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Copyright as a Property Right? Authorial Perspectives in Eighteenth-Century England

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Copyright as a Property Right? Authorial Perspectives in Eighteenth-Century England

Simon Stern*

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INTRODUCTION

The idea that copyright is a form of intellectual property has been so well-accepted, for so long, that it seems hard to conceive of any other way to conceptualize the applicable legal framework. In the last few decades, however, a number of scholars have questioned the proposition that copyright must necessarily be rooted entirely in a property paradigm, and have sought to show how, over the last century and a half or so, that paradigm has been applied increasingly strictly and its logic has been extended with ever greater force.¹ Against this effort, others have sought to establish that the language and conceptual framework of property have guided Anglo-American thinking about copyright for a much longer time.² That property-based rationales and rhetoric have informed the treatment of copyright

* Associate Professor of Law and English, University of Toronto. For comments on previous drafts, thanks to Zahr Said, Jessica Silbey, and Bob Spoo—and particularly to Mark Rose for his generous comments, and Dan Burk both for his comments and for inviting me to participate in a terrific conference.

1. See, e.g., ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* (2010); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2003); Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 *DUKE L.J.* 1 (2004); Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, in 6 *NEW DIRECTIONS IN COPYRIGHT LAW* 3 (Fiona Macmillan ed., 2007).

2. See, e.g., Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 *S. CAL. L. REV.* 993 (2005).

since the eighteenth century is hardly a novel proposition; every major history of copyright law that touches on its origins has commented on the significance of such explanations, particularly in relation to the passage of the Statute of Anne in 1710.³ But what becomes equally evident, from a reading of those histories and of the contemporaneous sources related to literary commerce more generally, is that the conception of copyright as a form of property was neither the only, nor even the dominant, paradigm in circulation at the time. There is, to be sure, a certain amount of satisfaction to be gained by discovering the word *property* in eighteenth-century legal sources, but that discovery marks the beginning, not the end, of any such analysis, because the question remains who is invoking the concept, and to what end.

In this article, I suggest that a historical discussion about the nature of copyright should consider the *sources* of the various ways of framing the issue. When the language of property appears among eighteenth-century commentators on copyright, it makes a difference whether this language comes primarily from judges, members of the bookselling industry and their lawyers, or writers and their counsel—or some combination of these. Moreover, the opacity of older sources may, on occasion, lead to misinterpretations of the case or treatise in which this language appears. Building on earlier work that traces some aspects of the property framework as it developed in eighteenth-century British jurisprudence,⁴ here I show that writers were far cagier about the language of property than were their colleagues in the bookselling industry, sometimes adopting this language equivocally, sometimes repudiating it emphatically. At a minimum, this should lead us to question the view that the mere presence of this language, in some contemporaneous legal decisions and pamphlets, shows that a property-based view was generally understood in the eighteenth century as the proper framework for understanding copyright.

There is little reason to suppose that property rights furnished the default legal framework for the “sole Right and Liberty of Printing” protected in the Statute of Anne, at the time of its passage.⁵ Before it came to be seen as a synonym for “literary property,” copyright was a *sui generis* right, understood according to various tentative analogies that included both property rights and various personal rights. The Statute of Anne prohibited unauthorized, verbatim reproduction of books, but

3. See, e.g., RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695–1775) 40–41 (2004) (noting the emergence of new property-based metaphors, elaborated by Daniel Defoe and members of the booksellers’ guild, during the first years of the eighteenth century); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 139–42 (1968) (noting, for instance, that in petitioning Parliament for the bill, the London guild of booksellers insisted that “their Property . . . should be provided for”); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 34–41 (1993) (also noting the emergence of new property-based metaphors, elaborated by Daniel Defoe and members of the booksellers’ guild, during the first years of the eighteenth century).

4. Simon Stern, *From Author’s Right to Property Right*, 62 U. TORONTO L.J. 29 (2012).

5. Statute of Anne 1710, 8 Ann., c. 19, pmbl. (Gr. Brit.).

did not deal with derivative rights and said nothing about originality.⁶ On its face, the statute prohibited a certain kind of act—reprinting texts in their entirety—and hence it could be seen not as protecting ownership of a thing, like an alienable interest in a chattel, but instead as protecting a personal right of the author.

The prohibition against unauthorized reproduction might be likened to the right against self-incrimination (insofar as both involve the right not to be compelled to speak except when and how one chooses) or the right not to be libeled (insofar as a publication that the author has not sanctioned might result in reputational harm). The view of copyright as a form of property was advanced primarily by members of the bookselling industry and their lawyers: their pamphlets calling for perpetual copyright protection, and their arguments in cases such as *Tonson v. Collins*,⁷ *Millar v. Taylor*,⁸ and *Donaldson v. Becket*,⁹ insistently pursue that analogy, which appears only fleetingly elsewhere.

Booksellers were not the only ones who held this view, but it is notable that very few writers adopted it. Eighteenth-century writers occasionally commented explicitly on the idea of literary property, but more often they addressed it obliquely in their work or implicitly in their literary practice. Thus, for example, whereas Samuel Richardson complained bitterly about sequels and imitations of his novels (which he considered to be just as illegitimate as unauthorized reprints), various other writers seem to have considered these practices perfectly acceptable, both for themselves and their imitators. Richardson's perspective, far from being typical among contemporary writers, was almost unique. Even when writers like Daniel Defoe and Samuel Johnson emphasized the rights of authors and called for stronger copyright protection, they did not present a more robust property right as the only means, or even the primary means, of achieving these goals. In what follows, I canvass the array of perspectives that eighteenth-century writers presented, both in their comments on authorial ownership and in their practice.

A property-oriented view, in the analysis I present here, is one concerned with threats of market rivalry—a view that eagerly discovers derivative uses, market substitutes, and other forms of financial competition by texts that seem (in the eyes of the copyright holder) to have been inspired by the author's work. Someone who thinks about authors' rights in financial terms might also have other reasons, not rooted in property rights, to object to imitations, sequels, and generically similar works (they might be seen as insults to the author, for instance, having the potential both to dilute the work's value in the market and to damage the public's opinion of the author).

6. See *id.*; see also Simon Stern, *Copyright, Originality, and the Public Domain in Eighteenth-Century England*, in ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT 69 (Reginald McGinnis ed., 2008).

7. *Tonson v. Collins* (1761) 96 Eng. Rep. 169; 1 Black W. 301; *Tonson v. Collins* (1761) 96 Eng. Rep. 180; 1 Black W. 321.

8. *Millar v. Taylor* (1769) 98 Eng. Rep. 201; 4 Burr. 2303.

9. *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837; 4 Burr. 2408.

Again, a writer who is primarily concerned with reputational matters might be disturbed by unauthorized reprints, while remaining indifferent to other works that use generically similar features—or might even be flattered by them. One who is concerned with property rights, on the other hand, would be readier to highlight the derivative status of these writings, and to insist that the derivative works' success should be attributed to the source that inspired them. Some eighteenth-century writers were openly critical of such views, whereas others had little to say about perceptions of market competition, while showing more interest in other aspects of literary commerce, such as the right not to have others' work "fathered" on them (i.e., not to be named as the author of work they did not write).¹⁰

More generally, despite the popularity of plagiarism-hunting among eighteenth-century writers and critics, it is striking that charges of plagiarism were rarely articulated in terms of property. The significant *absence* of property-based complaints from contemporaneous accusations of plagiarism has largely escaped notice, because the metaphor of "theft," which often accompanies these accusations, is often assumed to carry with it the logic of property rights. Even if the Statute of Anne applied only to the unauthorized copying of an entire work (as a commentator noted in 1767, most writers "never stole any thing except lines and sentences, which by the bye is not made penal"¹¹), a property-based view of copyright would tend to treat plagiarism, by extension, in the same terms—as a similarly larcenous violation whose kinship to piracy is perfectly obvious, whether or not the law is prepared to police it. Eighteenth-century writers were not averse to characterizing plagiarism as "theft," but these complaints nevertheless tended to emphasize that the conduct was an offense to propriety and decency. Given the seemingly inviting implication that the plagiarist was morally, if not legally, indebted to the original author, and should be obliged to account for the illicit profits, it is notable how rarely accusations of plagiarism pursued this theme, and how often writers who claimed to have been plagiarized were content simply to point out the similarities and to insist on the feebleness of the copy, rather than to demand restitution.

I. PROPERTY TALK, PROPERTY RULES, AND THE STATUTE OF ANNE

One of the most frequently cited grounds for contending that copyright was always a property right, from the time of its statutory origins, involves the use of the term *property* in the second clause of the Statute of Anne. This was, indeed, a

10. See, e.g., *infra* notes 78–79 and accompanying text.

11. ARCHIBALD CAMPBELL, THE SALE OF AUTHORS, A DIALOGUE, IN IMITATION OF LUCIAN'S SALE OF PHILOSOPHERS 5 (London, Booksellers in London and Westminster 1767). Similarly, Arthur Murphy, a playwright and a barrister, found himself unable to decide about the permissibility of the "Kind of Imitation . . . which consists in adopting the Sentiments and Phrases of others," concluding that its "Legality is yet a Question." ARTHUR MURPHY, *No. 16: On Imitation in Writing*, GRAY'S-INN JOURNAL (Feb. 3, 1752), reprinted in 1 THE GRAY'S-INN JOURNAL 105, 107 (London, W. Faden for P. Vaillant 1756).

point that the booksellers themselves never tired of repeating in their pamphlets and legal arguments concerning the nature of copyright, but on scrutiny, it proves to be remarkably weak. Scholars have shown that despite the property-laden rhetoric that saturated the original draft of the statute, which used language suggested by members of the bookselling industry,¹² nearly all of this language was excised as the draft proceeded through Parliament.¹³ The term had originally appeared in the preamble, explaining that “the undoubted Property of . . . Books and Writings” had once been safe, but that “Notorious Invasion[s] of the Property” in recent years, by way of unauthorized publication, had threatened its security, necessitating statutory protection “for the Preservation of the Property of the Rightful Owner thereof.”¹⁴ By the time the bill passed into law, however, the only remaining vestige of “property talk” appears in the provision related to the registration scheme, designed to give notice to others that a particular title was already taken: to ensure that no one violated the statute “through ignorance” of another’s claim, it was thought desirable that “some provision [should] be made, whereby the property in every . . . book . . . may be ascertained.”¹⁵

While the existence of this provision has often been noted (not least by the booksellers’ lawyers, as they litigated the statute’s meaning over the next six decades), the significance of its placement has received less attention. It is hardly plausible that, having excised the many references to property in the section where this term was used to introduce and justify the need for protection, and to demonstrate its basis, the drafters would have sought to convey the very same point by using the term in a subordinate clause in a provision concerning registration. The more plausible conclusion is that the drafters simply overlooked this instance, which managed to avoid the red pen precisely because it was buried in a seemingly

12. Commenting cynically on the booksellers’ motives, many decades later, Sir John Dalrymple remarked 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 PROPRIETORS as frequently as possible . . .” MORNING CHRON. & LONDON ADVERTISER, Feb. 11, 1774, at 3. Another critic observed that, even if taken at face value, the booksellers’ petition insisting on the need for statutory protection “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 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 7 (Edinburgh, Alexander Donaldson 1767).

13. On the excision of this language, see, for example, ROSE, *supra* note 3, at 45; John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, 8 PUB. HIST. 19 (1980); Stern, *supra* note 4, at 45–47.

14. In addition to the sources cited *supra* note 13, see Ronan Deazley, *Commentary on the Statute of Anne 1710*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), http://www.copyrighthistory.org/cam/commentary/uk_1710/uk_1710_com_272007105424.html [<https://perma.cc/QE6M-JNN4>] (last visited Jan. 20, 2019).

15. Statute of Anne 1710, 8 Ann., c. 19, § 2 (Gr. Brit.).

insignificant place. This era is not renowned for care, precision, and thoroughness in statutory drafting, and the Statute of Anne has been characterized as a particularly telling example of these deficiencies.¹⁶ That the word *property* appears in this niche, then, testifies more to the determination (and good fortune) of the booksellers who worked so energetically to specify an appealing legal framework for the protection they sought, than to the goals of the legislators who seem to have been doubtful, at best, about the desirability of adopting that framework.

Nor was this the first time the booksellers had managed to transform their assertions about the property-like nature of printing rights into an (apparently) officially accepted view. As Peter Blayney has noted, the Stationers' Company, the London guild of printers and booksellers, had long been given to mythologizing about the origins of printing rights, with an eye towards protecting the profits flowing from their publications. As Blayney explains, royal printing privileges, by which the Crown gave the holder of the privilege (the patentee) exclusive rights over a particular title or class of titles, were characterized by guild members, in the seventeenth century, as a kind of feudal property right, akin to the right of tenure in real property (with the implication that the right to print a certain title or class of books amounted to the same thing as fee simple).¹⁷ According to this view, all printing rights originated with the Crown (just as all real property did), and thus, the grant of a privilege amounted to the transfer of the Crown's property interest in the publications that fell within the privilege.

Blayney notes that various scholars have accepted this myth, and in doing so, [t]hey rely on . . . a myth deliberately invented . . . by the law-patentee and liar, Richard Atkyns. To lay the spurious groundwork for a legal defence of the patent his wife had inherited from her father, in 1660 Atkyns wrote and published a fictitious "history" of how Henry VI, at great expense, had brought printing to England in the 1450s by procuring the defection of one of Gutenberg's journeymen. Six years later his counsel used that fiction in court to argue that because a king had first financed the importation of the new invention, printing in England had always "belonged" to the Crown. That finding was subsequently cited in a lawsuit of 1677 by Sir Francis Pemberton, who argued that because the almanack then in question had "no certain Author . . . according to the Rule of our

16. See C.K. ALLEN, *LAW IN THE MAKING* 482 (7th ed. 1964) (remarking on a tendency, in statutory language in this era, towards "verbosity which succeeded only in concealing the real matter of the law under a welter of superfluous synonyms"); DEAZLEY, *supra* note 3, at 49 (discussing the statute's numerous deficiencies and noting that Daniel Defoe's prescient complaint about "the miserable Havock that is made in this Nation, . . . with Relation to Books," although it appeared while the statute was undergoing revision, might well be applied to the final product); Ian McLeod, *Legislative Drafting*, in *LEGAL METHOD* 193, 193–94 (1993) (quoting and commenting on C.K. Allen's observation about verbosity in statutory language in this era).

17. 1 PETER W.M. BLAYNEY, *THE STATIONERS' COMPANY AND THE PRINTERS OF LONDON, 1501–1557*, at 170–71 (2013) (citations omitted).

Law, the King has the property, and by consequence may grant his Property to the Company” of Stationers.¹⁸

Not only was this argument advanced by Pemberton, as counsel for the Stationers’ Company (the plaintiffs in the 1677 dispute in *Company of Stationers v. Seymour*), but it was accepted by the court, which ruled that “there is no particular author of an almanac; and then, by the rule of our law, the King has the property in the copy.”¹⁹ Blayney notes that the story of the Gutenberg defector is clearly anachronistic, because it was not until Elizabeth’s reign, a century later, that the Crown began to grant monopolies to “individuals who introduced new inventions into the realm,”²⁰ and he adds that even if this invented history had been accurate, its logic would be specious, because “the question of who had the right to use a printing press was (or should have been) entirely separate from the question of who had the right to *profit* from marketing printed copies of a particular text.”²¹ For present purposes, Blayney’s observations are significant for two reasons: first, they help to remind us once again of the booksellers’ zeal in manufacturing justifications that would transform the conventions of the guild into property rights recognized at law; and second, they show how much success these myths sometimes enjoyed, to the point where a court swallowed the myth and the conclusions it supposedly justified.

Just as the placement of the term *property* in the second clause of the Statute of Anne has generally been overlooked by those who take it as evidence of the legal framework governing the statute as a whole, so the booksellers’ own concerns about the statute’s approach to liability have also gone unnoticed. Most notably, the booksellers sought a law that either would create a right against unauthorized publication for a perpetual term, or, failing that, would say nothing about the term of protection, leaving it implicit that the protection lasted forever.²² That hope was shattered when the statute adopted a term of protection for fourteen years, with the possibility of another fourteen years if the author was still alive at the end of the first term.²³ In addition, the booksellers had little enthusiasm for a regime that imposed ex post monetary sanctions on violators. When this approach had been proposed in 1697, in a piece of legislation that ultimately failed, the booksellers were vehement in their criticism. They insisted that a penalty in the form of a fine, imposed after a showing of infringement, would be ineffective:

18. *Id.*

19. *Company of Stationers v. Seymour* (1677) 86 Eng. Rep. 865, 866; 1 Mod. 257, 258. For a recent discussion of this case, see H. Tomás Gómez-Arostegui, *Stationers v. Seymour* (1677), in *LANDMARK CASES IN INTELLECTUAL PROPERTY LAW* 21 (Jose Bellido ed., 2017).

20. BLAYNEY, *supra* note 17, at 171 n.8 (quoting J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 377 (2d ed. 1979)) (internal quotation marks omitted).

21. *Id.* at 171 (emphasis added).

22. Stern, *supra* note 4, at 39–41. They claimed that the guild convention had always been to confer perpetual publication rights for each title that a member registered, but again, as Blayney has shown, this convention began in the early seventeenth century. See BLAYNEY, *supra* note 17, at 171.

23. Statute of Anne 1710, 8 Ann., c. 19, § 1 (Gr. Brit.). On the introduction of this provision, and the booksellers’ reaction to it while the legislation was pending, see Stern, *supra* note 4, at 47–52.

[T]hose that will Invade their [i.e., the booksellers'] Rights, may wage Law with them out of the profits of their Own Books so pyrated upon them; and though [the violators] should lose the Cause, yet may be considerable Gainers by the Bargain, whilst in the meantime the Proprietor may be ruin'd; it being no easy matter for him to prove out of a stol'n Impression of a Thousand Books . . . that One hundred of them have been sold; and . . . even Then they cannot expect suitable Costs and Damages.²⁴

In short, the booksellers argued, a fine would be cumbersome, costly, and ineffective; it would come too late and would inevitably undercompensate them both for the injury itself and for the cost of litigation. What the booksellers wanted was not a liability rule but a property rule.²⁵

Even the authors who were sympathetic to the booksellers' position evidently did not understand this demand. Daniel Defoe, who energetically supported the booksellers' cause, drafted a proposed bill just days before the new legislation was formally proposed in parliament. (This effort puts him in the same company with Ezra Pound as one of the few writers actually to try his hand at copyright legislation.²⁶) Defoe explained that “[piracy] and the Printing seditious or heretical Books, is easily suppress'd by an Act of Parliament”; according to his proposal,

no Man shall presume to print, or sell when printed, any Book that has been printed before, without the Consent or Agreement of the Author or Proprietor of the said Book—under a Penalty of 5 *l.* per Sheet for the said Copy, to be paid Half to the Queen, Half to the Person injur'd, by the Printer or Publisher of the said Book . . . [and] the Author or Proprietor of any Copy so pyrated, shall have his private Action of Damages against every Seller or Publisher of such Copy, as well as against the Printer; wherein if he cast the said Publisher, he shall recover for every Book so vended or sold by them, 5 *l.* with treble Costs.²⁷

Thus, Defoe would have imposed a damages regime on piracies—just as the enacted legislation did. The key difference is that Defoe proposed a penalty of five pounds per sheet of pirated text, whereas the Statute of Anne provided only for one penny per sheet.

Yet if the fine provided in the statute seemed insultingly low, and seemed to confirm the booksellers' worst fears about the uselessness of a liability rule, the very fact of its inclusion proved to be sufficient for their purposes. The statute's provisions allowed for both “Actions [and] Suits”—the former being the mode of

24. DEAZLEY, *supra* note 3, at 41 (quoting REASONS HUMBLY OFFER'D TO THE CONSIDERATION OF THE HONOURABLE HOUSE OF COMMONS, SHEWING THE GREAT NECESSITY OF HAVING A BILL FOR THE REGULATING OF PRINTING AND PRINTING-PRESSES (1697)).

25. For the classic articulation of this distinction, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

26. Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775 (2009).

27. Daniel Defoe, *Miscellanea*, 6 REV. ST. BRITISH NATION (Dec. 6, 1709) (Gr. Brit.).

proceeding in a court of law, and the latter in a court of equity. It took the booksellers little time to realize that they could use the legal remedy as a basis for seeking injunctive relief.²⁸ Courts of equity granted a preliminary injunction on a showing of likelihood of infringement, and in that context, the use of the legal penalty was not that it furnished the remedy (since an equitable court could not grant money damages), but rather that it established the basis for the plaintiff's claim to some kind of relief—including the injunctive relief available in equity. Often, a preliminary injunction, granted on an *ex parte* basis, was sufficient for the booksellers' purposes, and if the defendant did not appear to contest the injunction, it could be extended.²⁹ By this means, they converted the liability rule into a property rule. To be sure, that is not a name that would have been used, at this time, for the booksellers' solution. Nevertheless, the result, over the following decades, was that they could claim to find protection for property rights in the language of the statute, and could derive from the statute's penalties clause a means of proceeding against alleged infringers by seeking an injunction rather than suing for the trifling amount of damages provided there. From what some might regard as a very unpromising source, the booksellers managed to extract a property right.

There is yet a further implication to be derived from the details we have observed thus far—namely, that when we encounter the word *property*, or property-based justifications, in older sources, we must consider the historical context, rather than concluding that the word's mere presence demonstrates that contemporaries generally would have adopted the legal framework that the term seems to import. Once we return to the language in the original version of the Statute of Anne, the term's placement in the final version tends to undermine the significance that commentators usually assign to it. Once we read the arguments in *Company of Stationers v. Seymour* in light the backstory that Blayney adumbrates, we have reason to doubt the often-repeated myth about the origins of the royal printing prerogative, and the feudal story of property rights that goes with it.³⁰

These may seem obvious points, hardly worth elaborating, but historical sources are sometimes harder to interpret than they may at first appear. Thus, for instance, one commentator, in a discussion of the eighteenth-century sources, observes that “[b]y 1743, the King’s Bench court would state without controversy that the Statute of Anne protected ‘[l]iterary property.’”³¹ The support for this claim

28. See DEAZLEY, *supra* note 3, at 51–65; H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247 (2010); Simon Stern, *Creating a Public Domain in Eighteenth-Century England*, OXFORD HANDBOOKS ONLINE (Aug. 2015), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935338.001.0001/oxfordhb-9780199935338-e-39> [<https://perma.cc/M2HD-ZSK8>].

29. In some instances, these injunctions were described as “perpetual”; whether they actually amounted to a perpetual injunction, today generally considered to be a form of relief rather than procedural measure, remains open to question. See DEAZLEY, *supra* note 3, at 63–65.

30. For evidence that the story is indeed often repeated, see BLAYNEY, *supra* note 17, at 171.

31. Hughes, *supra* note 2, at 1016 (citation omitted).

proves to come from the second round of litigation in *Tonson v. Collins*.³² However, the quoted language comes from a footnote in the *English Reports*, an early twentieth-century compilation of older, nominate English law reports.³³ That footnote was added by the editors of the *English Reports*, as becomes evident after a look at the original report of the case, in William Blackstone's posthumously published *Reports*.³⁴ What appears on its face to be the court's language thus turns out, on inspection, to form no part of the original judgment, but rather to be a modern addition.³⁵

For another illustration, consider the assertion by the Supreme Court, in *Feltner v. Columbia Pictures*,³⁶ that “[b]y the middle of the 17th century, the common law recognized an author’s right to prevent the unauthorized publication of his manuscript,” and that this right “derived from the principle that the manuscript was the product of intellectual labor and was as much the author’s property as the material on which it was written.”³⁷ These twinned propositions are said to find support, respectively, in *Stationers Co. v. Patentees* (1666) and *Millar v. Taylor* (1769).³⁸ First, a proposition dated to the mid-seventeenth-century can hardly be substantiated by *Millar*, a decision rendered a century later. Second, the theory of property summarized here finds its source in John Locke’s *Two Treatises of Government*, published more than twenty years after the first of these cases.³⁹ Finally, one must wonder how a dispute among members of the printing trade—namely, the Stationers’ Company and the patentees claiming the rights to print Henry Rolle’s *Un Abridgment des Plusieurs Cases et Resolutions del Common Ley*⁴⁰ (pursuant to a

32. *Id.* at 1016 n.95 (citing *Tonson v. Collins* (1761) 96 Eng. Rep. 180, 192; 1 Black W. 321, 345).

33. The *English Reports* were published in 1900–32; for some observations about the features that distinguish them from the nominate reports they collect, see Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 LAW LIBR. J. 3, 15, 29 (1982).

34. See 1 WILLIAM BLACKSTONE, REPORTS OF CASES DETERMINED IN THE SEVERAL COURTS OF WESTMINSTER-HALL, FROM 1746 TO 1779, at 321, 345 (1781). For further discussion of the significance of the *Tonson* litigation in relation to Blackstone’s views on copyright law, see Simon Stern, *Introduction* to 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at xvii (Simon Stern ed., Oxford Univ. Press 2016) (1766). Indeed, Hughes notes, when discussing this footnote, that it displays “a particularity,” because the same sentence refers to an “amendment of the Statute of Anne in 1814.” Hughes, *supra* note 2, at 1016 n.95 (citation omitted). But although a reference to a provision adopted in 1814 would suggest that the sentence could not have been written in the mid-eighteenth century, he does not go on to draw that conclusion.

35. This is not to dispute that the phrase *literary property* appeared in eighteenth-century sources; it appeared often—precisely because the booksellers invoked it repeatedly during their efforts to secure perpetual copyright.

36. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). Thanks to Zahr Said for pointing me to this example.

37. *Id.* at 349 (citing *Stationers Co. v. Patentees* (1666) 124 Eng. Rep. 842; Carter 89; *Millar v. Taylor* (1769) 98 Eng. Rep. 201, 252; 4 Burr. 2303, 2398).

38. *Id.*

39. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690). For citation to Locke in *Millar*, see 98 Eng. Rep. at 220; 4 Burr. at 2339 (argument of William Blackstone).

40. HENRY ROLLE, UN ABRIDGMENT DES PLUSIEURS CASES ET RESOLUTIONS DEL COMMON LEY (London, A. Croke et al. 1668).

privilege issued by the Crown)—could be said to turn on questions about the author’s rights over a manuscript, and indeed, there is no mention of this point anywhere in *Stationers v. Patentees*.⁴¹ To be sure, Lord Mansfield, in *Millar*, offered a justification along those lines, but not in relation to the dispute over Rolle’s *Abridgment*.⁴² The arguments about property rights and the invocation of *Millar* turn out, on inspection, to derive from the petitioner’s brief (whose lead author was John Roberts, then a partner at Hogan & Hartson);⁴³ how the case of *Stationers Co. v. Patentees* entered into the analysis remains unclear.

Again, the opacity of historical sources, particularly those dating from before the early twentieth century, can easily lead to misinterpretations unless one examines the original sources and asks not just what words appear in the text, but who is advancing a given proposition, and what it means, in the context of the litigation and the resulting decision. The problem is hardly unique to historical disputes about the status of property, but it is especially likely to arise in that context, in part perhaps because the term’s meaning may appear to be self-explanatory.

II. EIGHTEENTH-CENTURY WRITERS AND THE LANGUAGE OF PROPERTY

As noted above, the bookselling industry furnished an excellent source of arguments about the property-based nature of copyright during this period—but what if we turn to contemporaneous writers? A wide array of perspectives comes into view, but notably, those who laid great emphasis on property rights tended to be affiliated with the printing industry in some way. Thus, for instance, Samuel Richardson, a printer by trade, was particularly vociferous in attacking all forms of literary copying, whether it involved reprinting his novels without authorization or imitating them without authorization. Other writers, like Jonathan Swift and Alexander Pope, sometimes adopted the idiom of property, using this language to convey a subtler conception of ownership and use than one that equates property with chattels. Others again, like Henry Fielding, rarely invoked a conception of literature as property except as a means of mockery.

Alexander Pope offers a useful example of a writer who was fully capable of perceiving and exploiting the potential of copyright as a form of property, but

41. The dispute turned not on which of the parties had obtained Rolle’s permission to print the book, but on the validity of a patent (or privilege) issued by the Crown, relating to “all Law-Books that concern the Common Law.” 124 Eng. Rep. at 842; Carter at 89. The same Richard Atkins (or Atkyns) whom Blayney discusses was a party in the dispute. See *supra* note 18 and accompanying text.

42. Mansfield’s only reference to that dispute appears in *Millar*, 98 Eng. Rep. at 254; 4 Burr. at 2401. In the same decision, Mansfield repeats the claim that printing was introduced in England around the time of Henry VI. See 98 Eng. Rep. at 252; 4 Burr. at 2398; *supra* note 18 and accompanying text. Burrow himself, however, corrects that story in a “Memorandum” he added at the end. See 98 Eng. Rep. at 262–66; 4 Burr. at 2418–18.

43. See Brief for Petitioner at 25, & n.12, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (No. 96-1768) (citing *Millar* for the proposition that “[t]he early common law right was derived from concepts of natural law—recognizing the fruits of one’s intellectual labor as his property.”).

whose views on literary commerce were not restricted to this perspective. Because Pope was one of the best-known poets of his age, it is tempting to draw on his statements about violations of his property as evidence that this was the dominant view, shared by writers and booksellers alike. The temptation should be resisted, because his strategic invocations of this language occurred amidst various other ways of engaging with these questions.

One of the earliest uses of the term “copyright” (by someone other than a bookseller) appears in a letter from Pope to John Gay, written in 1732, concerning the Dublin bookseller Benjamin Motte. Pope writes,

Motte and another idle fellow, I find, have been writing to the Dean [i.e., Swift], to get him to give them some copy-right, which surely he will be not so indiscreet as to do . . . Surely I should be a properer person to trust the distribution of his works with, than so common a bookseller. Here will be nothing but the ludicrous and little things; none of the political, or any things of consequence . . . [I]t would be silly in him to give a copy-right to any, which can only put the manner of publishing [his writings] hereafter out of his own and his friend’s power into that of mercenaries.⁴⁴

These comments may have room for a conception of copyright as a kind of chattel, but their primary thrust involves Swift’s relation to his readers, as manifested by the mode of publication: Pope, rather than Motte, is more properly entrusted with control over the “distribution of [Swift’s] works” and the “manner of publishing,” because Pope knows which works would best represent Swift to the readership he seeks.⁴⁵ In these lines, decisions about what to print and how to print are bound up with reputational concerns, as Pope shows in his disparaging remarks about Motte as a “common bookseller” with mercenary motives, whose productions would not be a credit to the author. Pope is “properer” because of his concern about which works to select and how to present them; he will be careful to include the “things

44. Pope’s letter has not survived, but is quoted in a letter from Gay to Jonathan Swift, dated August 28, 1732. 3 LETTERS, WRITTEN BY JONATHAN SWIFT, D. D. DEAN OF ST. PATRICK’S, DUBLIN, AND SEVERAL OF HIS FRIENDS 82 (John Hawkesworth ed., London, T. Davies et al. 5th ed. 1767). The result of Swift’s interactions with Motte was 3 MISCELLANIES (London, Motte & Bathurst 1736). The context of Pope’s letter and its aftermath are most usefully explained in 3 IRVIN EHRENPREIS, SWIFT: THE MAN, HIS WORKS, AND THE AGE 746–48 (1983), where the other “idle fellow” (besides Motte) is identified as the bookseller Abel Bowyer. The letter is also discussed in DAVID FOXON, POPE AND THE EARLY EIGHTEENTH-CENTURY BOOK TRADE 224 (James McLaverty ed., 1991); ROSE, *supra* note 3, at 58 n.4; Donald W. Nichol, *On the Use of ‘Copy’ and ‘Copyright’: A Scriblerian Coinage?*, 12 LIBRARY 110, 114–15 (1990).

45. On Swift’s maneuverings over the authorized and unauthorized publication of his works more generally, see STEPHEN KARIAN, JONATHAN SWIFT IN PRINT AND MANUSCRIPT *passim* (2010); Sean D. Moore, *Banking on Print: The Bank of Ireland, the South Sea Bubble, and the Bailout*, in SWIFT, THE BOOK, AND THE IRISH FINANCIAL REVOLUTION (2010); Ian Gadd, *Leaving the Printer to His Liberty: Swift and the London Book Trade, 1701–1714*, in JONATHAN SWIFT AND THE EIGHTEENTH-CENTURY BOOK 51 (Paddy Bullard & James McLaverty eds., 2013); Ian Higgins, *Censorship, Libel, and Self-Censorship*, in JONATHAN SWIFT AND THE EIGHTEENTH-CENTURY BOOK, *supra* note 45, at 179; Stephen Karian, *Swift as a Manuscript Poet*, in JONATHAN SWIFT AND THE EIGHTEENTH-CENTURY BOOK, *supra* note 45, at 31; Andrew Bricker, *Libel and Lampoon: Satire in the Courts, 1670–1792* (unpublished manuscript) (on file with author).

of consequence” rather than degrading Swift’s name by trafficking in “the ludicrous and little things.” Ceding control to these “idle fellow[s]” would be “indiscreet.”

As it happens, Swift was indiscreet enough to let Motte publish the book, and the result fully justified Pope’s concerns. In a letter to Motte, Swift regretted his own inattentiveness to Pope’s advice. Swift complained that he had not expected to find some long-forgotten “humorous or satirical trifles” in the volume; that the volume erroneously credited him with material by others (“[T]he greatest part of the prose was written by other persons . . . as well as myself”); and that, worst of all, Motte had included some pieces whose authorship Swift had managed to disclaim up until then:

I have writ some things that would make people angry. I always sent them by unknown hands; the printer might guess, but he could not accuse me; he ran the whole risk, and well deserved the property, if he could carry it to London and print it there, but I am sure I could have no property at all.⁴⁶

The harms that Swift enumerates have to do with his name and dignity. His forgotten indiscretions have been revived, and he has had others’ works foisted on him. (He added, a month later, that the printing was “very incorrect.”⁴⁷) He disavows any property in his anonymous writings, even after Motte’s publication has brought them back to him. By saying that the printer “deserved the property,” Swift evidently refers to the income: whoever risked publishing these works was entitled to any profits they generated. From this, it would follow that any and all who were willing to take that risk deserved the same reward, and hence that they were equally entitled to profits in a work in which none of them could hold exclusive property. By the final phrase (“I could have no property at all”) Swift evidently means that, having never sought to acknowledge the work, he does not believe it is up to him to give anyone the right to print it, or to restrain them from printing it, nor may he partake of the profits.⁴⁸

Of course, Swift’s desire to separate himself completely from his anonymous writings helps to explain his posture, which appears strange from the perspective of a property-oriented copyright regime. This is not a case of an author who welcomes

46. EHRENPREIS, *supra* note 44, at 748 (letter from Jonathan Swift to Benjamin Motte, November 4, 1732). On this letter, see also Karian, *supra* note 45, at 42; Adam Rounce, *Swift’s Texts Between Dublin and London*, in JONATHAN SWIFT AND THE EIGHTEENTH-CENTURY BOOK, *supra* note 45, at 199, 204; Bricker, *supra* note 45.

47. Letter from Jonathan Swift to Benjamin Motte (Dec. 9, 1732), in 4 THE CORRESPONDENCE OF JONATHAN SWIFT 89, 89–90 (Harold Williams ed., 1965).

48. Ehrenpreis writes that “Property’ here means copyright . . .” EHRENPREIS, *supra* note 44, at 748 n.1. That appears to be Swift’s meaning in the second instance, but not in the reference to the printer who “deserved the property.” In other correspondence, Swift complained about the lack of “property among Printers” and of “Propriety of Copyes” in Ireland; after quoting these remarks, Stephen Karian concludes that “Swift could neither sign over publication rights to a bookseller nor order a bookseller not to print his works because, in the absence of copyright protection, he did not own the rights to those works . . .” KARIAN, *supra* note 45, at 27. The same could be said about Swift’s disavowal of property in the letter to Motte.

the attribution but is disinclined to see the text as a form of property. In this instance, and in many others, Swift would have preferred to do without the attribution as well; his reasons, as Stephen Karian notes, included “a gentlemanly disdain for the fame created by print publication, a natural love of games and deception, and protection from scandal or prosecution in the case of controversial writings.”⁴⁹ However, even after his cover has been blown and he has unwillingly been made to own up to these writings (vitiating his reputational interest in non-attribution), Swift nevertheless disavows any property interest. He distinguishes between the two, and disclaims the property even after being forced to accept the attribution.

Swift’s attitude is the opposite of the one contemplated just a few years later, in the legislation proposed (but not adopted) in 1737, which made special provisions for authors to retain copyright in anonymous and pseudonymous works.⁵⁰ Another part of the same bill—sometimes attributed to Swift—would have revised the reversion scheme to provide for repeated ten-year periods of protection, each followed by reversion to the author, continuing until eleven years after the author’s death.⁵¹ The attribution to Swift remains speculative, but it reminds us that what may seem, from one perspective, to reflect a concern for the author’s property right, might be used by others for reputational ends. Swift might well have disdained any measures to control the publication or profits of his anonymous writings, even if there were express provisions to allow for such control, while using a more favorable reversion arrangement to monitor the selection and correctness of those writings he cared to take credit for.

Though Pope was notoriously vigilant in maintaining control over his writings and in policing others’ use of them in the literary marketplace, like Swift, he was also capable of dwelling on reputational grievances in his complaints about unauthorized printing. On several occasions he went to great pains (using an elaborate subterfuge) to arrange for the unauthorized publication of his own letters

49. KARIAN, *supra* note 45, at 16.

50. *An 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, (Draft), London (1737)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1737b [<https://perma.cc/W4DR-TXZH>] (last visited Jan. 20, 2019). The legislation is discussed at greater length in Simon Stern, *Speech and Property in David Simple*, 79 *ELH* 623, 629–32 (2012).

51. See M. POLLARD, *DUBLIN’S TRADE IN BOOKS 1550–1800: LYELL LECTURES, 1986–1987*, at 70–71 (1989); Donald Cornu, *Swift, Motte, and the Copyright Struggle: Two Unnoticed Documents*, 54 *MOD. LANGUAGE NOTES* 114, 121–23 (1939); see also DEAZLEY, *supra* note 3, at 104–08 (noting that Swift had taken an interest in efforts to amend the Statute of Anne in 1735); Ronan Deazley, *Commentary on: Booksellers’ Bill (1737)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1737 [<https://perma.cc/U4GT-SXX9>] (last visited Jan. 20, 2019). Swift has been credited with devising this clause on the basis of a notation in a contemporary copy of the draft legislation, labeling this provision “Dean Swift’s Clause.” See Cornu, *supra* note 51, at 122; see also REPORT ON THE MANUSCRIPTS OF EARL BATHURST: PRESERVED AT CIRENCESTER PARK 10–11 (1923). Although no other sources corroborate this attribution, some scholars have credited it. See, e.g., Higgins, *supra* note 45, at 179, 181.

by his arch-enemy, the publisher Edmund Curll. On one of these occasions, in 1737, Pope awaited the book's publication and then, rather than harping on the property offense, objected in terms that sound like a repeat of Swift's letter to Motte: because of Curll's illicit conduct, Pope complained, he had been deprived of "the power of rejecting, and the right 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."⁵² The burden of this argument does not involve the misappropriation of the letters, or the profits accruing from their publication; rather, Pope dwells on the harm to his name and the impairment of his ability to decide what to print, and what to leave in manuscript. By highlighting the issue of control over his ability to "divulge or conceal" his sentiments, Pope seems to anticipate the privacy theory of Warren and Brandeis—a theory that emphatically rejects a property-based justification in order to stress the need to protect personal rights.⁵³

Pope's views on literary imitation, similarly, could accommodate a register that was not defined by property rights, but instead allowed for what he called "a mutual commerce" in which poets were free to recycle each other's images and ideas. In 1706, in a letter to the poet William Walsh on the permissibility of borrowing, Pope offers his own justification in a passage that anticipates his couplet in *An Essay on Criticism* (1711) about common knowledge transposed into the elegant cadences of the consummate stylist ("True Wit is Nature to Advantage drest, / What oft was Thought, but ne'er so well Exprest").⁵⁴ Pope writes,

I wou'd beg your opinion . . . [as to] how far the liberty of *Borrowing* may extend? I have defended it sometimes by saying that it seems not so much the Perfection of Sense, to say things that have *never* been said before, as to express those *best* that have been said *oftenest*, and that Writers in the case of borrowing from others, are like Trees which of themselves wou'd produce only one sort of Fruit, but by being grafted upon others, may yield variety. A mutual commerce makes Poetry flourish; but then Poets like

52. LETTERS OF MR. ALEXANDER POPE, AND SEVERAL OF HIS FRIENDS, at sig. 5v (London, J. Wright et al. 1737). For more on this episode, see PAUL BAINES & PAT ROGERS, EDMUND CURLL, BOOKSELLER 268 (2007); MAYNARD MACK, ALEXANDER POPE: A LIFE 654 (1985); HARRY M. SOLOMON, THE RISE OF ROBERT DODSLEY: CREATING THE NEW AGE OF PRINT 47–48 (1996); 2 THE MAJOR WORKS, 1725–1744, THE PROSE WORKS OF ALEXANDER POPE 341, 345–46 (Rosemary Cowler ed., 1986).

53. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); for their treatment of various copyright decisions as anticipating the right they limn, see *id.* at 201–04.

54. Alexander Pope, *An Essay on Criticism*, in THE POEMS OF ALEXANDER POPE 143, 153 (John Butt ed., 1963).

Merchants, shou'd repay with something of their own what they take from others; not like Pyrates, make prize of all they meet.⁵⁵

Pope imagines a literary orchard whose variety guarantees that authors will always have more fruit to pluck, more produce to cultivate, so long as they continue to intermix their stock. At first, he contemplates a landscape devastated by “Pirates,” whose ravages would ruin the victims and destroy the orchard according to the metaphor of “theft.” However, instead of assuming that literary borrowing necessarily leads to a tragedy of the commons, Pope then re-imagines it as a comedy: he dwells on the growth economy fueled by tradesman-poets whose “mutual commerce” not only recirculates but also multiplies their resources. Rather than insisting that copying inevitably results in impoverishment, Pope suggests that poets might opt for recompense instead of theft. The vocabulary of mutual exchange and repayment, of course, can hardly betoken a process of direct, one-to-one reciprocation between individual writers; rather, Pope seems to imagine a common literary fund open to all applicants on the condition that they respond in turn with their own contributions.

This account of poetic engraftment may seem hard to reconcile with the zeal that Pope would later display when enforcing his right to control the publication of his works. These two aspects of his authorial persona appear incongruent, however, only if we assume that strong copyright protection necessitates a fully propertized understanding of the literary work in all respects—that is, a view in which the properties encompassed by the work include all of its components, such as plot and character. If copyright is instead taken to extend only to unauthorized reprints, as the Statute of Anne provided, then imitative practices are entirely permissible. Other poets’ imitations of Pope, or their efforts to rival Pope by imitating the same sources he used, may be worthy of disdain because of their incompetence, but these writers are not necessarily piratical invaders who simply “make prize of all they meet.” Pope does not claim control over his writings because of his originality; rather, he relishes the opportunity to compete with others, striving for true wit by expressing best what others have said before. On this view, imitations are welcome, because they take up a competitive challenge that Pope feels confident of winning, but that does not appear worthwhile unless others join in the contest. Indeed, as Nick Groom notes, “Pope’s own imitations can read like an anthology of poetic models: Horace, Homer, and Virgil; Chaucer, Spenser and Shakespeare; Waller, Cowley, and Dryden.”⁵⁶

Nevertheless, when policing his statutory rights, Pope took a very strict view of illicit reproduction. His lawsuits are well known and I will not reexamine them

55. Letter from Pope to Walsh (July 2, 1706), in 1 THE CORRESPONDENCE OF ALEXANDER POPE 19–20 (George Sherburn ed., 1956). For a recent discussion, see RICHARD TERRY, THE PLAGIARISM ALLEGATION IN ENGLISH LITERATURE FROM BUTLER TO STERNE 81 (2010).

56. Nick Groom, *Unoriginal Genius: Plagiarism and the Construction of ‘Romantic’ Authorship*, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 271, 278 (Lionel Bently, Jennifer Davis & Jane C. Ginsburg eds., 2010).

here: they show that he was prepared to enforce a right against unauthorized publication—that is, against booksellers whose editions would have competed with his and thus are easily understood as threats to his property rights. Instead I will consider an episode in which he went so far as to pillory (though not to sue) a poet who had misappropriated six lines from one of Pope’s unpublished poems. James Moore Smythe had obtained permission from Pope to use the verses in a play called *The Rival Modes* (1727).⁵⁷ Pope later withdrew his permission, but Moore-Smythe included the extract anyway, rendering it in italics (the contemporary equivalent of quotation marks).⁵⁸ Pope used the lines himself in his verses to Martha Blount “Sent on Her Birth-Day” (1728) (and again in his “Epistle to a Lady” (1735).⁵⁹ However, he was not content simply to take back his own: in the footnotes to the *Dunciad* (1729), Pope also criticized Moore-Smythe as a “Plagiary.”⁶⁰ Perhaps he was concerned that otherwise, readers might believe that he, rather than Moore-Smythe, was the plagiarist. Pope writes that the

case . . . was like that of a man . . . who, as he was sitting in company, perceived his next neighbour has stolen his handkerchief. ‘Sir (said the thief, finding himself detected) ‘do not expose me, I did it for mere want; be so good but to take it privately out of my pocket again, and say nothing.’ The honest man did so, but the other cry’d out, ‘See, gentlemen, what a thief we have among us! look, he is stealing my handkerchief!’⁶¹

Some considered Pope’s response an example of proprietary overreaching.⁶² Nevertheless, it is not simply a story of theft and repossession: the thief’s unexpected ploy, if deceitful, is also comic. Similarly, the comparison between the literary theft and the theft of a handkerchief places the whole episode in a farcical register that makes the offense seem petty rather than disgraceful. To say that Pope casts the plagiarism as a property offense would be too simple: while doing so, he also renders the event in comic terms that emphasize its absurdity.

Around the middle of the century, William Warburton and Samuel Richardson took up the question of copyright protection, advancing its implications far beyond the limits that the booksellers were claiming. These two writers were perhaps the most enthusiastic contemporary proponents of a view of copyright as property; notably, both had affiliations that help to explain their proprietary zeal. By the time he published *Pamela* in 1740, Richardson was already well established in his career as a printer, while Warburton seems to have become interested in the issue of copyright because he was Pope’s literary executor, and he approached the question of copyright, and its

57. TERRY, *supra* note 55, at 89; *see also* ALEXANDER POPE, *THE DUNCIAD*, IN FOUR BOOKS 54–55 (Valerie Rumbold ed., Routledge 2014); PAT ROGERS, *THE ALEXANDER POPE ENCYCLOPEDIA* 200 (2004).

58. JAMES MOORE SMYTHE, *THE RIVAL MODES* 24–25 (Dublin, S. Powell et al. 1727).

59. POPE, *supra* note 57, at 55.

60. *Id.* at 152–53 & n.50.

61. POPE *supra* note 57, at 80. For a fuller discussion, *see* TERRY, *supra* note 55, at 88–89.

62. *See infra* note 72 and accompanying text.

associations, in the spirit of a manager dedicated to capitalizing on the assets in his custody.⁶³

Warburton was perhaps the first figure outside of the bookselling industry to defend the doctrine of perpetual copyright when he published *A Letter from an Author . . . Concerning Literary Property* in 1747.⁶⁴ There he develops a Lockean argument based on the author's labor. When he came to publish his edition of Pope's posthumous *Works* in 1751, Warburton took a more aggressive stance, combining the roles of editor and predator in a prefatory warning to the poet's enemies: "Together with his Works, he hath bequeathed me his dunces. So that as the property is transferred, I could wish they would now let his memory alone."⁶⁵ Warburton imagines himself as the inheritor, not only of Pope's literary estate, but also of all the appurtenances, fixtures, and paraphernalia that go with it—these assets helping, perhaps, to enhance the value of the estate that made him "one of the richest landlords of literary property in the century."⁶⁶ It remains unclear what exactly Warburton means to communicate by issuing this threat to the enemies whom Pope had castigated in *The Dunciad*, but the general sense appears to be that any challenge to Pope's memory, or property, will meet with swift punishment. Warburton thus adds, to the role of executor, something like that of an executioner. Because of the relation he bore to Pope's works, Warburton was far more disposed to regard himself as an embattled defender of textual incursions, of any kind, than most other writers would have been.

Equally significant is Richardson's outraged response to the booksellers who brought out an unauthorized sequel to *Pamela* in 1741. At a time when expansions of others' stories were commonplace, Richardson sees this "spurious Continuation" as an infringement of "his Right to his *own Plan*," and advertises that he was "actually continuing the Work himself, from Materials, that, perhaps, but for such a notorious Invasion of his Plan, he should not have published."⁶⁷ Richardson treats the novel's

63. Donald W. Nichol, *Warburton (Not!) on Copyright: Clearing Up the Misattribution of An Enquiry Into the Nature and Origin of Literary Property (1762)*, 19 J. EIGHTEENTH-CENTURY STUD. 171, 172 (1996).

64. WILLIAM WARBURTON, A LETTER FROM AN AUTHOR, TO A MEMBER OF PARLIAMENT; CONCERNING LITERARY PROPERTY 405 (R. Hurd ed., London, Cadell & Davies 1811) (1747).

65. William Warburton, *Advertisement of Warburton to His Edition of Pope's Works, 1751*, in 1 THE WORKS OF ALEXANDER POPE, ESQ. xii (William Warburton ed., 1751).

66. Nichol, *supra* note 63, at 172.

67. Samuel Richardson, *Advertisement*, DAILY GAZETTEER (London), May 7, 1741 and May 30, 1741 (quoted in T.C. DUNCAN EAVES & BEN D. KIMPEL, SAMUEL RICHARDSON: A BIOGRAPHY 135, 137 (1971)). For other discussions of Richardson's irate response to this perceived abuse of his characters and ideas, see LISA MARUCA, THE WORK OF PRINT: AUTHORSHIP AND THE ENGLISH TEXT TRADES, 1660–1760, at 138–40 (2008); NATASHA SIMONOVA, EARLY MODERN AUTHORSHIP AND PROSE CONTINUATIONS: ADAPTATION AND OWNERSHIP FROM SIDNEY TO RICHARDSON 124, 124–59 (2015); Elizabeth F. Judge, *Kidnapped and Counterfeit Characters: Eighteenth-Century Fan Fiction, Copyright Law, and the Custody of Fictional Characters*, in ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT 36–41 (Reginald McGinnis ed., 2009); Tom Keymer & Peter Sabor, *Literary Property and the Trade in Continuations*, in PAMELA IN THE MARKETPLACE: LITERARY CONTROVERSY AND PRINT CULTURE IN EIGHTEENTH-CENTURY BRITAIN AND IRELAND 50, 50–82 (2006).

underlying conception as a material quantity, capable of dissipation and recovery. Once “invaded” and seemingly diminished, his “Plan,” or plot, or conception, can only be redeemed if the author himself recovers it. His perceptions, evidently, reflected his experience as a printer, which made him unusually sensitive to the economics of the publishing marketplace, and consequently to any apparent form of market rivalry.

This anxiety would resurface when Richardson’s third novel, *The History of Sir Charles Grandison* (1753), was reprinted without authorization in Dublin, outside the geographical bounds of the Statute of Anne. Styling himself “the Editor and Sole Proprietor of this new Work (*New* in every sense of the Word),” Richardson decried “the INVASION of his PROPERTY,” giving equal weight to every component of the book: “[N]ever was Work more the Property of any Man, than *this* is his. The Copy never was in any other Hand: He borrows not from any Author: The Paper, the Printing, entirely at his own Expençe.”⁶⁸ Richardson stresses the enormity of the theft by aligning the intellectual and material property as if both parts were equally capable of depletion, as if meddling with the book’s plot constituted the same kind of violation as reprinting it without authorization. Seeking to discredit the Dublin booksellers for their “Attempt to possess themselves of [the author’s] whole Property,”⁶⁹ Richardson stresses the indivisible nature of the property in question.

The views of Warburton and Richardson stand in stark contrast to those of Henry Fielding, who was flippant, if not derisive, about the property claims that he understood other writers to be advancing. Fielding’s *Tom Jones* (1749), published shortly after Warburton’s *Essay* and in the midst of a copyright dispute that included Fielding’s previous novel, *Joseph Andrews* (1742), casts an equivocal eye on the idea of copyright as property.⁷⁰ From a pragmatic perspective, Fielding had good reasons for adhering to a property-based view of copyright: he had been offered a large sum for the copyright of *Joseph Andrews* and he looked forward to receiving even more for *Tom Jones*. Whatever Fielding might have thought about the reputational benefits of seeing his works published far and wide, even in unauthorized editions from other publishers, he could not expect to enjoy a continuing profitable relationship

68. Richardson, *supra* note 67, at 2, 3. For other discussions of this episode, see JOHNS, *supra* note 1, at 51–55; Daniel Cook, *On Authorship, Appropriation, and Eighteenth-Century Fiction*, in *THE AFTERLIVES OF EIGHTEENTH-CENTURY FICTION* 20, 25–26 (Daniel Cook & Nicholas Seager eds., 2015); Judge, *supra* note 67, at 30; Donatella Montini, *Owning the Text, Disowning the Hand: Sir Charles Grandison, the Epistolary Novel, and Copyright*, in *THE ECONOMY PRINCIPLE IN ENGLISH: LINGUISTIC, LITERARY, AND CULTURAL PERSPECTIVES* 376, 376–84 (Giovanni Iamartino et al. eds., 2002); Simon Stern, *The Law*, in *SAMUEL RICHARDSON IN CONTEXT* 231, 231–38 (Peter Sabor & Betty A. Schellenberg eds., 2017); see also *SAMUEL RICHARDSON, CORRESPONDENCE PRIMARILY ON SIR CHARLES GRANDISON (1750–1754)* 101–29 (Betty A. Schellenberg ed., 2014).

69. Richardson, *supra* note 67, at 3.

70. HENRY FIELDING, *TOM JONES* 541 (John Bender & Simon Stern eds., 1996). *Joseph Andrews* was one of the publications in dispute in a long-running lawsuit between the London and Edinburgh booksellers, *Midwinter v. Hamilton*, filed in 1743 and ending (inconclusively) in 1751. That dispute has not received much attention from scholars; for some useful treatments, see Ronan Deazley, *The Myth of Copyright at Common Law*, 62 *CAMBRIDGE L.J.* 106 (2003); Hector MacQueen, *The War of the Booksellers: Natural Law, Equity, and Literary Property in Eighteenth-Century Scotland*, 35 *J. LEGAL HIST.* 231 (2014).

with his bookseller, Andrew Millar, unless Millar could exploit the copyright as a form of property. Indeed, there is some evidence that Millar was periodically compensating Fielding according to a royalty-like arrangement, even in the absence of any contractual obligation to do so.⁷¹

Yet in *Tom Jones* and much of his other work, Fielding takes an ironic view of the property-minded author and the property-oriented text. For example, Fielding laughs at Pope for dwelling on the Moore-Smythe story in the *Dunciad*. Pope, Fielding writes, “luckily found” the six lines—as if they had gone missing and the author had fortunately stumbled across them—and, laying violent hands on his own property, transferred it back again into his own works.⁷² Presented here as a literary repossession man, Pope appears obsessive, grasping, and petty, rather than warranting sympathy as a writer simply trying to preserve his own reputation.

In a further elaboration of this mindset, Fielding writes in one of the prefatory chapters in *Tom Jones* that the ideas and images of ancient writers are free for moderns to appropriate, and then he attaches, with brilliantly self-serving logic, a clause declaring that he nevertheless has “Property in all such sentiments they moment they are transcribed into my Writings.”⁷³ In this joke about modern hacks who seek to arrogate freely available material, according to the terms of a property claim that purports to include the “sentiments” themselves and not merely the modern writer’s rendition of them, Fielding presents a deliberately exaggerated picture of literary ownership which, by virtue of being so exaggerated, casts doubt on this way of characterizing literary productions in the first place. Again, such claims would have had no statutory basis at this time, but in satirically donning the persona of a writer who imagines that he is entitled to make this demand, Fielding evidently means to discredit a proprietary mindset that he had observed in others—including, most likely, his literary rival Samuel Richardson.

In his journalistic writing, Fielding reviewed books and discussed the literary marketplace in the persona of a judge evaluating the merits and demerits of the parties’ claims. One such column, in *The Jacobite’s Journal*, finds Fielding presiding over a mock lawsuit involving claims of infringement raised by a group of literary hacks. He finds for the defendants on the ground that they hold a monopoly on scurrilous language: “[W]hen Invectives procee[d] to the Use of opprobrious Terms, and downright calling Names, such Works ha[ve] always been adjudged to be the Property of *Billingsgate*.”⁷⁴ The absurdly broad scope of the property claim corresponds to an idea of literary property that encompasses not just verbatim

71. MARTIN C. BATESTIN & RUTHE R. BATESTIN, *HENRY FIELDING: A LIFE* 712 (1989) (recording four payments from Millar for unspecified services, totaling £825.17.0, between May 1749 and December 1749, and likening these sums to payments of royalties).

72. FIELDING, *supra* note **Error! Bookmark not defined.**, at 541.

73. *Id.* These two examples are discussed at greater length in Simon Stern, *Tom Jones and the Economics of Copyright*, 9 *EIGHTEENTH-CENTURY FICTION* 429, 438–40 (1997); see also Cook, *supra* note 68, at 26.

74. HENRY FIELDING, *Proceedings at the Court of Criticism, Thursday, Feb. 11*, in *THE JACOBITE’S JOURNAL AND RELATED WRITINGS* 159, 160 (W.B. Coley ed., 1974).

reprinting, but any kind of writing that might compete with the source. Fielding uses the occasion to ridicule monopolistic claims akin to those that a writer like Richardson might appear to be raising, when complaining about other writers' "Invasion of his Plan." In Fielding's fiction and journalism, the term "Property" in association with texts invariably betrays an opportunistic and unjustified seizure. By making the claims of proprietary authors appear so unwarranted, Fielding challenges the underlying logic that would frame the work as an object of property.

Fielding continued to write reviews, in a similarly forensic mode, throughout the 1740s and early 1750s. He might well have used this venue to respond to the many imitations of his novels published during this period—such as *The History of Tom Jones, the Foundling, in His Married State* (1749); *The History of Charlotte Summers, the Fortunate Parish Girl* (1750; by an anonymous writer who introduces himself as "the first Begotten, of the poetical issue, of the much celebrated Biographer of *Joseph Andrews*, and *Tom Jones*"); *The History of Pompey the Little* (1750); Dr. John Hill's *The Adventures of Mr. Loveill* (1750); Edward Kimber's *The Life and Adventures of Joe Thompson* (1750); *The Adventures of the Rd. Mr. Judas Hawke, the Rd. Mr. Nathan Briggs, Miss Lucretia Briggs, &c. Late Inhabitants of the Island Querumania. After the Manner of Joseph Andrews* (1751); William Goodall's *The Adventures of Captain Greenland* (1752); and William Chaigneau's *The History of Jack Connor* (1752).⁷⁵ These publications run the gamut from brilliantly Fieldingesque chronicles to mundane and inept imitations, and under the circumstances, Fielding's lack of comment on these books is itself noteworthy. While he did not praise any of them or encourage the trend, he signally failed to object to what clearly, in some instances, were merely efforts to capitalize on his name—efforts that he might have greeted as encroachments on his own sales.

Fielding's silence in this respect is particularly telling in light of his complaints, on several occasions, about unwelcome paternity claims. In what today might be seen as a form of passing off, Fielding found himself named as the author of various works by others, or widely credited with their authorship. Unlike the prefatory joke, by the author of *Charlotte Summers*, to be Fielding's illegitimate literary offspring, these attributions appeared to present a more serious reputational threat. In his preface to the second edition of Sarah Fielding's *David Simple* (1744), he wrote,

[T]here are few Crimes, of which I should have been more ashamed, than of some Writings laid to my charge. . . . Among all the Scurrilities with which I have been accused, . . . none ever raised my Indignation so much as the *Causidicade*: this accused me not only of being a bad Writer, and a

75. For discussion of these and other imitations of Fielding's novels, see HENRY FIELDING: THE CRITICAL HERITAGE 24–25 n.34 (Ronald Paulson & Thomas Lockwood eds., 1969); Cook, *supra* note 68, at 30–31.

bad Man, but with downright Idiotism, in flying in the Face of greatest Men of my Profession.⁷⁶

In cataloguing the harms resulting from these misattributions, Fielding explains that they have made enemies for him—“Men whose Characters, and even Names have been unknown to me”—and that as a result of “these Aspersions” he has “suffered . . . cruelly in my own Ease, in my Reputation, and in my Interest.”⁷⁷ Similarly, in *Tom Jones*, Fielding insists that while some have unfairly called him “a very scurrilous fellow,” in fact he detests scurrility, “and what is a very severe fate, I have had the abusive writings of those very men fathered upon me, who, in other of their works, have abused me themselves with utmost virulence.”⁷⁸ Again, in the *Covent-Garden Journal*, at a time when the press was heaving with novelistic imitations of his work, he directed his attention to “Slanders . . . wickedly fathered upon me” rather than to any of his imitators.⁷⁹ As his objections show, Fielding’s concern in voicing these complaints involves personal insult, not market competition. His rights relating to others’ uses of his name and works have to do with his reputation, not his property.

Samuel Johnson’s reflections on copyright, similarly, reveal a much more diverse array of concerns than are usually attributed to him. As one of England’s first professional writers, Johnson’s views on literary commerce have been widely cited, and because of his pithy and pragmatic observations on writing for money, he is often aligned with advocates of authors’ rights as property rights. His statement that “[n]o man but a blockhead ever wrote, except for money”⁸⁰ might appear to align him with a property-based, market-oriented view of copyright, as would his assertion in 1773, when *Donaldson v. Becket* was pending, that authors have “a stronger right of property than that by occupancy; a metaphysical right, a right, as it were, of creation, which should from its nature be perpetual.”⁸¹ Nevertheless, as Martha Woodmansee has observed, Johnson displayed a “distinctly non-proprietary attitude”⁸² in his literary practices, which included numerous collective and collaborative projects, ranging from his work on *A Dictionary of the English Language* (1755) and *The Lives of the Most Eminent English Poets* (1779–81) to his ghostwritten poems for William Dodd, sermons for John Hawkins and the Reverend John Taylor, and law lectures for Robert Chambers.⁸³

76. Henry Fielding, *Preface* to SARAH FIELDING, *THE ADVENTURES OF DAVID SIMPLE*, iii, v–vi (1744), reprinted in *THE FLOWERING OF THE NOVEL: REPRESENTATIVE MID-EIGHTEENTH CENTURY FICTION 1740–1775* (1974).

77. *Id.* at vi.

78. FIELDING, *supra* note 70, at 809.

79. HENRY FIELDING, *THE COVENT-GARDEN JOURNAL AND A PLAN OF THE UNIVERSAL REGISTER-OFFICE* 235 (Bertrand A. Goldgar ed., Wesleyan Univ. Press 1988) (entry for May 23, 1752).

80. 3 BOSWELL’S LIFE OF JOHNSON 19 (G.B. Hill ed., Oxford Univ. Press 1979).

81. 2 BOSWELL’S LIFE OF JOHNSON 259 (G.B. Hill ed., Oxford Univ. Press 1979).

82. Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 *CARDOZO ARTS & ENT. L.J.* 279, 287 (1992).

83. *Id.* at 281–87.

Moreover, after commenting on the author's "strong[] right of property" Johnson immediately added that a perpetual term would be unwise, because "reason and the interests of learning are against it": once the author decides to publish, the work "should be understood as no longer in his power, but as belonging to the publick; at the same time the author is entitled to an adequate reward. This he should have by an exclusive right to his work for a number of years."⁸⁴ Equally significantly, Johnson understood this exclusive right as a right against unauthorized reproduction, not a right against imitative or derivative uses. As early as 1739, Johnson was already defending abridgment as a permissible and desirable practice: "[E]very book, when it falls into the hands of the reader, is liable to be examined, confuted, censured, translated, and abridged; any of which may destroy the credit of the authour, or hinder the sale of the book." Even if the author's sales are diminished, that is no justification for prohibiting abridgment, because "these inconveniences give way to the advantage received by mankind from the easier propagation of knowledge," a goal that matters more than the claim of "the proprietors of a particular book [to] enjoy their profits undiminished." The author's or bookseller's rights in "the copy of a book" are therefore subject to the "hazard of an abridgment [as] an original condition of the property."⁸⁵

Johnson plainly understood copyright as a property right, and as a right to control access to a market commodity, but he nevertheless saw it as a very limited property right—a right to prevent unauthorized reprints, but not a right against any rendition of the author's argument that might compete with the author's version. Johnson's example reminds us that even when writers invoked the language of property, they may not have had the view of copyright's scope that modern conceptions of copyright take for granted. The question of how to prevent market substitutes is one of the central concerns informing contemporary scholarship on copyright, and this concern is intimately linked to the invocation of a property framework—but Johnson was capable of drawing on the latter without much heed for the former.

What Johnson says about abridgments applies with even more force to imitative writing. Indeed, the mid-eighteenth century witnessed a flourishing of analyses of literary imitation, largely aimed at explaining why imitation was inevitable and when it was worthy of admiration. These defenses take it for granted that imitation is permissible (rarely even contemplating the possibility that the

84. 2 BOSWELL'S LIFE OF JOHNSON, *supra* note 81, at 159.

85. Samuel Johnson, *Considerations on the Case of Dr. Trapp's Sermons, Abridged by Mr. Cave, 1739*, reprinted in 11 ARTHUR MURPHY, THE WORKS OF SAMUEL JOHNSON 467, 472 (1837). In *Dodsley v. Kinnersley* (1761) 27 Eng. Rep. 270; Amb. 403, Johnson's publisher, Robert Dodsley, attempted unsuccessfully to sue another publisher for abridging *Rasselas* (1759) by reprinting it with the moral reflections excised. "[Dodsley's] argument rested on the fact that the best parts, the moral reflections, had been edited from the abridgment and only the plot remained. This was his only course of action because in 1761 the one [potentially] successful argument against the abridgment [was] that the abridgment devalued rather than enhanced Johnson's novel." William J. Howard, *Literature in the Law Courts, 1770–1800*, in EDITING EIGHTEENTH-CENTURY TEXTS 78, 87 (D.I.B. Smith ed., 1968).

author's property claim might prohibit such efforts); by implication, it is the prevalence of the practice that necessitates an explanation of good versus bad imitation. One of Johnson's earliest works announced its affiliation with *Gulliver's Travels*, in precisely the way that Richardson found offensive: titled "Appendix to Capt. Lemuel Gulliver's Account of the Famous Empire of Lilliput,"⁸⁶ the essay was an introductory foray into the parliamentary reporting that Johnson published in the *Gentleman's Magazine* as "Debates in the Senate of Lilliput."⁸⁷ Swift, who did not share Richardson's view of authors' rights, seems to have had nothing to say about this effort.

Again, in a discussion of imitative writing in a *Rambler* essay of 1751, Johnson warns that "interest or envy" often inspires those who "live upon literary fame to disturb each other at their airy banquets" by leveling "the charge of plagiarism." This is an expedient, he notes, "by which the author may be degraded, though his work be revered and . . . set at such a distance as not to overpower our fainter lustre"—an observation hinting that such attacks are prompted by spite more than concerns about the protection of property. A rival who claimed to detect a property violation, after all, presumably would not be satisfied to "degrad[e]" the author and to accept a "fainter lustre" but instead would insist on demanding the limelight that had been misdirected, or, if purporting to detect plagiarism from another source, would claim to be a rightful (non-imitative) property-holder, as against an illegitimate one. Johnson offers a number of reasons for doubting that similarities necessarily indicate copying, and he establishes, in seemingly forensic terms, a high standard of proof for those who would bring such charges: "[T]here [must be] a concurrence of more resemblance than can be imagined to have happened by chance . . . where not only the thought but the words are copied." Finally, he concludes that imitation should be encouraged: "[N]ot every imitation ought to be stigmatized as plagiarism. The adoption of a noble sentiment, or the insertion of a borrowed ornament, may sometimes display so much judgment as will almost compensate for invention" and there need be no "imputation of servility" in a writer's decision to "pursue the path of the ancients."⁸⁸ As a lexicographer, editor, journalist, and essayist, as well as a poet and novelist, Johnson was well situated to understand the publishing marketplace, and while he unambiguously describes the protection afforded by the Statute of Anne in terms of property, his comments on literary commerce show that he did not take a primarily property-oriented view of copyright. He understood the right against unauthorized reprinting as a crucial requirement for protecting the author's profits, but saw no ground for extending copyright protection any further.

86. 8 GENTLEMAN'S MAG. 283 (1738).

87. On the series, see DONALD GREENE, *THE POLITICS OF SAMUEL JOHNSON* 92–95 (Univ. Ga. Press 1990).

88. SAMUEL JOHNSON, 143 *THE RAMBLER* (July 30, 1751), reprinted in 4 *THE WORKS OF SAMUEL JOHNSON* (W.J. Bate & Albrecht B. Strauss eds., Yale Univ. Press 1969).

III. PROPERTY AND EIGHTEENTH-CENTURY LITERARY CULTURE

Turning from particular writers to literary practices more generally, we see that some of the conventions of eighteenth-century writing offer additional means of understanding the role of property in the authorial imagination at this time. Throughout this period, novels often included a preface in which the author claimed to have discovered the manuscript in an old desk, or to have received it as part of a bargain.⁸⁹ The reasons for this device are various—to create distance between the author or narrator and the text, to lend the work an air of authenticity if it claimed to describe historical events, or conversely to emphasize the artifice that permeates the narrative enterprise. What is notable for present purposes is that, despite the many examples of this prefatory device, the question of property in the text hardly ever arises. In one of the most famous instances, Henry Mackenzie’s *The Man of Feeling* (1771), the narrator begins by explaining how he acquired the manuscript from an acquaintance who considered it to be “excellent wadding” for his gun, having originally found it in “a bundle of papers” left among the author’s effects when he moved.⁹⁰ Mackenzie himself was trained as a lawyer (and eventually became a specialist in revenue disputes in the court of exchequer),⁹¹ but the novel’s preface never considers the question of whether publishing the text constitutes a violation of the true author’s property right. That the preface is laced with irony, as many critics have observed,⁹² cannot by itself explain this absence: one who evinces an ironic perspective on authorship, fame, and worldly commerce might also take the opportunity to engage in ironic reflections about property and the possibility of litigation (as we saw in Fielding’s example). Rather, the implication is that Mackenzie—like so many other writers who drew on the same conceit in their prefaces—did not regard the convention of the “found manuscript” as a useful springboard for a discussion of authorial property.

Perhaps the most striking example of this convention appears in Tobias Smollett’s *The Expedition of Humphry Clinker*, also published in 1771. There, Smollett’s characters do ask about the legal consequences that might follow from the unauthorized publication of a misappropriated manuscript—but instead of framing the issue in terms of property, they focus on reputational questions. The novel opens with a pair of letters between one Jonathan Dustwich, who has acquired the letters that comprise the novel, and Henry Davis, a London bookseller who has some concerns about the legality of the publishing them without permission.

89. The convention has not received much sustained critical attention. Among the few discussions to examine it at length are John Dolan, *Poetry, “Fiction” and Prose in Found Texts of the 1760s*, 28 *GENRE* 35 (1995); Ian Duncan, *Authenticity Effects: The Work of Fiction in Romantic Scotland*, 102 *S. ATLANTIC Q.* 93 (2003); Anthony J. Hassall, *Sarah and Henry Fielding and the Authorship of The History of Ophelia: Literary Considerations*, 30 *SCRIPT & PRINT* 93 (2006).

90. HENRY MACKENZIE, *THE MAN OF FEELING* 4 (Brian Vickers ed., 2002).

91. HAROLD WILLIAM THOMPSON, *A SCOTTISH MAN OF FEELING* 81 (1931).

92. See, e.g., ALEX WETMORE, *MEN OF FEELING IN EIGHTEENTH-CENTURY LITERATURE: TOUCHING FICTION* 7 (2013); Leo Braudy, *The Form of the Sentimental Novel*, 7 *NOVEL* 5 (1973).

Fending off the “objections” raised by the bookseller in a previous letter (not included in the text), Dustwich writes, “[A]s touching what prosecutions may arise from printing the private correspondence of persons still living, . . . the Letters in question were not written and sent under the seal of secrecy; [and] they have no tendency to the *mala fama*, or prejudice of any person whatsoever.”⁹³ Moreover, he claims, according to an “eminent attorney” whom he has consulted, “the said Letters [do not] contain any matter which will be held actionable in the eye of the law.”⁹⁴ Finally, as “to the manner in which I got possession of these Letters, it is a circumstance that concerns my own conscience only,”⁹⁵ and so the bookseller need not concern himself with such questions. On receiving these reassurances, Davis replies that he would be happy to discuss terms.

A striking feature of this correspondence is that questions of property never arise. Dustwich evidently has not asked at least some (or, more likely, any) of the correspondents whether he may print the letters, but he and Davis consider themselves free to proceed, so long as there is no risk of libel suit. Smollett addresses legal issues in many of his novels,⁹⁶ and yet here—in one of the few cases when any writer took such elaborate pains to ironize the prefatory convention and to ponder its implications for literary commerce—he glosses over the subject of property. Doubtless, one effect of the exchange between Dustwich and Davis is to elevate Smollett above the crass motivations that he ascribes to the battered and slippery denizens of the literary marketplace who open the book—but that can hardly explain why concerns about property are absent, since that topic would only underscore the mercenary attitudes of the two correspondents. Smollett shows no interest in this aspect of the conventional story about the “found manuscript”; instead, like many of his contemporaries, he associates the unauthorized publication of a manuscript with questions about injury to one’s character.

The absence of contentions about property is even more notable when one turns to the various allegations of plagiarism among eighteenth-century writers and critics. Allegations of plagiarism are closely tied to accusations of theft—and the eighteenth century is no exception to this pattern—but throughout this era, we rarely find complaints that translate these charges into the seemingly obvious

93. TOBIAS SMOLLETT, *THE EXPEDITION OF HUMPHRY CLINKER* 1 (Lewis M. Knapp ed., Paul-Gabriel Boucé rev. 1998).

94. *Id.*

95. *Id.* at 2.

96. See CHERYL L. NIXON, *THE ORPHAN IN EIGHTEENTH-CENTURY LAW AND LITERATURE: ESTATE, BLOOD, AND BODY* 228–56 (2011); Hilary Teynor Donatini, *Smollett’s Justices*, 23 *AGE OF JOHNSON* 273 (2015); Roger A. Hambridge, *Smollett’s Legalese: Giles Jacob’s New Law Dictionary and Sir Launcelot Greaves*, 44 *REVUE DES LANGUES VIVANTES* 37 (1978); Peter Miles, *The Bookhood of Humphry Clinker: The Editor, the Publisher, and the Law*, 18 *EIGHTEENTH-CENTURY LIFE* 48 (1994); Alice Parker, *Tobias Smollett and the Law*, 39 *STUD. PHILOLOGY* 545 (1942); Nicole Wright, *Stand “Yore” Ground: Atavistic Justice and the Rights of Outsiders in The Life and Adventures of Sir Launcelot Greaves*, in *Standing for the Powerless: Legal Agency After the Enlightenment* (Nicole M. Wright ed.) (unpublished manuscript) (on file with author).

conclusion that the plagiarist has committed an offense against the author's property.

Richard Terry, who has conducted the most extensive study of allegations about plagiarism in the eighteenth century, notes that even as the term began to encompass accusations about "the copying of ideas and expressions,"⁹⁷ and even though the term was often accompanied by complaints about theft, it rarely included the sense that this kind of copying was a property offense. Gerard Langbaine's *Momus Triumphans* was one of the first sustained efforts to catalogue examples of literary plagiarism; as Terry notes,

Though Langbaine sees himself as restoring stolen material to its rightful owners, he is not appealing to some high principle concerning the inalienable nature of individual creativity. What moves him rather is the prospect of the great writers suffering an erosion of their fames, as their credit is embezzled and spirited away by plagiarists. . . . Not only does he not invoke the concept of property or "propriety," he never considers the affront of plagiarism in monetary terms.⁹⁸

Terry sees precisely the same pattern repeated throughout the eighteenth century:

While plagiarism was certainly viewed by authors as being pernicious, the idea that what it specifically infringed was an author's property right seems to have very little currency in the period itself. Much more common was the idea that plagiarism constituted a rape against the author's credit or fame by the same token, when writers express indignation about unfair accusations of plagiarism, they tend to bemoan not the challenge to their ownership of property but to their entitlement to fame.⁹⁹

Discussing a wide range of authors including John Dryden, Aphra Behn, Joseph Addison, Alexander Pope, Samuel Johnson, Henry and Sarah Fielding, Laurence Sterne, and Charlotte Smith, Terry shows that accusations of plagiarism almost invariably targeted reputational issues, and that, during the period when the bookselling industry was busily advancing a property-oriented view of copyright, writers were more concerned with questions of character and respectability when they argued about illicit copying.

CONCLUSION

The logic of property law has significantly influenced the development of copyright doctrine since around the middle of the nineteenth century, particularly in the context of derivative use and infringement for nonliteral copying. When copyright scholars discuss the law's expansion and its increasing propertization, these are the changes they have in mind. Discussion of literary property may be found in many eighteenth-century sources, including judicial opinions, letters,

97. TERRY, *supra* note 55, at 23.

98. *Id.* at 31.

99. *Id.* at 117.

polemical pamphlets, and newspaper articles, as well as essays, fiction, and poetry. However, when we examine these sources, we rarely encounter the expansive view of the property right that modern copyright law carries with it; hence the mere appearance of the word *property* should not lead us to conclude that this period had already witnessed the propertization that commentators have described as a comparatively recent phenomenon. Again, when we look more closely at the writings of poets and novelists during the eighteenth century, we find that even when they speak of property and the rights it imports, these authors rarely take the same view of the subject that the bookselling industry was seeking to promote. Instead, writers tended to hold a very qualified conception of the property right, or to invoke it only to cast aspersions on it. The few who took the same position as the booksellers were affiliated, in some way, with the publishing trade. Finally, even the legal decisions that are sometimes offered as evidence of the early propertization of copyright law may turn out, when examined carefully, to have been misread. What becomes evident, from this examination of a range of eighteenth-century materials, is that when seeking to understand the history of legal concepts, we cannot be content simply to search for familiar language in older sources; instead, we must ask, in each instance, how the language is being used, who is using it, and for what purposes.