’s career is thoroughly examined in Paul Baines & Pat Rogers, Edmund Curll, Bookseller (Oxford: Oxford University Press, 2007) [Baines & Rogers]. For these and other titles published by Curll, see e.g. ibid at 117.
96 Rose, supra note 36 at 49. Accordingly, though Rose writes, ibid at 133, that, in treating the translation as non-infringing, the court ‘limited the property closely to the
that *Burnet* had little if any influence on the developing legal debate.\(^97\) The same cannot be said for *Pope v Curll* (1741), which was also litigated in Chancery and which later commentators regarded as a key precedent on the question of unpublished manuscripts, although, as we will see, this question played an ambiguous role in the dispute. While Hardwicke’s opinion has rightly been seen as making an important contribution to the discussion about what copyright protects, the judgment is also notable for what it does not say. It assumes, without arguing, that unpublished writings qualify for protection, and although some have seen the judgment as blending ideas about property with ideas about personality or reputation,\(^98\) the latter are notably absent from the pleadings and the court’s reasoning. In a context that would seem to invite discussion of the personal rights at stake in the unauthorized publication of manuscripts, the litigants and the court ignored that issue. Given the terms in which this dispute was waged, it seems that a property-based argument, by itself, was thought to provide a satisfactory justification for the plaintiff’s position.

Alexander Pope, who ‘hardly drank tea without a stratagem,’\(^99\) had arranged on a previous occasion (in 1735) to have some of his letters left with his arch-enemy, the bookseller Edmund Curll, who was tricked into publishing them so that Pope might then protest.\(^100\) In 1741, Pope again engineered the publication of a volume of letters, *Dean Swift’s Literary Correspondence . . . from 1714 to 1738*, which included many letters by Pope. Again, Pope proceeded by indirection and through intermediaries. Having ‘printed secretly an edition in small octavo,’ he covertly sent a copy to Dublin (where the *Statute of Anne* did not apply), and the book was promptly reprinted without authorization, as Pope intended.\(^101\) Another copy of the secret edition found its way into Curll’s hands, apparently not at Pope’s behest. Curll reprinted it, pretending to

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\(^{97}\) See supra note 93 and accompanying text.

\(^{98}\) Rose, supra note 36 at 62.


\(^{100}\) Baines & Rogers, supra note 95 at 246–76; see also [Alexander Pope], *A Narrative of the Method by Which the Private Letters of Mr Pope Have Been Procured and Published* by Edmund Curll, *Bookseller* (London: Cooper, 1735); Edmund Curll, ‘To Mr Pope,’ in Giles Jacob, *Liberty and Property: Or, A New Year’s Gift for Mr Pope, Being a Concise Treatise of All the Laws, Statutes and Ordinances* (London: Curll, 1736) iii.

have used the Dublin edition for his text and asserting in the preface that Irish books were ‘Lawful-Prize’ in London. Pope obtained an injunction and Curll moved to dissolve it, eliciting Hardwicke’s judgment upholding the injunction in part.

The procedure for obtaining a preliminary injunction in infringement cases was not onerous. To get an *ex parte* injunction, the plaintiff had to make a showing as to the merits of the claim but did not have to meet any particular standard as to the strength of its legal foundation. As a lawyer explained at mid-century, describing the process for obtaining ‘an injunction to stay other persons’ from competing with ‘the proprietors of new inventions under letters patent,’ a motion for an *ex parte* injunction would normally be granted after the plaintiff filed a bill of complaint and supported the motion with an ‘affidavit and certificate.’ The ‘certificate’ was the document issued by the clerk of the court affirming that the plaintiff had filed a bill, and the ‘affidavit’ set out the factual basis for the plaintiff’s allegations of infringement. By analogy to the practice in patent cases, ‘it became standard practice for a plaintiff to obtain an injunction *ex parte* in copyright cases.’ In justifying this procedure in copyright disputes, Hardwicke explained that a plaintiff could not usually ‘have an injunction upon filing the bill [and] before answer [by the defendant],’ unless ‘the right of the plaintiff appears on record.’ In patent cases, the issuance of the letters patent would suffice to make the ‘right appear[r] by matter of record,’ while in copyright disputes the plaintiff could meet this requirement by proceeding under the *Statute of Anne*; the alleged right might ‘not appear[r] by record of [the Chancery] court’ but because the right was ‘grounded on an act of parliament, that might be a foundation to grant injunction before answer.’ Further, whatever the strength of the legal basis for the plaintiff’s argument, an *ex parte* injunction could be ‘automatically transform[ed] . . . into [an interlocutory] injunction’ if the defendant’s

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102 Dean Swift’s Literary Correspondence . . . from 1714 to 1738 (London: Curll, 1741) at sig 4r; see also Baines & Rogers, supra note 95 at 284, 286.

103 *Pope v Curll*, supra note 74.

104 *Lowther v Stamper* (1747), 3 Atk 496, 26 ER 1085 (Ch) (argument of counsel).


106 Leeming, supra note 92 at 162.

107 Anonymous (1750), 1 Ves Sr 476, 27 ER 1152 at 1152 (Ch).

108 Ibid. For further discussion, see Leeming, supra note 92 at 162–3; see also Gómez-Arostegui, supra note 105 at 1228–31, discussing Chancery procedures for granting preliminary injunctions, on either an *ex parte* or interlocutory basis, in eighteenth-century copyright infringement suits.
answer did not challenge the plaintiff’s title. Even if the defendant insisted that the matter had to be determined at law, not in equity, this response would be regarded as ‘pro forma . . . and inconsequential.’

Despite his role in fostering the two preceding editions of the book, Pope framed the case as one involving unpublished material, and Hardwicke treated it accordingly. Curl tried the defence that he had merely reprinted an Irish book, having apparently concluded that the London edition was not lawful prize. He also argued, like the defendants in Burnet, that the statute did not apply – in this case, because letters were too trivial to qualify for protection. As to Irish books, Hardwicke reasoned that allowing such a defence would let London booksellers evade the statute by ‘send[ing] [a book] over to Ireland to be printed, and then . . . pretending to reprint it only in England.’ This policy argument, with its prototype of Holmes’s ‘bad man,’ perhaps unwittingly captures the strategic conduct of both actors in this litigation: Pope had angled for a Dublin edition so that he might claim to be publishing his own version reactively and not out of vanity, while Curl, with his special brand of forum selection, was even more devious than the booksellers in Hardwicke’s example. As to the eligibility of letters for statutory protection, Hardwicke wrote that ‘no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published.’ That statement includes the court’s only indication that the dispute (ostensibly) involved manuscripts rather than printed material. At the same time, the court addressed the issue of standing more directly than Burnet had, with the result that ‘[t]he injunction was continued . . . only as to those letters . . . written by [Pope], and not as to those which are written to him.’ Whereas George Burnet had been his brother’s executor, Pope

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109 Gómez-Arostegui, ibid at 1231.
110 Pope v Curll, supra note 74 at 608.
111 Baines & Rogers, supra note 95 at 287, observe that ‘[i]t seems odd that Pope did not seek to demonstrate that the material was reprinted from the London edition, but presumably he had not realized that fact.’ Had Pope acknowledged the existence of his secretly published edition, he would have been forced to abandon the pretence of reacting to an unanticipated Dublin edition.
112 Ibid. The genre of the ‘familiar letter’ was already well established by this time and included such contributions as Samuel Richardson’s anonymous collection, published five months earlier, Letters Written to and for Particular Friends, on the Most Important Occasions, Directing . . . the Requisite Style and Forms to be Observed in Writing Familiar Letters . . . Containing One Hundred and Seventy-Three Letters, None of Which Were Ever before Published (London: Rivington, 1741). According to Richardson, this effort, which had been under way for several years, was the seed for his bestselling novel Pamela, or, Virtue Rewarded, in a Series of Familiar Letters, first published in November 1740.
113 R v Curll, supra note 94 at 849.
stood in no relation to the other letter writers that enabled him to seek relief on their behalf.

This refusal to enjoin publication of the letters sent to Pope is particularly significant in light of the court’s famously elliptical and suggestive comments on the nature of the property at stake in this case. Hardwicke took it for granted that the dispute should be seen as a property contest. Curll had argued that the writers gave up any right to restrict publication when they mailed the letters. In Atkyns’s report of the judgment, Hardwicke is presented as saying that the receiver of a letter has ‘only a special property[,] . . . possibly the property of the paper may belong to him,’ but the sender does not thereby abandon any property claim and leave the letters open for ‘any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer.’114 Atkyns’s report was, until recently, the only one consulted by lawyers or historians, and according to that version, any ‘special’ or ‘joint’ property that Pope held in letters written by others was insufficient to give him any basis for blocking their publication. As Ronan Deazley notes, according to an unpublished report of the case, Hardwicke was more specific about the nature of the receiver’s claim, which did not include any property claim in the text of the letter: ‘[T]he receiver only acquires a qualified interest in [the letter]. 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 writer.’115 If the judgment is notable for its innovation in locating the author’s property in the immaterial text rather than its physical medium, by the same token, Hardwicke

114 Pope v Curll, supra note 74 at 608.
115 Deazley, Origin, supra note 31 at 72, citing John Campbell, Lives of the Lord Chancellors (London: John Murray, 1857) vol 6 at 202 [emphasis added] [Campbell]. According to Campbell’s account, Hardwicke also amplified his view on standing, observing that ‘as for the letters in this volume written to Mr. Pope, I think that he cannot be heard to complain. They may possibly be published with the authority of the writers of them, and from copies taken from before they were sent to him’; ibid. If the writers could authorize publication, then accordingly only they could be heard to enjoin publication. Deazley credits this report to ‘a Mr. Jodderell, a Chancery barrister,’ but that appears to be incorrect; Deazley, Origin, supra note 31 at 72. Campbell mentions, several pages before his extract from the report, that he consulted ‘several MSS. collections of [Hardwicke’s] decisions,’ including ‘four quarto volumes, beautifully written by Mr. Jodderell,’ but Campbell does not specifically attribute the report of Pope v Curll to Jodderell, whose notes begin in November 1741, five months after Pope’s case was resolved; see Campbell, ibid, vol 6 at 198 and 198, n*; JH Baker, Guide: English Legal Manuscripts, Stage I–VI (Zug, Switzerland: IDC, 1987) at 30. All four volumes of Jodderell’s reports are reproduced on microfiche in the series indexed in Baker’s Guide, and no report of Pope v Curll, supra note 74, appears there, nor does it seem to be included in any of the other manuscript reports of Chancery cases in the series. It is not clear whether the report that Campbell consulted still survives.
also presses the property-based argument to its logical conclusion. A reputational argument might allow the recipient, as well as the author, to enjoin a letter’s publication; after all, the letter might be part of an ongoing correspondence that reflects on both participants, and the person who sent it might be seen as entrusting the recipient to let it go no further. Imagine, for example, that Pope had shared some of his ‘strange notions’ in a letter to Swift, and that Swift had discussed these ideas at length in his response. The logic of Burnet might apply to that case, but a property-based view pays no heed to such considerations, instead looking to the party in whom the composition vests as property and treating that claim as the only one which that party has standing to raise. Hardwicke intimated that the other authors might have a claim on the same ground – but they would have to raise it themselves.\textsuperscript{116} The recipient’s ‘qualified interest’ is insufficient, even if, as a recipient, that person has a reputational interest in the text of the letter.

As Pope framed it, the case would have offered an excellent opportunity to opine on dignitary rights in relation the right of first publication. In printing the letters, Curll could be accused of actually committing the invasion of privacy that readers found so tantalizing in fictional works that claimed to offer unauthorized access to private correspondence, such as Charles Gildon’s \textit{The Post Boy Robb’d of His Mail; Or, The Pacquet Broke Open} (1692) and \textit{The Unknown Lady’s Pacquet of Letters} (1707).\textsuperscript{117} Pope had capitalized on this point in the mid-1730s, when opposing the booksellers’ efforts to increase copyright protection. He had argued that authors’ rights were not receiving enough attention, as the unauthorized publication of his letters by Curll helped to show.\textsuperscript{118} This illicit conduct, Pope complained, had deprived him of ‘the power of rejecting, and the right of judging . . . what pieces it may be most useful, entertaining, or reputable to publish, at the time and in the manner [he thought] best,’ and ‘of the right even over [his] own Sentiments, of the privilege of every human creature to divulge or conceal them.’\textsuperscript{119} This argument

\textsuperscript{116} \textit{R v Curll}, supra note 94 at 849.
\textsuperscript{117} Citing these texts and many others, including Richardson’s \textit{Pamela}, James Grantham Turner explains that ‘[t]he eighteenth-century novel should be placed within a complex network of clandestine reading, looking, and reporting’; James Grantham Turner, ‘The Erotics of the Novel’ in Paula Backscheider & Catherine Ingrassia, eds, \textit{A Companion to the Eighteenth-Century Novel and Culture} (Oxford: Blackwell, 2005) at 216.
\textsuperscript{118} See text accompanying note 100 supra.
\textsuperscript{119} \textit{Letters of Mr Alexander Pope, and Several of His Friends} (London: Wright, 1737) at sig 5v. For more on this episode, see Maynard Mack, \textit{Alexander Pope: A Life} (New York: Norton, 1985) at 654; Baines & Rogers, supra note 95 at 268; Rosemary Cowler, ed, \textit{The Prose Works of Alexander Pope}, vol 2 (Hamden, CT: Archon, 1986) at 341, 345–6; Harry
eloquently and succinctly blends the essential features of the communicative and reputational theories, and Pope could have repeated the point in his suit against Curll – particularly since they were in a court of equity, where full justice could arguably have encompassed these non-economic concerns. Having persuaded the court that the letters ‘were never intended to be published,’ Pope might have made a plea involving harm to his reputation as distinct from property.

Why, then, did the plaintiff and the court focus on the question of property, without emphasizing the author’s personal rights? As noted above, Hardwicke saw the statutory basis of the plaintiff’s claim – its ‘grounding [in] an act of parliament’ – as the condition that justified the issuance of an ex parte injunction in copyright cases.120 In cases involving unauthorized publication of manuscripts, the dispute turned on whether protection for printed books, for which the copy had been entered in the stationers’ register, extended to unpublished material that had not been registered. These arguments might have dwelt on the author’s right to control the fate of the manuscript, but evidently it seemed safer to assume that manuscripts were just like printed books. Courts were only rarely presented with cases involving unpublished material, and in each instance – Webb v Rose (1732), Forrester v Walker (1741), and Duke of Queensberry v Shebbeare (1758)121 – the court


120 See text accompanying note 108 supra.

121 Cited in Deazley, Origin, supra note 31 at vii–ix. Webb, in fact, did not even pose the issue, while Forrester and Shebbeare resolved it without analysis. Webb was cited in a few eighteenth-century judgments but was not reported. The defendant was using manuscript copies of conveyancing drafts that he had prepared for the plaintiff’s father, and the court enjoined this use, treating the documents as physical property of the decedent’s estate. As Deazley notes, although Blackstone saw Webb as ‘evidence of an “original and natural right which every man has in his own composition,” in reality, the case concerned nothing of the sort’; Deazley, ibid at 69, citing Tonson v Collins 1762, supra note 45 at 184. Forrester v Walker (1741) [Forrester], which also went unreported, involved publication of manuscript court reports. The plaintiff claimed statutory protection and Hardwicke granted an injunction without discussing how the statute applied to manuscripts; ibid at 70. Duke of Queensberry, supra note 23, involved a manuscript history of the reign of Charles II. The defendant claimed that the author had loaned the manuscript and told the recipient that ‘he might take a copy . . . and make use of [it] as he should think fit’; ibid at 925. Without addressing the statute, the court concluded that the recipient was not entitled to ‘the profit of multiplying [the text] in print’; ibid. David Saunders rightly notes, in a related context, that Chancery judgments from this era are not a productive hunting ground for a theory of copyright, and that ‘talk of a “principle” behind early copyright might better be seen as [an] . . . abstraction imposed post factum on the [Chancery] Court’s procedure’; David Saunders, ‘Purposes or Principle? Early Copyright and the Court of Chancery’ (1993) 15 Eur IP Rev 452 at 456.
assumed that manuscripts were entitled to the same protection as printed books, rather than striving to justify this view by analogizing the two categories or explaining why manuscripts should enjoy even stronger protection.

Summing up the import of these cases, in Donaldson v Becket, Baron Eyre observed that ‘although the Court of Chancery . . . frequently granted Injunctions, it cautiously avoided giving any final Adjudication upon the Matter. An antecedent Common Law Right was never hinted at.’\(^{122}\) From the litigants’ perspective, this approach may have been motivated by concern about the shaky basis of a right over manuscript material. The manuscript cases were later championed, by counsel for the London booksellers, as having established an independent, common-law basis for copyright, but a party seeking protection of a manuscript would have been understandably reluctant to proceed expressly on a common-law theory if reference to the Statute of Anne was the established means of obtaining an ex parte injunction. The statute required registration so that the ownership of the copy might be ‘ascertained’ and no one would ‘through ignorance offend against [the] Act.’\(^{123}\) A common-law theory of manuscript protection would have to explain why notice to others was not required.\(^{124}\) To a plaintiff who anticipated this problem, it may have seemed better to assume it away rather than explain why the concern about innocent mistakes did not apply to manuscripts. In such a case, trumpeting the author’s natural right to determine when and how to publish, which had never been directly litigated, might have seemed a risky strategy.

On the other hand, this point had analytical purchase for parties who had no option but to insist on copyright’s common-law origins. In those cases, proving that the author was entitled to control the manuscript was a means of facilitating the following argument: authorial control implies

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\(^{122}\) Cited in Cases of the Appellants, supra note 28 at 33. Eyre also claimed to have seen ‘some Notes Lord Hardwicke had taken down, which set forth the sole and exclusive Right of an Author at Common Law, to multiply Copies for Sale. In the Margin . . . there is in Lord Hardwicke’s own Hand Writing, a very large Q. which proves that his Lordship entertained Doubts, respecting the Legality of the Position’; ibid.

\(^{123}\) Statute of Anne, supra note 10, s 2. Arguably, because Pope waived the statutory penalties and sought only injunctive relief, it did not matter that he had not complied with the statutory registration requirement. Lord Mansfield would later observe that ‘entry [of the copy] . . . was only necessary, to enable [a] party to bring [an] action for the penalty’; Tonson v Collins 1762, supra note 45 at 184. But a litigation strategy that raised this point explicitly would risk highlighting the difference between unpublished manuscripts and printed books, a distinction that plaintiff’s Bill of Complaint carefully ignores.

\(^{124}\) In rejecting a common-law theory, Justice Yates would raise this point in Millar v Taylor, supra note 23; see infra notes 146–7 and accompanying text.
a common-law right preceding the statute; therefore the statute merely complements the common law, and so the common-law right lasts in perpetuity. Plaintiffs were mostly likely to reach for this argument when they sought to enjoin alleged piracies after the statutory term had ended, leaving the claim to perpetual protection as a necessary requirement for an injunction. In that case, the assertion of a common-law right provided the only possible ground for the plaintiff’s claim. The statutory penalties would not apply, but the plaintiff could still seek an injunction. The common-law right did not need to be addressed directly in disputes over manuscripts, because in those cases, the plaintiffs sued immediately. As the question of perpetual protection did not arise, the only hurdle to be overcome was the conflation of manuscripts with books that had been printed and registered.

Paradoxically, the right to control manuscripts seems to have found little favour among the plaintiffs who faced that issue directly and was most likely to be emphasized in the very different case of a book that had been reprinted without consent after the statutory term of protection had expired. Pope’s position was particularly convoluted because he had published the material privately and had furtively encouraged its publication abroad, and was now planning to reprint his correspondence, all the while asserting that the letters were private and not for publication. To avoid questions about his failure to register the privately printed edition, Pope was constrained to argue that the dispute involved manuscripts, but to avoid questions about the common-law right, Pope was constrained to argue as if manuscripts were just like printed books.

Despite the seemingly propitious setting, then, Pope v Curll refrained from discussion of the author’s control over the manuscript. If Burnet was an ‘author’s case’ in which the plaintiff focused on dignitary rights, Pope assumed a dignitary bearing for the litigation and then bracketed the dignitary issues and the common law, proceeding entirely on a property-based claim under the Statute of Anne. Like Burnet, but for opposite reasons, this dispute takes on a new significance when viewed in relation

125 See e.g. Tonson v Collins 1762, supra note 45 at 184: argument of Blackstone, for the plaintiff, to the effect that Pope v Curll, supra note 74, and several other cases of unpublished manuscripts must be understood as relying on ‘the original and natural right which every man has in his own composition.’

126 Further, Pope carefully revised his letters in anticipation of publication: ‘Pope’s decisions were often radical in preparing his correspondence for print. Sentences were omitted, words changed, allusions altered’; Howard Erskine-Hill, Alexander Pope: Selected Letters (Oxford: Oxford University Press, 2000) at xxiv. But Pope did not acknowledge this; he expected readers to think they had access to unvarnished originals, and he treated the misappropriation of his letters as an invasion of his privacy, not as an unfair interception of material that was already destined for the press.
to dignitary questions: Pope’s legal strategy anticipates the emphasis on property rights that later courts would solidify. Pope is best known as the judgment that began to articulate a distinction between the physical embodiment of the work and the words that constitute it, but the dispute is also important as an early example of an exclusively property-driven approach to copyright. Here, again, if the litigation had proceeded on slightly different grounds, the consequences for copyright doctrine might have been significant. Pope was perhaps the most proprietary of eighteenth-century writers, but his remarks just a few years earlier show that he was fully capable of describing the dignitary harms flowing from unauthorized publication. Pope was also among the most litigious writers of his day and was nearly alone in enforcing the fourteen-year reversion provided by statute. His booksellers were highly accommodating on this point, and we can only speculate as to how the copyright debate would have proceeded if they had treated him the way they usually treated other writers. If Pope had had occasion to sue one of his booksellers for failing to observe the fourteen-year reversion, presenting a legal challenge to the common-law basis of copyright in the 1720s or 1730s, the dispute would have arisen without a record of Chancery injunctions or any of the other justifications that were developed by the mid-century.

The result might well have been a rejection of the common-law theory within a few decades after the passage of the Statute of Anne.

Some advocates of perpetual copyright – including Pope’s own counsel, William Murray (later Lord Mansfield) – would later seek to treat the judgment in Pope v Curll as having directly confronted the question of a common-law right over unpublished writings, independent of the statute. Eleven years later, as counsel for the plaintiffs in another copyright dispute, Murray cited the manuscript cases, including Pope v Curll, to

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128 Such an occasion nearly arose in 1743, when Pope sued Henry Lintot for undertaking to publish a new edition of The Dunciad, despite the reversion of copyright to Pope in 1742, fourteen years after its first publication in 1728. According to Pope’s bill of complaint, Lintot claimed ‘the sole absolute and entire property of the book without any restriction in point of time’; that is, a perpetual right in defiance of the reversion requirement. See Deazley, Origin, supra note 31 at 61, n 58, citing Pope v Gilliver, Lintot, et al (Public Record Office C11/549, f 39, Chancery, 16 February 1743). Lintot, however, avoided a dispute over that issue, responding that he did not intend to reprint the book but only sought to sell the remaining copies printed during the first fourteen-year term of protection. Pope evidently was unable to prove that Lintot had printed additional copies after the end of the first term, and the litigation ended there; see Howard P Vincent, ‘Some Dunciad Litigation’ (1939) 18 Philological Quarterly 285 at 287.
argue for a common-law copyright that would justify an injunction against the publishers of an edition of *Paradise Lost* more than eighty years after its first publication.\(^{129}\) Again, in his capacity as Lord Chief Justice, Mansfield would participate in several major rulings on copyright, which he treated as a property right while also showing a pronounced interest in the reputational aspect of the question. In *Millar v Taylor* (1769), Mansfield recalled that he had taken up the subject of copyright on ‘frequent opportunities’ and that he ‘was counsel in most of the cases which have been cited from Chancery.’\(^{130}\) From this experience, he also concluded that the preliminary injunctions issued as a matter of course in Chancery, in litigation that never proceeded to a full hearing, were ‘equal to any final Decree’ rendered on the merits.\(^{131}\) Among the judges and lawyers who revisited the manuscript cases, Mansfield was perhaps uniquely knowledgeable about the posture in which they had been presented, and yet he facilitated the view that these judgments turned on the existence of a common-law right, an issue they had uniformly avoided.

D MILLAR V TAYLOR

Around the middle of the century, property-based analyses of copyright proliferated, and this tendency was reflected in the title of a pamphlet by Pope’s literary executor, William Warburton’s *A Letter from an Author to a Member of Parliament, Concerning Literary Property* (1747), the first discussion to speak of copyright as ‘literary property.’\(^{132}\) Earlier discussions

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\(^{129}\) *Tonson v Walker*, supra note 93 at 1018. Hardwicke granted the injunction, reasoning that the statute protected the notes in Tonson’s edition (which the defendant had also reprinted), regardless of the status of the poem itself; *ibid* at 1020; see also *Tonson v Collins* 1762, supra note 45 at 184; Deazley, *Origin*, supra note 31 at 134–7; Stern, ‘Copyright,’ supra note 92 at 78. Murray was also plaintiff’s counsel in *Tonson v Walker* (Ch. 1739), an earlier dispute between the same parties over the same text; he also acted for the London booksellers in their unsuccessful appeal to the House of Lords in *Millar v Kinkaid* (1751), cited in *Millar v Taylor*, supra note 23; and after becoming Lord Chief Justice of the King’s Bench, he handed down rulings in *Tonson v Collins* 1762, *ibid*, and *Millar v Taylor*, *ibid*. On this point see also Thomas F Bonnell, *The Most Disreputable Trade: Publishing the Classics of English Poetry, 1765–1810* (Oxford: Oxford University Press, 2008) at 52–3. Rose, supra note 36 at 68–9, discusses Mansfield’s affinity for a common-law theory of copyright.

\(^{130}\) *Millar v Taylor*, supra note 23 at 257.

\(^{131}\) *ibid* at 253. This assertion is surprising because seven years earlier, Mansfield had appeared to acknowledge the inapplicability of these decisions when he observed, with respect to the Chancery disputes over works that were outside the statutory term limits, ‘I remember no [such] Case, where the merits have been fully argued, and the Injunction made perpetual; at the hearing of the Cause’; *Tonson v Collins* 1761, supra note 45 at 173. See also Deazley, *Origin*, supra note 31 at 78–9.

\(^{132}\) Warburton, supra note 30. Scholars have cited earlier uses of the phrase ‘literary property,’ but examination of the sources shows those references to be inaccurate.
referred to ‘property in [or of] copies,’ a more technical phrase that incorporated the booksellers’ terminology. ‘Literary property,’ by contrast, aims at a nonprofessional audience. The term did not go uncontested, but by the 1760s it had begun to appear not only in commentaries on the merits and flaws of a theory of common-law copyright but also in contexts directed at more popular audiences. The term ‘intellectual property’ also emerged in the later eighteenth century, though it was not used widely. (Often described as a mid-nineteenth-century

Discussing a petition presented to the Commons in 1707, John Feather writes that the stationers ‘asked that what they called “literary property” ([a] new phrase) should be secured to the writer or his assignees, or to the publisher’; Feather, Publishing, supra note 27 at 56. The entry in the Commons Journal includes several references to ‘property,’ saying that the booksellers ‘by . . . their Property, [have] made Provision for their Widows, or Children; but of late Years such Properties have been much invaded . . . to the great Damage of the Proprietors,’ necessitating ‘a Bill for the securing Property in such Books’; however, the phrase ‘literary property’ does not appear in this entry; UK Journal of the House of Commons, vol 15 (26 February 1706/7) at 313. See also Feather, Publishing, supra note 27 at 74: ‘the petitioners asked for the protection of what they called “literary property.”’ Others who have followed Feather on this point include Jane Ginsberg, “Une Chose Publique”? The Author’s Domain and the Public Domain in Early British, French and US Copyright Law” (2006) 65 Cambridge LJ 636 at 641; Rosemary Dixon, ‘The Publishing of John Tillotson’s Collected Works, 1695–1757’ (2007) 8 Library 154 at 162; Richard Sharpe, ‘Inequalities in the Globalised Knowledge-Based Economy’ in Judith Burnett et al, eds, The Myths of Technology (New York: Peter Lang, 2009) 39 at 41. Confusingly, Hughes cites Tonson v Collins 1762, supra note 45, to support the proposition that ‘[b]y 1743, the King’s Bench court would state . . . that the Statute of Anne protected “[l]iterary property”;’ Justin Hughes, ‘Copyright and Incomplete Historiographies of Piracy, Propertization, and Thomas Jefferson’ (2006) 79 S Cal L Rev 993 at 1016 and 1016, n 95 [Hughes, ‘Copyright’]. William Blackstone (who argued for the plaintiff in Tonson v Collins) was an advocate for the property-based view of copyright; however, the case was argued in 1762, not 1743, and the phrase ‘literary property’ does not appear in Blackstone’s report of the case in Reports of Cases Determined in . . . Westminster-Hall (London: Strahan, 1781) vol 1 at 321–45; rather, the phrase appears in a note added by the editors of the English Reports in the early twentieth century; see Tonson v Collins 1761, supra note 45 at 192.

See e.g. Daniel Defoe, A Review of the Affairs of France (8 November 1705) 421 at 424; Edward Ward, The London Spy Compleat (London: How, 1709) vol 1 at sigs A3v–A4r; Observator (1 February 1709/10) at 2; William Congreve, Works (London: Tonson, 1717) vol 1 at sig A3v; The Works of J.S., D.D., D.S.P.D. (Dublin: Faulkner, 1735) at sig A11r; The Westminster Journal or New Weekly Miscellany [London] (12 May 1744) 4 at col 1. Deazley also notes a variety of similar phrases used during the lobbying effort for the 1710 Act; see Deazley, Origins, supra note 31 at 49.


See e.g. Review of William Smith, A New and General System of Physic, Part 2, (1769) 41 Monthly Review 278 at 290; William Donaldson, Agriculture Considered as a Moral and
the term had no fixed meaning in the eighteenth century, referring in some instances to copyright, and in others to rights in intellectual productions generally. Concomitant with these developments was a proliferation of pamphlets and essays in support of a common-law copyright understood in terms of property. These arguments frequently drew on a labour theory; as noted earlier, for most commentators, this

136 See e.g. Catherine L Fisk, Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800–1930 (Chapel Hill, NC: University of North Carolina Press, 2009) at 36; Adam Mosoff, ‘Exclusion and Exclusive Use in Patent Law’ (2009) Harv JL & Tech. 321 at 353; Carla Hesse, ‘The Rise of Intellectual Property, 700 BC–AD 2000: An Idea in the Balance’ (2002) 131:2 Daedalus 26 at 39; Justin Hughes, ‘Notes on the Origin of “Intellectual Property”: Revised Conclusions and New Sources’ (2009) [unpublished manuscript, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1432860&download>. The term does not seem to have appeared in a judgment by a US court until 1845, but it appeared frequently in English and American publications in the early nineteenth century. See e.g. Samuel Jackson Pratt, Gleanings in England (London: Longman & Rees, 1801) vol 1 at 285; ‘New England Association in Favour of Inventors and Discoverers, and Particularly for the Protection of Intellectual Property’ (1808) 5 Medical Repository 302; [Richard Duppa], An Address to the Parliament of Great Britain on the Claims of Authors to Their Own Copy-Right (London: Warwick, 1813) at 10; Joseph Adams, Memoirs of the Life and Doctrines of the Late John Hunter, Esq (London: Thorne, 1817) at 130; John L Sullivan, A Demonstration of the Right to the Navigation of the Waters of New York (Cambridge, MA: Hilliard and Metcalf, 1821) at 10; Richard Ryan, Dramatic Table Talk (London: Knight & Lacey, 1825) at 206; Robert Maugham, A Treatise on the Laws of Literary Property (London: Longman, 1828) at 189; Olinthus Gregory, ‘Notes by the Editor’ in The Works of Robert Hall, A.M. (London: Holdsworth & Ball, 1831) vol 3 at 4. For discussion of what seems to be the term’s first appearance in a judgment by a US court, see Hughes, ‘Copyright,’ supra note 132 at 1006 and the sources cited there. For earlier American judgments speaking of property in the intellect and its productions, see e.g. Marshall v Peck, 31 Ky 609 at 615 (1833), ruling that inventions should be protected as property because ‘[a] man’s intellect is his best property, and every one has a natural and inviolable right to appropriate to his own use, the productions of his own industry and the conceptions of his own genius’; Taylor v Carpenter, 11 Paige Ch 292 at 295 (NY Ch 1844), denigrating trademarks, as against patents and copyright, by arguing that ‘when . . . property is of an immaterial or intellectual character,’ it is protected ‘only [for a] limited duration,’ and if this is true for ‘property of the highest intellectual character,’ then a fortiori it is true for trademarks, which are ‘so much inferior as not to be deemed worthy of protection under the laws provided for the enjoyment of patents and copyrights.’ For an English example, see Boosey v Jeffreys (1851) 155 ER 675 at 676: ‘[I]t is difficult to conceive anything more in the nature of property than the produce of a person’s own intellect.’

137 For a useful discussion of this phase of the copyright debate in relation to efforts to develop an abstract model of property, see Oren Bracha, ‘Owning Ideas,’ supra note 44 at 202–20.
approach offered the simplest and most direct route of justification for the idea of copyright as property.138

The 1760s marked the apex of the common-law theory of copyright. The question was presented directly in a court of common law for the first time in Tonson v Collins (1761–62), where again the plaintiffs (represented first by Alexander Wedderburn and then by Blackstone), grounded the property right in the author’s labour.139 After being argued twice in the King’s Bench, the suit was deemed to have been ‘brought by collusion,’ with a merely ‘nominal defendant set up, in order to obtain a judgment, which might be a precedent against third persons.’140 The imputation is reminiscent of the strategy of litigating in a court of equity over a statutory property right and later interpreting the judgment as a vote for a common-law right.

In Millar v Taylor, the question was raised again, starting in Chancery in 1765 and finally reaching a resolution in 1769 in the King’s Bench, where a divided court ruled in favour of a common-law right and perpetual copyright. The dispute involved James Thomson’s book-length poem, The Seasons, first published in 1728–9. Andrew Millar, who owned the copy, charged Robert Taylor with having sold one thousand copies that were ‘injuriously printed by some person or persons.’141 In the Chancery suit, Taylor argued that the book ‘was first printed and published about 30 years ago, and the author has been dead about 15 years; therefore the term of protection had expired, and Thomson’s works were now ‘the property of the publick.’142 The Master of the Rolls concluded that the question had to be resolved by a court of common law and directed the parties to litigate in the King’s Bench.143 In that court,
Justices Willes and Aston agreed that a common-law copyright preceded the statute and was not displaced by it, but they did not dwell on the relation between this right and the author’s right to control the manuscript. The other two judgments, however, extensively considered the question of unpublished manuscripts.

Justice Yates, in a rare dissent, found no common-law basis for copyright and rested his opinion in part on the distinction between the author’s ability to control the manuscript and the impossibility of any such control over a printed book. A manuscript may be locked up, or lent out on the condition that the borrower ‘should only peruse it,’ whereas a book, once published, ‘can[not] be afterwards recalled by the author.’ Yates also saw no means of giving the ideas in a manuscript the kind of protection that could be afforded to the manuscript itself. When an author refrains from publishing, others who have had the same idea cannot tell whether they are infringing, if they decide to publish. The manuscript itself may not be appropriated and printed, but suppose that others should have the same idea. In that case, Yates concluded, neither the statute nor the common law could be used to enjoin them from publishing. This hypothetical clarifies the basis of Yates’s resistance to the common-law theory. As he saw it, the author had a right (seemingly at common law, though he did not say so) to prevent others from publishing a manuscript without permission but no common-law right to restrain others from printing books that would vitiate the market for the as-yet unpublished manuscript.

seemed to require an adjudication on the merits rather than the merely interim relief typical in most of the Chancery disputes. Besides any questions about institutional competence raised by the dispute, Sewell’s reluctance to undertake such an adjudication may also have been prompted by his relative lack of experience on the bench – he had been appointed just a year earlier – and by a sense that, as Master of the Rolls, he had less authority to render a final decision than did the Lord Chancellors who had handled many of the other Chancery cases.

Willes J raised the point briefly but only to observe that manuscripts were ‘not within the Act of Queen Ann[e]’ and that their unauthorized publication, while ‘not a crime indictable,’ would be ‘a gross violation of a valuable right’; Millar v Taylor, supra note 23 at 216. This assertion hardly comports with the positions of the plaintiffs in Pope v Curll, supra note 74, or Forrester, supra note 121, which Willes cited for support; in both cases, the plaintiffs had pressed their claims by relying on the statute.

Millar v Taylor, ibid at 234 (Yates J, dissenting).

Ibid at 231. In an observation that anticipates Learned Hand’s famous hypothetical about Keats’s ‘Ode on a Grecian Urn,’ Sheldon v MGM Pictures Corp, 81 F 2d 49 at 54 (2d Cir 1936), Yates J adds, ‘Sentiments are free and open to all; and many people may have the same ideas upon the same subjects. In that case, every one of these persons to whom they independently occur, is equally possessed and equally master of all these ideas; and has an equal right to them as his own’; Millar v Taylor, supra note 23 at 231.
Yates doubted that copyright could be regarded as property for many reasons, including that ‘the whole of this right . . . is a mere right of action; a right of bringing an action against those that print the author’s work without his consent.’\footnote{Ibid at 245 (Yates J, dissenting). Similarly, Oren Bracha has observed that the statute ‘did not create a new concept of “ownership” of a copy’; ‘[t]he only entitlement conferred on authors . . . was “the sole Liberty of Printing and Reprinting” a book for the prescribed term’; Bracha, ‘Owning Ideas,’ supra note 44 at 188.} Such an action, he concluded, is at common law a personal right of the author and could not be transferred to another party: ‘[T]his action is merely vindictive: it is in personam; not in rem. Now there is no maxim in our law more clear and plain that this, “that things in actions are not assignable.”’\footnote{Millar v Taylor, supra note 23 at 245 (Yates J, dissenting). As counsel for the defendant in Tonson v Collins, Yates had argued similarly that copyright could not be a form of property: ‘It is not a chose in action, for those are not assignable, and this is insisted to have been usually assigned. It is merely a right of publishing ideas; and under what denomination of property that can fall, unless the Legislature will give it one, I cannot comprehend’; Tonson v Collins 1762, supra note 45 at 187.} Without pointing to libel as an especially apt analogy for the right to prohibit reprinting – any \textit{in personam} claim would be equally apt – this analysis strongly emphasizes the personal nature of the right in question. The existence of an assignable right in printed books was due entirely to the \textit{Statute of Anne}. It empowered authors to transfer the right to control publication, but the statute could not transform a personal right into a right \textit{in rem} at common law.

Because Yates focused on refuting the arguments for deriving copyright from the common law and for regarding it as a form of property, his judgment does not strive to spell out a positive conception of copyright along reputational or communicative lines. Nevertheless, the elements of such a conception may be found in his judgment. As defendant’s counsel in \textit{Tonson v Collins}, he had hinted at a reputational analogy, observing that ‘the good-will of a shop is every day sold for a valuable consideration: yet that does not make it property.’\footnote{Ibid at 185: argument of Yates, counsel for defendant. In fact, some twenty years earlier, Lord Hardwicke had suggested that the good will of an inn might be regarded as property: putting the case of a testator who had run ‘a house of great trade,’ Hardwicke observed that the executor ‘must account for the value of what is called the good-will of it’; Gibblett v Read (1743), 88 ER 573 at 574 (Ch).} Yates was ready to grant that the manuscript was a form of property, though he called it a ‘peculiar property,’ again suggesting that such a claim was uniquely available to the author:

\textit{E}very man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them public . . . [T]he manuscript is, in every sense, his peculiar property; and no man may take it from him, or make any use of it which he has not authorized, without being guilty of a
violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication.\textsuperscript{150}

Although he categorizes manuscripts as property, the rights that Yates describes include a significant dignitary aspect: the author’s rights are as much violated when someone else reads the manuscript without consent, as when it is published without consent. That an author chooses not to share his ideas with others is sufficient reason to make the unauthorized perusal ‘a violation of his property.’ Yates hints at this kind of violation again in a passage that questions the stationers’ ‘unwarrantable’ powers under the guild’s royal charter and the ensuing licensing acts, which, as he puts it, made the guild members ‘a kind of literary constables, to seize all books that were printed contrary to the statute.’ Fortified with this ‘absolute’ power, he adds, ‘they attempted to execute such outrages that no body could submit to.’\textsuperscript{151} The implication is that the stationers conducted themselves as if acting under a general warrant – a license to conduct indiscriminate searches, recently condemned in the landmark case of Wilkes v Wood,\textsuperscript{152} which would provide a basis for the Fourth Amendment right against unreasonable searches and seizures.\textsuperscript{153}

\textsuperscript{150} Millar v Taylor, supra note 23 at 242 (Yates J, dissenting). Alexandra Halasz, discussing the stationers’ practices in the seventeenth century, similarly describes them as investing in ‘textual property,’ which she calls ‘a peculiar form of property because it consists not in owning something, but in having control over a particular text’; Alexandra Halasz, The Marketplace of Print: Pamphlets and the Public Sphere in Early Modern England (Cambridge: Cambridge University Press, 1997) at 24.

\textsuperscript{151} Millar v Taylor, ibid at 240.

\textsuperscript{152} (1763), 98 ER 489 (CP).

\textsuperscript{153} See e.g. Powell v McCormack, 395 US 486 at 527–41 (1969); Boyd v United States, 116 US 616 at 625–30 (1886) [Boyd]. Commentators on Millar v Taylor have overlooked this passage, but Donaldson’s lawyers apparently noticed and treasured it, because in their pleadings before the House of the Lords five years later, they repeated the remark about ‘literary constables’ and then drew the obvious conclusion, remarking that the stationers behaved as if they were ‘armed with a GENERAL WARRANT’; Appellants’ brief in Donaldson, supra note 15, reprinted in Cases of the Appellants, supra note 28 at 7 [emphasis in original]. Edward Thurlow and Arthur Murphy, who had represented the defendants in Millar v Taylor, supra note 23, were both counsel (along with Sir John Dalrymple) for the defendants/appellants in Donaldson, supra note 15; Cases of the Appellants, ibid at 14. This language would be repeated later the same year in a pamphlet that criticized the booksellers’ efforts to reverse Donaldson legislatively. The proposed bill included a forfeiture provision, which, according to the author of the pamphlet, ‘seems to arm the booksellers with a general warrant to search houses’; ‘Further Remarks and Papers on the Booksellers Bill’ in Petitions and Papers Relating to the Bill of the Booksellers Now before the House of Commons (London; no publisher, 1774) at 4. For the impugned provision, see An Act for Relief of Booksellers and Others, by Vesting the Copies of Printed Books in the Purchasers of Such Copies from Authors, or Their Assigns, for a Limited Time (London: no publisher, 1774) at 3.
In short, Yates suggests that the stationers used their charter to justify invading the privacy of anyone who might be suspected of infringing on the guild members’ patents and grants. These ‘unwarrantable’ searches involve a violation much like the one committed by the unauthorized reader of a manuscript. The harm that Yates discerns is reminiscent of the communicative harm in *Burnet*, involving the compulsion to speak to an audience whom the author never sought to address. By implication, the booksellers were using their powers arbitrarily to force their victims to incriminate themselves. The right against unreasonable searches is distinct from the right against self-incrimination, but the two are conceptually linked as personal rights that protect physical and mental privacy.154 This commonality, in turn, shows why they serve in Yates’s view as analogues for the author’s right against unauthorized publication of a manuscript: all of these are non-assignable rights, attaching strictly to the person whose privacy is threatened.

If Yates offered perhaps the fullest articulation of copyright as a personal right that resists transposition into the framework of property, Mansfield attempted to justify this transposition by linking the author’s property right to the right over the manuscript. Yet his judgment seems to assume, rather than to demonstrate, that the right of control amounts to a property right. Inquiring into the source of a common-law right protecting ‘the copy before publication,’ Mansfield concedes that it ‘can not be found in custom’ and cannot be said to have been produced by ‘immemorial’ use.155 Having already framed the issue as one involving a property right at common law, Mansfield then asks again, ‘From what, then, is the common law [right] drawn?’ and he proceeds to investigate the source by enumerating the author’s rights over the manuscript. While his emphasis on the author’s natural rights has often been noted,

154 These rights are conjoined – and linked to property rights – in *Boyd*, supra note 153 at 630: ‘The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . [T]hey apply to all invasions on the part of the government and its employe[e]s of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offence, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN’s judgment [in *Wilkes*]. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other’ [emphasis in original].

155 *Millar v Taylor*, supra note 23 at 252 (Lord Mansfield CJ).
less attention has been given to the structure of his argument, which proceeds by interleaving financial concerns and dignitary rights.

[I]t 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 ever 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 Care he will trust the Accuracy and Correctness of the Impression; in whose Honesty he will confide, not to foist in Additions.

... The author may not only be deprived of any profit, but lose the expence 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 errors. He cannot amend; or cancel a faulty edition . . . He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.

... The Whole then must finally resolve into this Question, ‘Whether it is agreeable to Natural Principles, Moral Justice and Fitness, to allow him the Copy, *after* publication, as well as *before*.’

In the first two paragraphs, Mansfield rehearses the same pattern, starting with economic rights and then quickly moving to dignitary concerns. The natural-rights principles that he identifies seem to be bound up with both aspects of the author’s entitlements. Rather than emerging as a precipitate from this combination, however, the property right serves as a premise for the inquiry.

Mansfield begins by insisting on the author’s right to the ‘Profits of his own Ingenuity and Labour,’ an unsupportable view unless the right in question has already been assumed to be a property right. Yates would not afford the author these profits, precisely because he would not grant the premise. Rather than developing or grounding the economic argument, Mansfield immediately turns to the right to decide when and how to publish – a right that involves a host of communicative issues including timing, book format, and publisher. The author’s right to bar others from ‘us[ing] his Name’ also seems to bear on the communicative right at this step: as in *Burnet*, the concern involves the harm of compelling the author to speak in public ‘without his Consent.’ After a final observation about allowing the author to choose the vehicle of publication, Mansfield starts afresh.

156 Ibid at 252–3.
Again he begins with economic rights, this time pointing to the inequity of leaving the author in debt while others profit from selling the work. As in the first instance, Yates would find nothing inequitable about this state of affairs because he would assume that, if there were no statutory protection, the author who published had deliberately chosen to make the work freely available. Again, Mansfield drops the financial point and rapidly moves on to dignitary concerns, this time raising reputational issues as he defends the author’s control over ‘the use of his own name,’ the accuracy of the text, and the publishers with whom he is associated.157 Communicative issues are also relevant here, but the emphasis falls more heavily on how the author will be perceived if he cannot prevent publication of an error-ridden text and cannot decide on the company he is seen as keeping. Here, once again, the threat posed by a ‘faulty edition’ that links the author with reckless publishers recalls the harms that result from libel.

The dignitary arguments, in both instances, may serve to elaborate the economic right specified at the outset, but as they unfold, they point to concerns that are not encapsulated by the right to profit from the work. Rather, we begin with the author’s claim to the profits, and as we learn how the author may control the process that may potentially yield those profits, we are increasingly immersed in details that have more bearing on the author’s public stance and image than on any financial considerations. Again, it must be recalled that most publishing contracts at this time involved a one-time transfer of copyright and that only the most successful writers were in any position to bargain over the various matters that Mansfield enumerates. In this setting, many of the items on Mansfield’s list would relate solely to prepublication rights (‘the Manner of Publication, how many, what Volume’) and therefore could have no bearing on the fitness of the author’s right to ‘the Copy, after publication, as well as before.’ Yet having concluded that these concerns justify a common-law right, Mansfield implies that the demonstration is complete.

Significantly, the view that moral justice and fitness should secure a post-publication right was inconsistent with contemporary law and with the whole rationale behind the booksellers’ push for a common-law copyright. Authors occasionally contracted for rights involving revisions to later editions and the like, but lacking any such arrangement, booksellers assumed that in buying the copy they acquired the right to control

157 See also ibid at 256: ‘[The author’s] 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.’ Treating faulty editions as a disgrace to the author and a distortion of the work’s message, this passage combines reputational and communicative concerns.
the book’s future.\textsuperscript{158} Thus the post-publication rights that Mansfield describes were rarely retained by the author, or even contemplated as belonging to the author. Finally, even if Mansfield’s arguments could be taken to justify an authorial property right, they do not apply to the bookseller, after assignment of the copyright, unless the purchaser is seen as having the same dignitary stake in the product – a claim that Mansfield does not advance.\textsuperscript{159} He strives to translate a set of personal concerns into justifications for a property right that may then, without further inspection, be deemed assignable, so that the substructure falls away once its work has been done. The author’s personal stake in the text and its reception was the very feature that led Yates to deny that any property right could be discerned.

Mansfield’s argument does not strive to demonstrate that property is the appropriate frame, so much as it implies that the dignitary questions are tinged with the financial considerations that they follow and seem to illustrate, in the treatment of communicative rights and again in the treatment of reputational rights. The right to decide ‘how many, what Volume, what Print,’ and the opportunity to correct or update the text, may certainly affect the text’s value and the author’s ability to profit but might also be seen as supporting Yates’s view that the dispute is over a personal right, a right to do something and restrain others from doing it. Mansfield attempts, at the beginning of his opinion, to describe the nature of the property right, but in that section he does not so much rebut Yates’s view as repeat the problem: to understand copyright as property, Mansfield explains, we need only abandon a physicalist understanding of property and accept that this label may also cover an ‘incorporeal right’ over something with no ‘physical existence whatsoever.’ Granting that such rights may exist, the description does not explain why they are better understood in terms of property rather than as personal rights or interests, like a chose in action. The thrust of the argument seems to be that economic concerns are at stake for the author, and so the category of property, assumed at the outset to apply here, proves apt once we consider the threats that an unauthorized edition may pose.

Without arguing for a property framework, James Oldham hints at its role in this analysis when he observes that if \textit{Millar} had not been

\textsuperscript{158} Eighteenth-century publishing contracts have usually been examined in individual cases, rather than collectively. For a useful set of examples, see Percy J Dobell & Arthur E Dobell, \textit{A Catalogue of a Remarkable Collection of Publisher’s Agreements . . . in the Eighteenth Century} (Tunbridge Wells, UK: Dobell’s Antiquarian Bookstore, 1941). Lionel Bently, at the University of Cambridge, is currently researching this subject.

\textsuperscript{159} For a parallel critique of the labour theory, see supra note 13.
overruled within a few years, Mansfield’s opinion might have afforded more scope for reputational claims in copyright suits: ‘Although not explicit, one of Mansfield’s objectives in Millar appears to have been to preserve the opportunity for injured authors to recover reputational damages.’160 This possibility was nipped in the bud because Millar was so quickly reversed in Donaldson. ‘The remedy flourished, however, in the related context of trademark protection, a context unencumbered by statute in the late 1700s. In ‘passing off’ cases, plaintiffs were afforded a common-law right to protect their distinctive ‘marks’ in a manner quite similar to the right recognized for authors in Millar.’161 If this was Mansfield’s aim, he evidently misunderstood the structure of contemporary publishing transactions. Perhaps his experience with Pope led Mansfield to consider him typical rather than exceptional, or perhaps Mansfield’s work as a legal advocate for booksellers caused him to lose sight of the contexts in which writers’ and publishers’ interests were not synonymous.162 Authors were not likely to be plaintiffs in reputational cases, and the affirmation of a perpetual copyright term was precisely the way to ensure that authors would not be plaintiffs, because booksellers would persist in disregarding the reversion scheme and so authors would lack standing to claim reputational damages.

Further, that a plaintiff might claim reputational damages does not necessarily suggest that the right being vindicated is a property right; it is doubtful, for example, that damages awards in libel cases contributed to an understanding of reputation as property in the eighteenth century. Nevertheless, as the trademark example suggests, where the dispute is already embedded in a commercial context, the ability to measure a plaintiff’s reputational harm by reference to market losses may facilitate

160 James Oldham, English Common Law in the Age of Mansfield (Chapel Hill, NC: University of North Carolina Press, 2004) at 195. Oldham notes, ‘Reputation damages were allowed in a number of contexts, despite the difficulty of measurement. In criminal conversation [i.e. adultery] cases, for example, special juries of gentlemen readily accepted the idea of reputation damage . . . As Mansfield noted in Pitt v Almon, “From defamation the law implies a damage[;] the proof of actual damage is not necessary to sustain an action”’; ibid at 205 [footnote omitted]. Similarly, in discussing a trademark infringement case in which the defendant was charged with imitating the plaintiff’s watches, Oldham writes, ‘The newspaper report . . . reveals the similarity between Mansfield’s thinking in passing-off cases and his views in Millar v Taylor. In his charge to the jury, Mansfield described the harm done by . . . passing off . . . as follows: “First, the injury done a man of reputation by having his name put on indifferent work; next, the injury it did the nation by bringing the trade into disrepute with foreigners”’; ibid at 197 [citation omitted].
161 Ibid at 196.
162 On Mansfield’s work as a lawyer for Jacob Tonson, see supra note 129 and accompanying text.
the view that reputation itself, in this context, is not the essence of the dispute but is an effect of a property claim that provides the real source of the controversy. The deprivation of profit is no longer seen as an aid in measuring an injury (such as loss of ‘control over the correctness of [the] work’), but instead appears to be the source of the injury, which the reputational harm merely substantiates. Though Mansfield catalogues dignitary injuries in considerable detail in the paragraphs quoted above, it is notable that, at each step, he begins with financial considerations. This structure might be taken to suggest that he regarded this aspect as the primary one, which the reputational and communicative concerns merely substantiated.

Millar was a major triumph for the London booksellers and appeared to settle an issue that had worried them for many decades. When the litigation was over and the Chancery issued a permanent injunction for a book that was more than forty years old, newspapers reported that ‘the question about literary property is finally closed, which is a matter of great concern to many of the booksellers in London.’ Reports of the judgment were quickly published, reflecting the booksellers’ eagerness to have the judgment circulated. However, in its first appearance as a separate text, in 1771, it was not published in London but in Leith, in a volume that added an appendix on the ‘state of literary property,’ taking a hostile view of the London booksellers and their common-law claims for perpetual protection. In an effort that was more supportive of the Londoners, James Burrow published his report of the judgment in a stand-alone volume in 1773. He explained that he was preparing his fourth volume of King’s Bench reports, but its completion was some time off and he had been asked by ‘Friends who bear no small Character in the learned World, to select this Case . . . and communicate it to the

164 Speeches or Arguments of the Judges of the Court of King’s Bench . . . in the Cause Millar against Taylor (Leith, Scotland: Coke, 1771). It is not surprising that a bookseller in Leith would adopt this view, because the copy-holding booksellers were concentrated in London. Booksellers outside of London could rarely acquire copies and had nothing to gain from a ruling that supported the Londoners’ monopoly on copies. On this point see e.g. Christopher Flint, The Appearance of Print in Eighteenth-Century Fiction (Cambridge: Cambridge University Press, 2011) at 5.
165 The Question Concerning Literary Property, Determined by the Court of King’s Bench . . . in the Cause between Andrew Millar and Robert Taylor (London: Strahan & Woodfall, 1773). The book was published on 5 April 1773. See The General Evening Post [London] (27–30 March 1773) 1 at col 2, advertising the book’s publication.
Public as a detached Piece.’ Burrow added that the judgment ‘is . . . become a Precedent for all other Cases which come within the Reason of it.’\textsuperscript{166} The statement seems to be optative rather than descriptive: Burrow cites no cases that Millar helped to resolve, nor is it clear that he could have cited any.\textsuperscript{167} Less than a year later, the judgment was overruled in Donaldson v Becket.

E. DONALDSON v BECKET

Yates was the only member of the Millar court to resist the property framework, and his view would have little influence on the judges in Donaldson. Historians have discussed this judgment at length, and my comments focus only on the very limited place of dignitary rights and on the significance of property in the judges’ comments.\textsuperscript{168} The five questions put to the judges did not use the term ‘property.’ Rather, these questions involved ‘the sole first Right of printing and publishing [a composition],’ asking whether, at common law and after the passage of the Statute of Anne, the author could sue for violation of any such right, and if so, whether this right lasted in perpetuity.\textsuperscript{169} That many of the judges answered by speaking of ‘literary property’ shows how influential this framework had already become. A majority held that authors had a common-law right over the work (though not necessarily a property right), but a majority also held that whatever was true at common law, authors now had only the limited right specified in the Statute of Anne. Three of the eleven judges – Adams, Gould, and Nares – answered elliptically, in terms that convey little about the basis for their views. Among the remaining eight, discussed below, three found either no common-law right or a limited one that did not constitute a property right, while five held in favour of a property right at common law.

\textsuperscript{166} Ibid at sig A2r–v. This statement seems to hint at Burrow’s partiality for a common-law right. As Rose, supra note 36 at 108–9, notes, when Burrow came to report on Donaldson, supra note 15, he ‘made it seem as if the author’s common-law right was not seriously challenged,’ instead ‘convey[ing] the impression that the determination . . . consisted of a solid affirmation of the author’s right . . . This representation was a distortion in a limited number of respects.’

\textsuperscript{167} The decision was cited (but was not followed) in the Scottish Court of Session by Lord Hailes in Hinton v Donaldson; see James Boswell, The Decision of the Court of Session, upon the Question of Literary Property; in the cause John Hinton . . . against Alexander Donaldson and John Wood (Edinburgh: Donaldson, 1774) at 8.

\textsuperscript{168} Deazley has undertaken the most intensive analysis of the judges’ opinions to appear so far; see Deazley, Origin, supra note 31 at 191–212; also Deazley, ‘The Myth of Copyright at Common Law’ (2003) 62 Cambridge LJ 106.

\textsuperscript{169} Cited in Cases of the Appellants, supra note 28 at 31.
Only Lord Chief Justice De Grey seems to have agreed with Yates that the author had a personal right – even a personal property right, but not one that could be converted into an assignable property right. De Grey defended the author’s ‘sole Right to dispose of his Manuscript as he thinks proper’ and concluded that ‘till [the author] parts with it, he can maintain an Action of Trover, Trespass, or upon the Case against any Man who shall convert that Property to his own Use.’  

For De Grey, however, these claims defined the outer limits of the author’s control over unpublished material, and he added that authors had no ‘Right or Property . . . detached from [the] Manuscript.’ He offered no theory as to why the author’s manuscript merited any kind of protection, and while his list of actions echoes Yates’s comments about in personam claims, for De Grey this seems to be merely a truism about choses in action that tells us nothing significant about the nature or basis of the author’s claim. His account nowhere suggests that, because the author has a personal right, it is akin to a reputational right. Rejecting any argument based on ‘the Moral Fitness of Things,’ De Grey observed that, while ‘Beautiful . . . in Theory,’ such a principle could be not applied practically without causing ‘intollerable Confusion.’ This statement responded not only to Mansfield’s judgment in Millar but also to several of the other Donaldson judges, who spoke of moral rights while supporting a property right.

Baron Perrot also held against any common-law right and would not even allow that authors had a right against unauthorized publication of their manuscripts: ‘If a Manuscript is surreptitiously obtained, an Action at Common Law will certainly lie for the corporeal part of it, the Paper; but if someone, after ‘multipl[y]ing] Copies, should return the manuscript, ‘he hath surrendered all that the Author hath any Common Law Right to claim.’ Both De Grey and Perrot, then, would have rejected Hardwicke’s view in Pope v Curll that the author of a letter has an ongoing property claim in its ‘composition’ or has a ‘joint property’ with the recipient. On De Grey’s view, an author who voluntarily parts with a letter cannot complain about trover or trespass by the recipient who ‘convert[s] that Property to his own Use,’ while for Perrot, there were simply no rights beyond the right to the manuscript itself.

Baron Eyre took much the same view, finding the idea of ‘a Right to appropriate Ideas’ so inherently dubious that he did not trouble himself with any personal rights that the author might have over the

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170 Ibid at 44.
171 Ibid at 45.
172 Ibid at 46.
173 Ibid at 40.
In his view, ‘at Common Law, the Author of a literary Composition, hath no Right of printing and publishing the same for Sale,’ and ‘[t]here being no Common Law Right, An Author could not bring his Action against any Person for publishing his literary Composition without his Consent.’ Thus, where Pope v Curll opened up a means of distinguishing the ideational aspect of the text from its physical manifestation, providing the basis for what would later become the idea/expression dichotomy, those who were most hostile to the property approach would have barred this development. The result, had theirs been the majority view, might have been to foreclose the possibility of any claim to derivative rights because that claim turns on a property right that extends beyond the form of words that makes up the book.

Among the six judges who found in favour of a common-law property right that outlived the statute, five gave their reasons in some detail, and to varying degrees, they seem to have shared Mansfield’s view that the property right was associated with the author’s interest in the profits flowing from the manuscript. Justice Ashurst defended the ‘Claim of Literary Property’ at common law on the grounds of ‘natural Justice and solid Reason’; he offered little by way of elaboration, except to observe that a literary work is ‘of Value to the Owner.’ By this, he seems to have meant that the work could be lucrative, just as, in his parallel example, the owner of a piece of land reserves the right to exploit an underground mine even if he creates a public highway on the surface. Lord Chief Baron Smythe gave a similar analysis, finding a common-law right to ‘Literary Property,’ which he defended largely by reference to the cases rather than to natural law. However, he repeated Ashurst’s observation about the right to give away surface land without giving away ‘the Mines beneath it,’ implying that in his view, the revenue that could be derived from the work was an important consideration in treating it as property. Justice Blackstone gave short answers, without explaining their basis; however, several reports reprinted his discussion in the Commentaries, which categorized copyright as a property right that was anchored

174 Ibid at 31.
175 Ibid at 32 [emphasis altered and internal quotation marks omitted].
176 De Grey considered this possibility when he asserted that there was no basis for prohibiting ‘Abridgements . . . Translations, [and] Notes,’ even if they ‘effectually deprive the original Author of the Fruit of his Labours’; ibid at 46.
177 Nares, Ashurst, Blackstone, Willes, and Aston J, and Smythe LCB.
178 Cited in Cases of the Appellants, supra note 28 at 35. On this point, see also Bracha, ‘Owning Ideas,’ supra note 44 at 207–8, 211–2.
179 Ibid at 36.
180 Ibid at 43.
in Locke’s theory of labour and that protected the author’s ability to ‘make Profit of the Copies’ of a work. Justice Willes held that the ‘Copy Right of Authors’ was justified by ‘Reason and Truth,’ observing that the ‘Claim of Right began with Printing’ because the right to copy manuscripts, ‘from which no Profit could be got, was hardly a Property.’ Justice Aston held in favour of ‘Literary Property’ at common law on various grounds, including the author’s ‘natural Right to the Produce of his mental Labor,’ a right that he did not specify in more detail. In one way or another, each of these opinions associates property with the author’s financial rights.

Given the brevity of their opinions, it is hard to tell whether these judges shared the same views about the relation between natural rights, property rights, and the author’s right to profit from the work. Mansfield’s comments on the relations among these concepts, quoted earlier, were well known to all of the judges and were reprinted in the *Morning Chronicle* while *Donaldson* was pending. A similar view, also bereft of the dignitary concerns that Mansfield had enumerated in his judgment, was succinctly presented at oral argument by Solicitor General Wedderburn, arguing for the London booksellers:

Authors . . . from Principles of natural Justice . . . have the best Right to the Profits accruing from a Publication of their own Ideas, and . . . it hath been admitted on all Hands that an Author hath an Interest or Property in his own Manuscript . . . It is an Author’s Dominion over his Ideas, that gives him Property in his Manuscript originally, and nothing but a Transfer of that Dominion or Right of Disposal can take it away.

This dominion over ideas might have been regarded as a personal right – an interest rather than a property – that was incapable of transfer. However, as the judges’ comments show, the rejection of a perpetual common-law right was not premised on the rejection of a property right. Rather than establishing two distinct varieties of authors’ rights – a personal right over the manuscript and a statutory right over the printed text – the effect of the discussion was to flatten all these rights into a property right. If the booksellers did not succeed in establishing a perpetual common-law right, they had at least succeeded in designating property as the default category for the right, and by the 1770s, this characterization

181 Ibid at 36.
182 Ibid at 38.
183 Ibid at 39.
184 In this instance, they were reprinted alone, without the other three judges’ comments; *The Morning Chronicle and London Advertiser* (2 February 1774) 4 at cols 2–4.
185 Cited in *Cases of the Appellants*, supra note 28 at 27 [emphasis added].
had come to seem so obvious that it was shared even by the opponents of a common-law copyright.

*Donaldson* remains one of the enduring enigmas of copyright law, partly because of the diversity and cryptic nature of the judges’ comments, partly because of confusion about how the votes were recorded, and partly because the judges’ opinions were only advisory and there was no explanation accompanying the final vote in the House of Lords in favour of a limited term. Coupled with these features is the historical proximity of the US Constitution, which makes *Donaldson* a frequently revisited site for scholars in search of illumination on the origins of the Copyright Clause. The judges’ opinions have been cited as evidence that authors did, or did not, enjoy copyright protection at common law and that natural law does, or does not, play a role in copyright. As the foregoing discussion shows, there can be no simple answer to these questions. *Donaldson* does, however, testify to the robustness of a property framework for understanding copyright by the latter part of the eighteenth century.

### III The property framework

The role of dignitary rights in the early development of copyright law might simply be regarded as an antiquarian topic that illuminates the origins of modern doctrine but tells us nothing about contemporary doctrinal issues. At a minimum, however, this historical investigation helps to explain the roots of two problems that have persisted in copyright law since the mid-nineteenth century: the expansion of derivative rights and the lengthening term of protection. When the rights associated with

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186 On this point, and for clarification of the judges’ votes, see Deazley, *Origin*, supra note 31 at 196–205.

187 Discussions of common law as playing a role in *Donaldson*, supra note 15, include Rose, supra note 36 at 111–2; Deazley, *Origin*, supra note 31 at 191–210; Hughes, ‘Copyright,’ supra note 132 at 1025. *Donaldson* is often described simply as extinguishing a common-law right. See e.g. Howard Abrams, ‘The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright’ (1983) 29 Wayne L Rev 1119 [Abrams]. In arguing that *Donaldson* rejected the common-law theory, Abrams does not say that the judges rejected the natural-rights theory, though some have credited him with this argument.

188 For a discussion that finds a role for natural law in *Donaldson*, ibid, see e.g. Yen, supra note 11 at 528–9. In a number of articles, L Ray Patterson has argued that *Donaldson* rejected a theory based on natural law. See e.g. Patterson, ‘Understanding the Copyright Clause’ (2000) 47 Journal of the Copyright Society of America 365 at 382. The same view may be found in John Tehranian, ‘Et Tu, Fair Use? The Triumph of Natural-Law Copyright’ (2005) 38 UC Davis L Rev 465 at 469–70, 472 [Tehranian]; Neils Schaumann, ‘Copyright Class War’ (2003) UCLA Ent L Rev 247 at 283, citing Abrams, ibid.
Copyright are understood primarily within the frame of property, their distance from rights over tangible property seem – to proponents of stronger protection, at least – to become more difficult to justify. In particular, advocates of heightened copyright protection find it hard to resist the analogy with tangible property when challenging the limited duration of copyright, and they find it hard to resist the analogies of theft and trespass when insisting that similarities in other works should be treated as infringements. These aspects of copyright law have undergone significant change since the mid-nineteenth century, spurred on not only by evolving conceptualizations of copyright’s legal domain but also by shifting views about authorship, literary creation, reading, and the circulation of writing. Without minimizing the significance of these other factors, it would be fair to say that the frequent appeal to property rights has played an important role in the developments of the last century and a half. Others have discussed the ‘propertization’ of copyright as a nineteenth- or twentieth-century phenomenon; while that may provide an accurate assessment of the doctrinal changes in this area, the evidence discussed above suggests that this process began earlier. Facilitating this pattern has been an increasing tendency to explain the rights of authors according to the logic of incentive; that is, to argue that these rights are necessitated by the need to encourage writers and conversely are limited to those considerations that can be expected to have that effect. A justification based on incentives need not look to property rights as its sole province, but when pursued within that sphere, the search for incentives readily translates into talk of rewards and compensation construed in financial terms. The Statute of Anne itself

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190 For a helpful diagnosis of that perspective, see Diane Leenheer Zimmerman, ‘Copyrights as Incentives: Did We Just Imagine That?’ (2011) 12 Theor Inq L 29.

191 Mansfield drew on this logic not only in Millar v Taylor, supra note 23 – see text accompanying note 156 supra – but even more explicitly in Sayre v Moore (1785), when he insisted on the need to ‘guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The Act that secures copy-right to authors, guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject’; cited in Cary v Longman (1801), 1 East 358, 102 ER 138 at 140, note b. Mansfield adds that ‘similitude[s]’ must be allowed except when they show that the defendant’s publication ‘is a transcript of the [plaintiff’s], and nothing more than a transcript’; ibid. Emphasizing the need to advance ‘progress in the arts’ as well as the need to
referred to the ‘Encouragement of Learning,’ and as we have seen, some eighteenth-century judges – particularly Mansfield – were vocal about the need to ensure that authors received the profits that were due to them. But while readily discernible in the jurisprudence, this strain of thought hardly defines the contemporaneous view of copyright, which permitted numerous forms of imitation that might affect the market for the source, including abridgements.192

When a proposal to forbid abridgements was included in the unsuccessful bill introduced in 1737, the prohibition was restricted to a three-year window, justified by language suggesting that the primary concern involved the author’s right to control the integrity of the text following its initial publication.193 Three years, evidently, was thought to be enough time to allow the author’s message to circulate without contamination; after that, the revisers and paraphrasers would be free to ply their trade, even if their efforts might reduce the sales of a book published so recently. Today, the market effects wrought by an abridgement would provide a paradigmatic example of the harm that is often treated as a fundamental concern of copyright law. From a modern perspective, the radical change in the characterization of infringement since the eighteenth century shows that the jurists and legislators of that era simply misunderstood the point of copyright and failed to make good on the statute’s express commitment to ‘the encouragement of learning.’ However, if we do not approach the question from the bias of the present but instead try to make sense of the jurisprudence on its own terms, we might say that it reflects an emerging property framework, not yet seen as supplying the basic structure for resolving copyright disputes.

Since the early nineteenth century, advocates of copyright-term extension in England and the United States have emphasized the importance of protecting property. In nineteenth-century England, the duration of copyright increased from the twenty-eight years set out in the Statute of Anne to a term of forty-two years, or seven years after the author’s death, whichever was longer.194 By the end of the twentieth century, the term had increased to seventy years after the author’s death.195 The copyright

encourage and reward writers, this view does not associate incentives with compensation for the value of all potentially protectable aspects of the work, an association often taken for granted in modern explanations that proceed entirely within a property framework. For a critique of this mode of explanation, see Rochelle Cooper Dreyfuss, ‘Expressive Genericity: Trademarks as Language in the Pepsi Generation’ (1990) 65 Notre Dame L Rev 397 at 405 [Dreyfuss].

192 See supra notes 86, 92, and 176.
193 See supra note 35.
194 Copyright Law Amendment Act, 1842 (UK), 5 and 6 Vict, c 45.
195 Copyright, Designs and Patents Act 1988 (UK), c 48, s 12(2).
term in the United States has undergone a similar extension, increasing from twenty-eight years in 1790 to forty-two years under the 1831 Act (reaffirmed in 1870) and, after various intermediate extensions, to life plus seventy years in 1998. As Lawrence Lessig has observed, this process of expansion reflects a view in which ‘privileges granted to authors in exchange for creativity’ are translated into ‘rights that are, like natural property rights, permanent and absolute.’ While courts reject this characterization of copyright, it is notable that arguments for the extension of the copyright term have been consistently presented in rhetoric that compares the author’s property to tangible property.

The same developments have been seen in the growth of derivative rights. The Statute of Anne was concerned with unauthorized reprintings of books and was treated by courts as an anti-piracy statute aimed at verbatim reprints. The subject of copyright expanded in the nineteenth century to cover many forms of imitation that had played a vital role in the development of eighteenth-century literary culture, such as sequels and parodies. Non-literal aspects of texts such as plots, characters, and settings became eligible for protection, so long as they were delineated in sufficient detail. George Ticknor Curtis, in his 1847 treatise on

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196 Act of 31 May 1790, c 15, 1 Stat 124.
197 Act of 3 February 1831, c 16, 4 Stat 436; Act of 8 July 1870, c 230, 16 Stat 198.
200 See e.g. Fogerty v Fantasy, Inc, 510 US 517 at 526 (1994): ‘[T]he monopoly privileges that Congress has authorized, while intended to motivate the creative activity of authors and inventors by the provision of a special reward, are limited in nature and must ultimately serve the public good’ [internal quotation marks and citation omitted].
copyright, explained that ‘whatever is metaphysically part or parcel of the intellectual contents of a book, if in a just sense original, is protected and included under the right of property vested by law in the author.’ It would be difficult to establish that this conclusion was based directly on Curtis’s view of copyright as property, but he displays an abiding interest in the analogy to tangible property throughout the treatise. An American court could declare, in 1868, that an imitation infringes if ‘the appropriated series of events . . . [though couched in] different language, is recognized by the spectator . . . as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order.’ In an early application of the ‘if value, then [property] right’ logic criticized by Rochelle Dreyfuss, the court reasoned that the defendant’s play infringed because it included a scene, pioneered by the plaintiff and constituting ‘the chief value of [his] composition,’ in which a character is tied to a railroad track and escapes at the last moment. Perhaps neither of these examples had a particularly significant influence on thinking about derivative rights, but both are symptomatic of an increasing concern to convert previously permissible forms of imitation into infringement, especially when the imitations, by capitalizing on the plaintiff’s success, could be asserted to affect the market for the source. After a century’s worth of jurisprudence reflecting this view, the Copyright Act of 1976 expressly cited, as a factor vitiating a defendant’s fair use claim, ‘the effect of the use upon the potential market for . . . the copyrighted work.’ The impulse to capture, for the plaintiff, the value that might have been derived from potential but unexploited markets is easily justified in a property framework and helpfully reflects the prevalence of property-based thinking in modern copyright law.

204 See e.g. Curtis, ibid at 4–8 (discussing the theoretical basis of property); 43–44, 75 (arguing that the stationers’ practices and litigation in the seventeenth century show that copyright was a form of property at common law); 86 (citing Lord Mansfield CJ in Millar v Taylor, supra note 23, and appealing to Locke’s theory of labour to justify copyright on ‘the ultimate foundations which sustain property in general’).
205 Daly v Palmer, 6 F Cas 1132 at 1138 (CC NY 1868). Quoting this passage, John Tehranian writes that in Daly, ‘derivative rights . . . [serve] to protect the natural property rights of authors in both the literal and nonliteral elements ascribed to their creations’; Tehranian, supra note 188 at 491.
206 Ibid at 1133. For Dreyfuss’s critique, see supra note 191.
In light of the competing arguments over the *Statute of Anne* that had been circulating since its passage, the success of this view is striking. Oren Bracha has emphasized the innovative nature of the model of property that was developed in the course of the copyright debate – an ‘abstract model detached from physicalist definitions and limitations’ that found few parallels elsewhere in the law but that was treated by its proponents as a straightforward application of property doctrine, generating all of the rights and duties usually associated with property.\textsuperscript{208} As we have seen, the *Statute of Anne* almost entirely avoided any discussion of property and provided for an authorial reversion right which, even if it was understood in terms of property, carried the implication of a personal right along the lines that Justice Yates delineated in *Millar*. If an author like Pope had sought to litigate the issue, or if the King’s Bench had taken up the question earlier, there would probably have been no confusion by the latter part of the century about a common-law property right: it would very likely have been nipped in the bud before it had a chance to find a home between the lines of Chancery injunctions and in pamphlets on natural rights. Copyright would likely have come to be classified as property in any case, but this approach would have been tempered through exposure to the dignitary claims that such litigation would have presented.

\textsuperscript{208} Bracha, ‘Owning Ideas,’ supra note 44 at 219.