

## The Transactional Origins of Authors' Copyright

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### ABSTRACT

One of the paradoxes of copyright history is that the Statute of Anne, which nominally recognized authors' copyright for the first time, did not much change the day-to-day business of the Stationers who had previously enjoyed a virtual monopoly on the legal right to copy and who had also lobbied in support of the statute. This Article posits that commercial practice continued as it had because the concept of authors' copyright had already begun to form in the contracts between authors and their publishers prior to the Statute's enactment. These transactions, in some cases, gave authors greater rights in their work than the legal default required. Experience in the marketplace helped to assure both authors and booksellers that licensing transactions could support the creation and distribution of books in a world in which, going forward at least, authors would hold copyright in their new works. Commercial practice informed legal theory at this critical juncture in history and helped to change the legal and social norms associated with copyright. This Article draws on the records of the Stationer's Company, parliamentary journals, and rarely seen, unpublished contracts from the eighteenth century and before to uncover the practical, transactional origins of authors' copyright in England.

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One of the paradoxes of Anglo-American copyright history is that the role of authors in the early development of copyright is obscure. Aside from the comparatively rare printing privileges granted directly from the Crown to authors, the exclusive right to print a book was, at its origins, a right legally recognized for Stationers, the printers or booksellers who produced and distributed books, rather than authors.<sup>1</sup> Even the Statute of Anne, which nominally recognized authors' copyright for the first time,<sup>2</sup> did not much change the day-to-day business of the Stationers who had previously enjoyed a virtual monopoly on the legal right to copy.<sup>3</sup> Stationers themselves were the most prominent voices lobbying for the

1. Leo Kirschbaum, *Author's Copyright in England before 1640*, 40 THE PAPERS OF THE BIBLIOGRAPHICAL SOC'Y OF AM. 43, 43–44, 46 (1946); R.C. Bald, *Early Copyright Litigation and its Bibliographical Interest*, 36 THE PAPERS OF THE BIBLIOGRAPHICAL SOC'Y OF AM. 81, 83 (1942). *But see* Meraud Grant Ferguson, 'In Recompense of His Labours and Inuencyon': *Early Sixteenth-Century Book Trade Privileges and the Birth of Literary Property in England*, 13 TRANSACTIONS OF THE CAMBRIDGE BIBLIOGRAPHICAL SOC'Y 14, 20 (2004) (arguing that the first privilege granted to an author, Thomas Linacre, "has far-reaching implications for our understanding of the desire of early sixteenth-century writers to protect their words and our conception of their sense of agency"). For further detail on the first such privilege granted to an author, *see* Rebecca Schoff Curtin, *The 'Capricious Privilege': Rethinking the Origins of Copyright under the Tudor Regime*, 59 J. OF THE COPYRIGHT SOC'Y OF THE U.S. 391 (2012). On the comparative rarity of privileges granted to authors, *see* PETER BLAYNEY, *THE STATIONERS' COMPANY AND THE PRINTERS OF LONDON, 1501–57*, 160 n.A (2013). Blayney believes that Linacre's printer, John Rastell, likely suggested that Linacre seek the privilege. *Id.* at 166–67.

2. With respect to works unpublished or yet to be composed, the statute reads, "the Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of Fourteen Years to Commence from the Day of the First Publishing the same, and no longer." Statute of Anne, 1710, 8 Ann., c. 19, § 2 (Eng.).

3. Michael F. Suarez, *To what degree did the Statute of Anne (8 Anne, c. 19, [1709]) affect commercial practices of the book trade in eighteenth-century England? Some provisional answers*

statute, which began as a petition to Parliament by a group of booksellers and printers.<sup>4</sup> As for litigation under the new statute, in spite of the seemingly sudden appearance of authors as the initial copyright holders in their new work under the Statute of Anne, as far as recent research has uncovered, a living author did not appear in court on his own behalf for almost twenty years after the passage of the Act.<sup>5</sup> How is it possible that authors, arguably the central focus of the incentivizing, utilitarian energies of our modern-day copyright law,<sup>6</sup> are eclipsed at its origins? Where, then, did the concept of authors' rights originate and why wasn't the passage of the Statute of Anne more disruptive to the Stationers' own understanding of their commercial relationships with authors? The Statute of Anne itself notoriously fails to define the right to a "copy."<sup>7</sup> What rights exactly did people think were being recognized for (or conferred on) authors and proprietors of books at the time? And, finally, if it is true that authors were marginalized in the early conceptions of literary property, how did authors move to the center of copyright law and policy, to the extent that they have done so?

This Article contributes to the answering of these questions by interrogating sources that are rarely consulted by legal historians, the contracts and correspondence between authors and their publishers prior to the passage of the Statute of Anne and in the early years following its enactment. I posit that commercial practice continued as it had in part because the concept of authors' copyright had already begun to form in the transactions between authors and their

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*about copyright, chiefly from bibliography and book history, in* GLOBAL COPYRIGHT 54, 67 (Lionel Bently, Uma Suthersanen and Paul Torremans, eds., 2010).

4. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 142 (1968).

5. For the first copyright suit brought by a living author under the Statute of Anne (by John Gay for piracy of his opera *Polly* in *Gay v. Read* (1729)) and a brief identification of other early suits, see MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 59 (1993); see also Suarez, *supra* note 3, at 54–55. For what is thought to be the first-ever suit under the Statute of Anne, brought by the stationer Jacob Tonson, see 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). Gómez-Arostegui has discovered a remarkable exception to the general rule of living authors being absent from the court room prior to the Statute of Anne: in *Chiswell v. Lee* (C33/257, f. 100r (Ch. 1681)), the Chancellor orders an author to certify, as a kind of expert witness, whether the allegedly infringing book was a copy of the author's book. See H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197, 1232 n.171 (2008) [hereinafter Gómez-Arostegui, *What History Teaches Us*]. The extent to which Stationers in court prior to the passage of the Statute of Anne may have relied on their dealings with authors as the ultimate source of their rights is a separate and crucial question. See H. TOMÁS GÓMEZ-AROSTEGUI, *Stationers v. Seymour* (1677), forthcoming in LANDMARK CASES IN INTELLECTUAL PROPERTY (Jose Bellido ed., 2017).

6. See, e.g., Wendy Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 634–35 (2014) (arguing that "focus on authorial incentive is far more well-entrenched in our history than is solicitude for commercial disseminators"). But see Jane Ginsburg, *The Author's Place in the Future of Copyright*, in COPYRIGHT IN AN AGE OF EXCEPTIONS AND LIMITATIONS (Ruth Okediji ed., forthcoming 2017), <https://perma.cc/F2SD-9DCK> (observing that "[i]n the copyright polemics of today, moreover, authors are curiously absent; the overheated rhetoric that currently characterizes much of the academic and popular press tends to portray copyright as a battleground between evil industry exploiters and free-speaking users").

7. RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695-1775) 49 (2004).

publishers prior to the Statute's enactment. If we want to know what authors and booksellers both understood at the time by words like "copy" and "right, title, and interest in" a book, the best possible place to look is in their own uses of these words, in the contracts and correspondence that memorialized and bound their commercial dealings.

To the extent that these transactions have been referenced in copyright histories, they are traditionally conceptualized as outright sales of the physical manuscript,<sup>8</sup> but this view underappreciates the diversity of evidence that has survived and the importance of those instances, rare though they may have been, in which the deals between authors and publishers contained terms beyond flat, upfront sums. Where the contractual evidence is given closer attention, notably in the work of legal academics Jane Ginsburg and Lionel Bently and book historians Leo Kirschbaum and Peter Lindenbaum, the traditional view begins to break down.<sup>9</sup> In some exceptional cases, even prior to 1710, transactions gave authors greater rights in their work than the regulations of the Stationers' Company would have required. Through contract language, authors and booksellers explored the meaning of the rights they purported to transfer between them. We should pay more attention to the sparks of innovation we can find there.

Evidence of these dealings shows some authors acting in the marketplace, in the phrase taken up by Mark Rose in his seminal study, as "proprieters" of their work, long before the Statute of Anne was enacted. This experience in the market helped to assure both authors and booksellers that transactions (in the form of licenses or assignments of copyright) could support the creation and distribution of books in a world in which, going forward at least, authors would hold copyright in their new

8. See, e.g., PETER W. M. BLAYNEY, *THE PUBLICATION OF PLAYBOOKS*, in *A NEW HISTORY OF ENGLISH DRAMA* 383, 394 (John D. Cox & David Scott Kastan eds., 1997); Kirschbaum, *supra* note 1, at 44; HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* 104 (1956); Suarez, *supra* note 3, at 62 (quoting Dustin Griffin's assertion that "as any careful historian of copyright observes, eighteenth-century authors almost always immediately sold their owner's right to a bookseller, and, once it was sold, did not think of themselves as legal proprietors of their work: copyright in the eighteenth century is essentially a bookseller's exclusive right to copy (and sell) a work, and not a key to authorial self-images"); *But see* PATTERSON *supra* note 4, at 73 (characterizing the author's conveyance as "a negative covenant—that is, a contract not to object to publication of the work, rather than a contract granting a right to publish it" and recognizing a cooperative relationship between authors and publishers).

9. See Lionel Bently & Jane C. Ginsburg, *The Sole Right . . . Shall Return to the Authors': Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 *BERKELEY TECH. L. J.* 1475, 1492, 1498 (noting "the diverse set of practices" in "post-1710 author-publisher documents" and concluding that "[l]ooked at in the round, these documents suggest that the assumption that after 1710 copy was universally assigned from authors to publishers in full upon the initial sale of the manuscript is something of an exaggeration"); Kirschbaum, *supra* note 1 (noting early evidence of authors contracts); and multiple articles of Peter Lindenbaum, *infra* Sections II and III of this Article (analyzing Milton's contract for the publication of *Paradise Lost* and bringing lesser known contracts to light). See also John Feather, *From Rights in Copies to Copyright: The Recognition of Authors' Rights in the English Law and Practice in the Sixteenth and Seventeenth Centuries*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 97, 208 (Martha Woodmansee & Pater Jaszi eds., 1994) (observing that "[i]t would be perverse to claim that authors' rights were widely recognized in pre-revolutionary England; it would be more accurate, although still perhaps a slight exaggeration, to suggest that they were dimly perceived"); PATTERSON, *supra* note 4, at 66 (noting the extent to which stationers and authors worked together cooperatively).

works. Commercial practice informed legal theory at this critical juncture in history and helped to change the legal and social norms associated with copyright. This Article draws on the records of the Stationers' Company, parliamentary journals, and unpublished authors' contracts from the eighteenth century and before, to uncover the practical, transactional origins of authors' copyright.

Traditionally, we have answered these questions in quite a different way. Scholars have characterized the Statute of Anne's inclusion of authors as a mere political expediency that did not bear real fruit until decades later, after a combination of legal and cultural developments.<sup>10</sup> These developments range from the rise of the Romantic conception of the author to the debates surrounding the seminal case of *Donaldson v. Becket*, in which the House of Lords interpreted the Statute of Anne.<sup>11</sup> While these developments undoubtedly contributed to the evolution of copyright, further study of the private ordering between authors and publishers prior to the Statute of Anne is crucial to understanding the development of authors' copyright for two primary reasons.

First, documents recording private ordering via contract and the settling of disputes by negotiated agreement offer evidence of authors and Stationers engaging in the market for works that emphasizes the agency of living authors. Such business records are comparatively difficult to access. Admittedly, the serendipity of what has survived (and what portion of those documents we know have survived) as a mere accident of history may skew the picture such documents provide. Nonetheless, records of commercial dealings provide a window into the privately ordered dynamics that in most cases ultimately controlled what actually happened in the market for literary works. The extent to which commercial dealings may have been relevant to the legal recognition of literary property at common law is a tantalizing question that must remain beyond the scope of this Article.<sup>12</sup> But this Article can contribute to our understanding of what ideas regarding an author's intangible rights were conceivable prior to the Statute of Anne and trace the development of a language in which authors and publishers identified those rights. As Ronan Deazley has recognized, "that the figure of the author had been socially and culturally reified to such a significant extent as to have an identifiable market presence by the beginning of the eighteenth century was of central importance in securing the Statute of Anne."<sup>13</sup> The shape of authorial market presence was most prominently defined by the actual commercial dealings of authors with their publishers.

Second, many of the cultural and legal developments that have been recognized as influencing the development of authors' rights occurred in the decades following

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10. See DEAZLEY, *supra* note 7, at xviii–xxiv (summarizing the work of several historians suggesting that "the transformation of copyright as publishers' right to copyright as authors' right takes place in the years following the 1709 Act, culminating in the decision of *Donaldson*").

11. *Id.*

12. The relationship between custom and common law is complex. For an example of the ways in which the question is posed in relation to copyright history, see H. Tomás Gómez-Arostegui, *What is the Point of Copyright History: Reflections on Copyright at Common Law in 1774*, 66–72 (CREATe, Working Paper 2016/04, 2016), <https://perma.cc/3QHL-RDP6/>.

13. DEAZLEY, *supra* note 7, at xviii.

the Statute of Anne. While do not at all dispute that these developments were extremely important to the evolution of authors' copyright, they can do little to explain the origins of authors' rights as a concept, or, indeed, to illuminate what the Statute of Anne meant to the relevant constituencies at the time of its passage. It has been observed that the Statute of Anne appeared merely to facilitate business as usual for the Stationers' Company.<sup>14</sup> Somewhat in tension with this observation is that the Statute was also poorly drafted, creating confusion and uncertainty in the market, or, alternatively, causing the Stationers in large part to ignore the Statute.<sup>15</sup> By resorting to close reading of the language of authors' contracts, we can shed new light on what "business as usual" meant, and therefore the extent that the Statute of Anne spoke intelligibly to both authors and Stationers at the time and what it meant to them when it recognized that "the author of any book or books already composed, and not printed and published, or that shall hereafter be composed . . . shall have the sole liberty of printing and reprinting such book or books for the term of [14] years."<sup>16</sup>

This Article begins by examining the earliest evidence of agreements between authors and their printers or publishers in the form of indentures that have survived from the period prior to the charter of the Stationers' Company in 1557. These early agreements give us a glimpse of authors bargaining in the shadow of the privilege system and asserting considerable control over their work. In the next section, the Article turns to the records of the Stationers' Company for evidence of authors working with their publishers within the regulations of the Company in the late sixteenth and early seventeenth centuries. Through this work it becomes immediately clear that, as early as the sixteenth century, some authors and printers were engaging with the meaning of the right to print in a substantive way by negotiating publishing agreements. It also appears that the administrative body that enforced the rules of the Stationers' Company, the Court of Assistants, recognized and enforced the terms of such agreements. In this section the Article also turns to correspondence of authors to understand their commercial dealings in this period. In the third section, the Article analyzes a series of written contracts that reveal increasingly sophisticated conceptualizations of literary property, from the seventeenth century to the early eighteenth century. The fourth section concludes with thoughts on the emergence of the modern language of copyright.

## I. PYNSON, AUTHORS, AND PRIVILEGES

The first printing privilege ever granted by the English Crown is thought to be the privilege granted to Richard Pynson for the exclusive right to print, for two

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14. See, e.g., JOHN FEATHER, *PUBLISHING, PIRACY, AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN* 64 (1994); *but see* DEAZLEY, *supra* note 7, at 45 (arguing against this position).

15. Suarez, *supra* note 3, at 61.

16. See DEAZLEY, *supra* note 7, at 233 (for the text of the statute printed in Appendix 1).

years, the first statute of Henry VIII's reign.<sup>17</sup> Such privileges have been compared to "temporary commercial monopolies," which, depending on the terms of the particular grant, applied to a specific text, a named genre, or to all the books published by the grantee.<sup>18</sup> The granting of the privilege had its origin not in property rights *per se*, but in the Crown's prerogative to regulate industry.<sup>19</sup> In 1518, Henry VIII granted another privilege to Pynson, this one protecting all of Pynson's publications for a period of two years from the date of first printing.<sup>20</sup>

Shortly thereafter, Pynson entered into an agreement with William Horman for the printing of a Latin textbook called *Vulgaria*. The agreement is memorialized in an indenture<sup>21</sup> in which Horman agrees to pay Pynson five shillings per ream for 800 copies of the book, printed to particular specifications in type font and paper. Thus far, the agreement resembles a modern work order for a printing job. In return, however, Pynson agreed to the following covenant:

... the seyde Master Richarde Pynson byndythe and promysythe hym selfe by an othe to the seyde William Horman that he shall not prynte, nether do, or geve, or cause to be prynted any moo then the seyde nombre wythein the space of five yeres next folowying wythe-owt the consent and graunt of the seyde Wylliam Horman. Vnder the priuilege and payn that he hathe grauntyde hym by the grace of owre soverayne lorde the kyng. And that the seyde privilege shalbe prynted in every of the seyde bokys.<sup>22</sup>

Peter Blayney and Meraud Grant Ferguson are in accord that the privilege referenced in the final clause is Pynson's general privilege.<sup>23</sup> Horman's control over the number of copies Pynson prints, then, was a function of the agreement, to be enforceable against Pynson for five years.<sup>24</sup> Because all 800 copies Pynson was obligated print were to be delivered to Horman, it is probably safe to assume that Horman was acting as the publisher, taking all of the financial risk in whether or not the copies would sell. The requirement that notice of Pynson's privilege be printed in each of the copies would have been to Horman's advantage, then, signaling to others that there was protection enforceable against the world. The meaning of the clause "vnder the priuilege and payn that he hathe grauntyde hym

17. Ian Gadd, *The Stationers' Company in England before 1710*, in RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW 83 (Isabella Alexander and H. Tomás Gómez-Arostegui, eds. 2016); *but cf.* Ferguson, *supra* note 1 (characterizing the privilege as covering the Statutes).

18. Gadd, *supra* note 17, at 83–84.

19. BLAYNEY, *supra* note 1, at 170–71.

20. Gadd, *supra* note 17, at 83; BLAYNEY, *supra* note 1, at 170.

21. Indentures were sealed deeds copied twice and then separated by a wavy cut. The seals were necessary during this period to make covenants enforceable. *See* A. W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 35–36 (1987).

22. SP/9/89 (1519), in STATE PAPERS ONLINE, <http://www.columbia.edu/cgi-bin/cul/resolve?clio7201506>, reprinted in F. J. Furnivall, *Pynson's Contracts with Horman for his Vulgaria, and Palsgrave for his Lesclaircissement, with Pynson's Letters of Denization*, in 12 TRANSACTIONS OF THE PHILOLOGICAL SOCIETY 362, 364–365 (1868).

23. BLAYNEY, *supra* note 1, at 170; Ferguson, *supra* note 1, at 21.

24. *Cf.* Ferguson, *supra* note 1, at 21 (noting that "since the author was involved in the initial financial outlay he would have stood to benefit just as much from the arrangement"); BLAYNEY, *supra* note 1, at 170.

by the grace of owre soverayne lorde the kyng,” is obscure, but perhaps the intention was that Pynson would enforce the privilege on Horman’s behalf or would apply the same remedies to a breach of the oath as apply to a violation of the privilege.<sup>25</sup>

A first draft of a similar indenture between Pynson and John Palsgrave, dated 1523, has also survived.<sup>26</sup> The language of the indenture similarly obligated Pynson to print Palsgrave’s work in return for payment. In addition to paying Pynson, Palsgrave would also have been required to pursue obtaining an author’s privilege:

Furthermore hit ys agreed, couenauntid, and condescended bytwene the parties aforsayd, that the forsaid Master John Palsgrave, at his Labour and suite, optayne a pryuelege that there shall none of the Kynges subiectes, by the space of iii or iiii yeres, imprynt the saide boke, nor none sell them, tho they be impryntyd ellys where.<sup>27</sup>

The subsequent drafts of the agreement dropped this provision,<sup>28</sup> but it is interesting because it shows the parties explored tools to increase the author’s control over distribution of the book.<sup>29</sup> A separate author’s provision of the terms described would have doubled the duration of the possible protection under Pynson’s two-year privilege.<sup>30</sup>

Also interesting was that the copies of the book, once printed, were to be put under lock and key, with only Palsgrave to have access, “prouyded alleway that the forsaid Richard Pynson may at all tymes haue sufficient books to sell to such a nombre as the forsaidd Maister Iohn Palsgraue and the aboue named Richard Pynson shalbe agreed vpon.” So, Pynson seems to have taken on some of the bookselling activities in this deal, but the author has taken on more of the status as a holder of both the privilege and the physical access to the books. In sum, these indentures effectively leveraged contractual obligations to give the author control of the number and quality of copies made of the book, albeit without express reference to a separate property right in the text.

## II. ENTERING INTO COPYRIGHT: EVIDENCE OF AUTHOR-PUBLISHER CONTRACTS IN THE STATIONERS’ COMPANY RECORDS

This Section of the Article moves to the period following the incorporation of the Stationers’ Company in 1557 and the establishment of the Stationers’ Register. The Stationers’ Register was initially begun as a means to track whether the fee for

25. BLAYNEY, *supra* note 1, at 170 (suggesting that the provision would apply the same conditions and the same penalties to Pynson’s oath as would apply to the privilege).

26. Transcribed in Furnivall, *supra* note 22, at 366–68.

27. *Id.* at 367.

28. BLAYNEY, *supra* note 1, at 201.

29. A privilege was granted. See Ferguson, *supra* note 1, at 23–24 (describing and analyzing the text of the privilege).

30. *Id.*



permission to print a particular text had been paid. Over time, entry in the register additionally became the mechanism by which the Stationers' Company recorded a member's claim to the exclusive right to print a particular work.<sup>31</sup> A typical entry need not even have included the name of the author at all, the critical information being the name of the Stationer claiming the "copy," the title of the work, and the notation of the fee paid. In a handful of instances, however, the entries contain additional information about what we might think of as the division of rights in the work between the author and the publisher.<sup>32</sup> These entries have long been known, but their importance as evidence of agreements between authors and their publishers has been underappreciated.<sup>33</sup>

The earliest of these entries to provide a glimpse of the commercial dealings between authors and their publishers was entered jointly by Bishop and Windet in 1586. The entry famously contains an addendum, as follows: "Received of them for printing a treatyse of Melancholie sett furthe by Mr. T. Bright . . . Memorandum that Mr. doctor Bright hathe promised not to medle with augmenting or alteringe the said book until th' impression wich is printed by the said John Windet be sold."<sup>34</sup>

As W.W. Greg and Lyman Patterson have observed, this record of a promise on the part of the author, Timothy Bright, not to issue a revised edition of his *Treatise of Melancholie* until the edition printed by Windet has sold out implies that the parties recognized that Bright would otherwise have been free to alter the work and re-sell the new version.<sup>35</sup> As I have argued elsewhere, the memorandum of Bright's promise is remarkable as evidence that the parties have negotiated to avoid a key problem in Stationer's copyright:<sup>36</sup> what is the scope of the Stationer's exclusivity in the "copy"? In other words, is the Stationer protected only against literal copies of the exact same work? If so, how much revision is required before a revised text may be considered a new work to which new rights in a "copy" may attach? The language of the promise conveys some of the uncertainty around the

31. Gadd, *supra* note 17, at 88–89, 91; Maureen Bell, *Entrance in the Stationers' Register*, 16 THE LIBRARY 50, 51 (1994).

32. It should be emphasized that the Register did not by any means create a complete record of all works published. Recent studies suggest that the rate of entry in a typical year averages only a little over half the new works printed. Bell, *supra* note 31, at 54.

33. Kirschbaum, *supra* note 1, at 77–78. Kirschbaum ends his discussion of the early evidence of authors' contracts with the remark: "This paper is to be considered a tentative survey of a rather unexplored territory. It is to be hoped that someone will carry the story beyond my narrow chronological limit." *Id.* at 80. This Article is, in some ways, an answer to that invitation.

34. EDWARD ARBER, 2 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554–1640 A.D. 457 (1950).

35. W. W. GREG, RECORDS OF THE COURT OF THE STATIONERS' COMPANY: 1576 to 1602 From Register B lxx-lxxi, n.1 (1930); PATTERSON, *supra* note 4, at 71–72. For Patterson, this suggests that printers acknowledged a "right of the author, and by implication, only the author, to alter and revise his work, despite the existence of copyright [held by the stationer]." PATTERSON *supra* note 4, at 71. Greg focused more on what the note implies about the default limits of the Stationer's right in the "copy." "This seems clearly to envisage the possibility of Bright revising the work and getting another edition issued by a different stationer." GREG, *supra* note 35, at lxxi.

36. Rebecca Schoff Curtin, *Hackers and Humanists: Transactions and the Evolution of Copyright*, 54 IDEA 103, 127 (2013).

kinds of changes that could create a slippery copy—“meddl[ing]” with “augmenting” or “altering.” We know that revised editions of previously printed works sometimes appeared as separate entries in the Register. Here, Bright, Windet, and Bishop have apparently agreed that Windet and Bishop would be protected from the release of an updated edition (whether enlarged or otherwise changed) until the planned impression of their edition had sold out. At that point, Bright would be free to alter his text and, by implication, to sell it to a different Stationer. The recordation of this promise in the Register implies that the author will thereafter be free to sell a revision to different Stationers. The focus on a restricting the author from revising until after the impression is sold (as opposed to after it is merely printed) suggests that this covenant is not just about letting the publisher get on with printing the edition. The concern is about competition in the marketplace. A private alteration would not have been a concern to the Stationers warranting publication of the promise in the Register, where it could serve as the basis of evidence should a different Stationer attempt to enter a revision before the first impression had sold out. Presumably, such an occurrence would trigger liability for breach of the covenant for Bright, in the event that he was the source of the revised text.<sup>37</sup>

Patterson makes the inference that only the author, or perhaps someone with his consent, would be allowed to revise a text under the Stationers’ system.<sup>38</sup> To the extent that this was true, the agreement binding Bright would have given Windet and Bishop assurance that they would be protected from close competitors until their impression sold out, because their agreement with Bright would “piggyback” upon Bright’s exclusive right to revise the text. But it is not clear that this was ever settled under the regulations enforced by the Stationers’ Court of Assistants. While there is very good evidence that, under the Stationers’ system, an author’s right to control (and receive remuneration for) first publication of a book was respected going back to the mid-sixteenth century,<sup>39</sup> an ambiguity arises as to whether a substantial revision of an existing work was a new work, whose adaptor had status as a separate author in his own right. For instance, Timothy Bright himself published an abridgement of John Foxe’s *Book of Martyrs*, which was much shorter and cheaper than the original, and apparently enjoyed a wide circulation.<sup>40</sup> John Windet in fact printed the edition.<sup>41</sup> While this did cause a dispute with the holder of the privilege for the complete book, it is difficult to tell from the records what the result was.<sup>42</sup> In the face of such uncertainty, it is notable that Bright, Bishop,

37. For more on adjudication of disputes potentially arising from authors’ contracts in the Court of Assistants, see discussion *infra* notes 69–86 and accompanying text.

38. PATTERSON, *supra* note 4, at 71.

39. See, e.g., PATTERSON, *supra* note 4, at 67–68. But see BLAYNEY, *supra* note 8, at 395 (noting that “it was not unknown for a stationer to admit quite openly that a book was being published without its author’s knowledge or consent”).

40. Page Life, *Timothy Bright*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Jan. 2008), <https://perma.cc/Z672-3LFC>.

41. As indicated by the colophon of the work, STC 2d ed. 11229, <https://perma.cc/HCX4-66VJ>.

42. The record merely states that the Court of Assistants will indemnify the master and the wardens “against John Wyndett and Mr. Doctor Brighte and all others . . . for all such somes of monie

and Windet negotiated to clarify the scope of the Stationers' right to the *Treatise of Melancholie* by contractually defining when the author, at least, was free to re-enter the market with a revision.

There were a few circumstances in place for Bright, Bishop, and Windet that may have encouraged the parties to hit on this ingenious mechanism for clarifying their rights. First, an edition of Bright's *Treatise of Melancholie* had already been printed by Thomas Vautrollier that same year.<sup>43</sup> As a result, the parties may have been especially concerned about limiting the number of further versions competing in the market, thereby making it worth the extra effort to hammer out the expectations with respect to revised editions. Second, Timothy Bright was a prolific author who was politically connected<sup>44</sup> and who was therefore more likely to have the wherewithal to enter into negotiation on the scope of his rights. In 1585, he was appointed chief physician to the Royal Hospital of St. Bartholomew, London, having been recommended by the very powerful Francis Walsingham.<sup>45</sup> By the time he was seeking publication of the *Treatise of Melancholie*, he had published four other works and had already invented a system of shorthand that had been recommended to members of Queen Elizabeth's inner circle.<sup>46</sup> By 1587, the year after *The Treatise of Melancholie* was entered into the Register, Bright was working as a cryptographer for the Elizabethan spy network and the following year received a patent directly from the Queen on his shorthand system, giving him the exclusive right to publish his own or any competing shorthand system for fifteen years.<sup>47</sup> He seems to have been well-equipped to engage with the Stationers and

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and damages as shall be claymed . . . againste . . . them by reason of anie promise or Agreemente made by them or anie of them before anie the Lordes of her maiesties privie Councell or otherwise touching anie thinge or matter that was moved in or aboute the late Controversie or striffe touching the abridgement of the Booke of Martyrs." GREG, *supra* note 35, at 31-32. Greg's preface to the records remarks that it is not clear how the master and wardens had become involved in any dispute. *Id.* at lxxv-lxxvi. Perhaps it is merely that the outcome of such a suit was uncertain enough that the Court was hesitant to mediate the conflict without some shield from personal liability, should Windet and Bright seek adjudication outside the Court of Assistants. Also, Bright's connections within the Privy Council would not have raised the confidence of the Court in ruling against him. *See infra* text accompanying note 44.

43. For more on Vautrollier's edition, *see* GREG, *supra* note 35, at 128 n.93. It does not appear to have been entered in the Register. Though the typesetting in Vautrollier's edition differs from that in the edition printed by Windet, the tables of contents are identical. *Id.* Perhaps Bright was looking for a new printer/bookseller for the work so soon because Vautrollier, already "infirm" as of 1583, passed away in July 1587. Andrew Pettegree, *Thomas Vautrollier*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004), <https://perma.cc/LK6U-QB3K>. While it was normal for widows to carry on their husband's business for a time, Jaqueline Vautrollier's ability to do so was limited by a decree against the business in the Star Chamber, according to a record of the Court of Assistants in March of 1587/8, ordering that she "shall not at anye tyme or tymes hereafter prynte anye manner of Booke or Bookes whatsoever, as well by Reason that her husband at the tyme of his decease was noe printer As alsoe for that by the decrees sette down in the starre chamber she is barred from the same." GREG, *supra* note 35, at 26. The order was relaxed some weeks later to allow her to finish a couple of particular impressions, but Bright's treatise was not among them. *Id.* at 27. I note that Bishop was sitting on the Court of Assistants on each of the days the court issued its holding with respect to Mrs. Vautrollier. *Id.*

44. Life, *supra* note 40.

45. *Id.*

46. *Id.*

47. *Id.*

perhaps to apply exceptional leverage. A clearer definition of Bright's right to revise was just as advantageous for Bright as it was for Windet and Bishop.<sup>48</sup>

If Bright's memorandum suggests that an agreement defined the limit of the author's right to revise and re-sell the work in that case, then later entries provide yet more remarkable evidence of authors' contracts defining the limits of the buyer-Stationer's rights to publish the work without consent of the author.<sup>49</sup> There are three entries that explicitly record agreements to the effect that the text will not be printed again without the consent of the author. First, in March of 1607, John Browne made the following entry:

Entred for his copie under the hands of the wardens a book called musicke of sundry Kyndes sett forthe in Twoo Books &c Composed by Tho. Fford } vjdyt is agreed 13 marcii Anno supradicto that this copye shall never hereafter be printed agayne without the consent of Mr fford the Author

John Browne<sup>50</sup>

The author, Thomas Ford, apparently negotiated an agreement that Browne would not be allowed to print the book, *Musicke of Sundry Kyndes*, again without his consent. To be clear, we are not quite seeing an acknowledgement of authors' copyright beyond the first publication here, but the effect is quite the same. Here, the contractual agreement "piggybacks" on Browne's exclusive right to print the work via the regulations of the Stationers' Company to provide Ford with protection against reprinting, unless he consents (and, presumably, is paid). That is, no one other than Browne would be allowed by the Company to print the work (assuming Browne pressed his rights), and Browne is bound by the agreement to seek Ford's consent. In 1627, an entry for printer William Jones contains a similar note:

William Jones

Entred for his Copie under the hands of mr. Dr. worall and both [the] wardens A book called A Mathematicall Manual. by John Dansye. Memorandum that this booke is not to be reimprinted agayne, without the consent of the author Mr Dansye} vjd<sup>51</sup>

Memorialization of these agreements in the Stationers' Register implies that the Court of Assistants would be willing to enforce the agreement, even though ordinarily entry of the copy would have given the Stationer (and his assigns or devisees) a virtually perpetual right to reprint the book.

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48. Bright chose Windet to print two more of his works: his patented shorthand treatise, a deal in which he again likely enjoyed rare leverage, and his abridgement of Foxe's *Acts and Monuments*. Curtin, *supra* note 36, at 128–29.

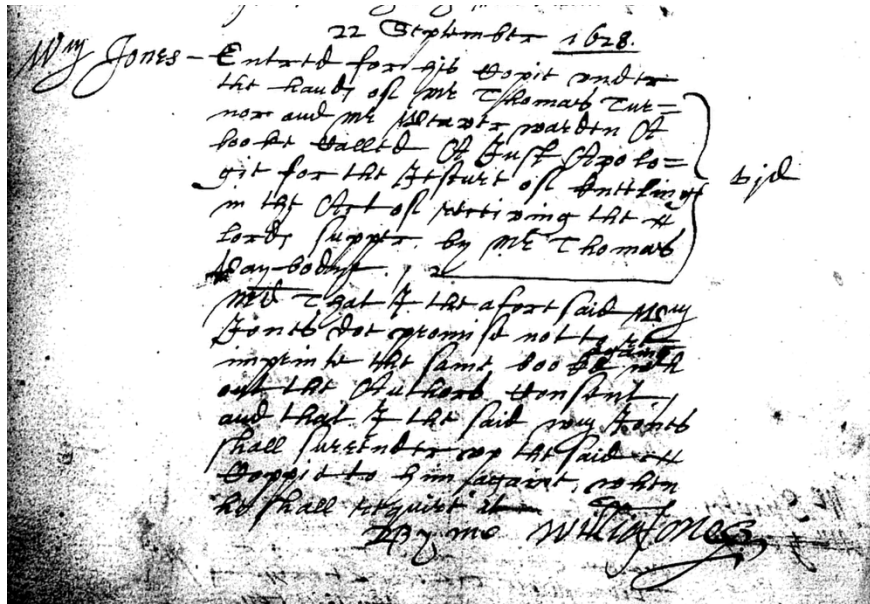
49. Kirschbaum, *supra* note 1, at 77–78.

<sup>50</sup> EDWARD ARBER, 3 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554–1640 A.D. 344 (1876).

<sup>51</sup> EDWARD ARBER, 4 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554–1640 A.D. 191 (1877).

These entries do leave one point about the underlying agreement ambiguous, which is whether, following the first printing, the author was free to make a new deal with a different Stationer (rather than merely refuse to deal again with the first Stationer). In 1628, William Jones again entered copy with an additional note added that may speak to that ambiguity.

The entry is pictured below with a transcript beneath it (emphasis added):



William Jones - Entered for his Copie under the hands of Mr Thomas Turnor and Mr Weaver Warden A booke Called A Just Apologie for the Gesture of kneeling in the Act of receiving the Lords Supper by Mr Thomas Paybody. \_\_\_\_\_ } vjd

Memorandum That I the aforesaid William Jones Doe promise not to reimprint the same booke againe without the Authors consent and that I the said William Jones shall surrender up the said Copie to him againe, when he shall require it.

By me William Jones<sup>52</sup>

With the added phrase in italics above, it now seems clear that the intent of the parties is for the author, Thomas Paybody, to be free to deal with another Stationer if he so chooses after the first print run. Further, the exact phrasing, “that *I the said William Jones shall surrender up the said Copie to him againe, when he shall require it*” (emphasis added), implies that Jones is not free to assign the copy to anyone other than Paybody. Here, Paybody may choose to exercise the option to regain complete control of the work after the first impression. The parties have advanced to a point in which they do appear to be thinking in terms of rights in the

<sup>52</sup> *Id.* at 202.

work that survive first publication and may be transferred back to the person, in this case the author, from whom they came: “surrendering up the said Copie to *him againe*” (emphasis added). The “said Copie” here surely refers to the right to print the manuscript, rather than the physical manuscript itself, because of the use of “said” in the phrase. The last use of the word “Copie” was in the first line of the entry (“Entered for his Copie . . . A booke”) in a context in which scholars have long acknowledged the word to refer to the right to print, going back to the sixteenth century.<sup>53</sup> Elsewhere in the entry, where the text itself is being referred to, the clerk uses the word “booke” (“a booke called,” “not to reimprint the same booke againe”). The entry is evidence of (1) careful distinction between the physical text and the rights in it, and (2) an underlying agreement that defined the rights and obligations of the parties, giving the author greater rights than the legal default would have required.

It should be acknowledged that these entries, and possibly the agreements that underlie them, are exceptional. In noting these entries, Kirschbaum observed that “it is rather bewildering to see the guild acceding to such a drastic limitation of a member’s traditional rights. There may have been special circumstances.”<sup>54</sup> Elsewhere, I have described what I have been able to learn of the circumstances of each deal.<sup>55</sup> With respect to the Stationers, one of the special circumstances relevant to these entries is that John Windet had a connection of some kind to each deal. Windet was the printer and co-copy holder in the 1586 deal with Timothy Bright.<sup>56</sup> In the 1607 deal with Thomas Ford, Johne Browne was the copy holder (and bookseller), but John Windet was hired to print the book.<sup>57</sup> John Windet passed away in 1610,<sup>58</sup> but the William Jones who made the deals noted above with authors John Dansye and Thomas Paybody had received his training as an apprentice with John Windet.<sup>59</sup> So, is it possible that the idea of memorializing an agreement with an author in the Register was hit upon by Windet and Bishop in 1586, suggested by Windet later in 1607, and then taught by Windet to Jones as a tool to use in particular circumstances? I think it is, but to say so does not diminish the importance of the entries as evidence of how authors and booksellers were beginning to think in terms of literary property.

I think it likely that such agreements existed at least more often than we have record of them, as it is unlikely that Windet and these parties somehow created the concepts they were using out of whole cloth. In that case the entry would hardly have been an effective tool to use, since it would not have been intelligible to the

53. See, e.g., John Feather, *From Rights in Copies to Copyright: The Recognition of Authors' Rights in the English Law and Practice in the Sixteenth and Seventeenth Centuries*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 197* (Martha Woodmansee & Pater Jaszi eds., 1994).

54. Kirschbaum, *supra* note 1, at 78.

55. Curtin, *supra* note 36, at 126-29, 131-34.

56. See *supra* text accompanying notes 40-48.

57. Curtin, *supra* note 36, at 131 nn.116-17.

58. Mark Bland, *John Windet*, in *THE BRITISH LITERARY BOOK TRADE, 1475-1700* 319 (James K. Bracken & Joel Silver eds., 1996).

59. Curtin, *supra* note 36, at 133.

clerk, other Stationers, or, in the event of dispute, the Court of Assistants. Windet's primary innovation was to memorialize these particular terms of the private agreement in the register—though, as we will see, he was far from alone in the idea that the register could be used in this way. This view is bolstered by additional evidence of agreements between authors and publishers, discussed below in Section III, that cannot be conceptualized as a mere physical sale of the manuscript.

Further, the special circumstances with respect to the Stationers involved cannot explain the genesis of these deals alone, because these same Stationers did not always record such exceptional terms in their entries, even when working together.<sup>60</sup> Rather, the circumstances more likely to explain why these deals were done and recorded in this exceptional manner are those related to the author and the particular work that was the subject of the negotiation. For instance, I have argued above that Bright's status as an experienced and politically connected author made him likely to have the wherewithal to negotiate with Windet and Bishop, while the existence of a previous edition made it likely that the parties would be sensitive to the issue of subsequent editions. In Thomas Ford's case, the work in question, *Musicke of Sundry Kinds*, has been characterized by book trade historian Henry Plomer as one of Browne's most important publications.<sup>61</sup> Browne's catalog was eclectic. He published everything from cookbooks to music,<sup>62</sup> which suggests that he sought out whatever he thought would sell well and he detected a winner in *Musicke of Sundry Kinds*. If so, Ford would have enjoyed better bargaining power with Browne. It was Ford's first book, but within three years of its publication he procured the lucrative position of musician to the Prince of Wales.<sup>63</sup> From Ford's perspective, assuming that he was selling the book at a time when he anticipated that his reputation was building, the ability to control when (or if) the book was reprinted might have seemed especially advantageous. In the case of Thomas Paybody, whose deal with William Jones included the explicit right to return of the "copie," Paybody might have been interested in regaining the ability to hold or sell the copyright because he anticipated entering the trade himself as a bookseller.<sup>64</sup>

60. For instance, Windet worked as a printer for John Browne at least three more times, with none of those works producing evidence of an unusual deal. Curtin, *supra* note 36, at 132 n.124.

61. H. R. Aldis et al., *Browne (John) Senior*, in *A DICTIONARY OF PRINTERS AND BOOKSELLERS IN ENGLAND, SCOTLAND, AND IRELAND, AND OF FOREIGN PRINTERS OF ENGLISH BOOKS 1557-1640* 51-52 (1922).

62. *Id.*

63. Frank Traficante, *Thomas Ford (d. 1648)*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2008), <https://perma.cc/8H3T-94ZT>.

64. A number of books appear with colophons noting that they were printed "for Thomas Paybody" in the English Short Title Catalogue between the years of 1642 and 1657. A "Thomas Paybody" also appears in Plomer's *Dictionary of Printers and Booksellers*, active 1642-1665. Aldis et al., *supra* note 61, at 146. Digital searches of the register do not reveal any entries in his name, but the colophons naming him along with other partners suggest that he preferred to work in collaboration with other printers and booksellers. I cannot yet be sure that this is the same Thomas Paybody who published *A just apologie*, but the possibility is intriguing and might indicate that Paybody was sensitive to the distinction between merely having a right to refuse a second impression and regaining complete control of the copy.

We cannot know the exact circumstances of these exceptional deals and therefore it is helpful to contextualize the entries with evidence that the register was used to record other kinds of private agreements with respect to the rights in copy. Certainly, records indicating coownership or the division of copy into shares among more than one Stationer are common in the register. Occasionally, we find recordings of transfers in copy. John Feather has described the existence of a number of entries that condition the right of ownership that would otherwise be recognized by the entry:

A number of entries in the 1580s are made with such comments as “vpon condition that no other man be interested in yt,” and “soe much . . . as Doth not belonge to anie other of this Companie.” These cases, which are a few among many, clearly illustrate that the Stationers’ primary concern was to regulate the trade to benefit its own members.<sup>65</sup>

The conditional entries also recognize that entry in the register created evidence of ownership, but did not itself confer rights.<sup>66</sup> Hence the possibility for underlying agreements, establishing ownership via purchase from the author and transferring ownership between Stationers.

There are also a number of entries indicating that the copy has been returned to the author. For instance, Kirschbaum notes that on August 10, 1632, Reynold’s *Mithmystes* was entered for John Waterson, but the entry was later crossed out and a margin note was added, reading: “crost out by his owne consent and resigned to the Author vt patet supra etc.”<sup>67</sup> Apparently after the death of William Jones,<sup>68</sup> his widow made a similar arrangement, as evidenced by an entry made by William Jones on April 18, 1633, for Theodore Mecalfe’s *The Art of Stenography*, which is accompanied by a marginal note: “This copy by consent of Mistris Jones is Surrendered vp to the Author to be by him dosposed [sic] of.”<sup>69</sup> Kirschbaum cautioned that we should not make too much of these entries:

One must not misinterpret those few entrances in the registers in which it is stated in the margin that the copy was given back to the author. This does not mean that the author controlled the publication but that the Stationer, not willing to publish the book for one reason or another, returned the manuscript to the author, who, if he chose, could try to find a new publisher . . .<sup>70</sup>

However, this way of reading the evidence unnecessarily minimizes the value of this aspect of commercial practice to the author. What we are seeing in these entries is that the Stationer has agreed to relinquish his rights because he is unwilling or unable to perform. Whether the genesis of this practice is found in an

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65. Feather, *supra* note 53, at 198-99.

66. *Id.* at 202.

67. Kirschbaum, *supra* note 1, at 52.

68. The date of Jones’s death is unknown, but McKerrow et al. place it at prior to 1653. R.B. MCKERROW ET AL., *A DICTIONARY OF PRINTERS AND BOOKSELLERS IN ENGLAND, SCOTLAND AND IRELAND, AND OF FOREIGN PRINTERS OF ENGLISH BOOKS 1557-1640* 161 (1910).

69. Kirschbaum, *supra* note 1, at 52-53.

70. *Id.*



explicit agreement prior to sale of a copy or it is merely customary, the effect is similar to a modern (implied) diligence obligation of an exclusive licensee on the part of the Stationer.<sup>71</sup> That the return of the copy to the author was recorded in the register would give notice to all Stationers that the author was the person with whom to bargain for the copy. The entries described above by Browne and Jones, recording agreements that the book is not to be reprinted without the consent of the author, perform a similar function, giving notice to all Stationers that the author is the person with whom to bargain for printing rights. The only difference is that, in the case of Browne and Jones, the books were actually printed before the power to control the right to print was returned to the author. Both kinds of entries are inconsistent with the conceptualization of the author's deal as a sale of the physical manuscript or of an author's rights as dependent on possession of the physical manuscript. Rather, the author's rights are dependent on contractual agreement with the Stationer. Given the bargaining power of the average author in the seventeenth century, the improvement is likely subtle, but it is tremendously important to our understanding of the idea of literary property in the period.

Further evidence of underlying agreements between authors and Stationers may be found in the records of the Court of Assistants in this period, though the evidence is admittedly sparse.<sup>72</sup> For instance, W.W. Greg identified two instances in the records prior to 1603 in which the Court of Assistants ordered Stationers to pay an author in a dispute involving a reprint.<sup>73</sup> Both occur in 1602. In 1596, Jackson and Dexter jointly entered *The English Schoolmaster*.<sup>74</sup> In 1602, Jackson

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71. One important difference between the implied diligence obligation for exclusive licenses under modern law and the arrangement we see recorded in the entries is that it is not clear under the Stationers' Company rules whether an author could unilaterally terminate the Stationer's rights due to a failure to publish. Thus far, I have been able to find very little evidence regarding the enforcement of author-publisher agreements during this period, prior to 1710. Another important difference is that implied diligence obligations under modern law are usually associated with agreements involving running royalties, so the obligation arises from the expectation of the licensor to receive revenue from the efforts of the licensee to exploit the work. See JAY DRATLER, JR. & STEPHEN M. MCJOHN, 2 LICENSING INTELLECTUAL PROPERTY 8-73 (2016). Here I imagine that the return of the rights to the author is motivated by the loss of the value of publication itself to the author, even in the absence of the expectation of further payment upon publication.

72. The examples discussed here, of author-publisher agreements apparently being enforced by the Court of Assistants in the seventeenth century, raise the question of whether we might be able to find further evidence of such transactions in the records of suits brought in other courts by authors or their heirs seeking enforcement of contracts. I am aware of only one case, brought in 1670 by the son of a theologian named Peter Heylyn against his publishers, Phillip Chetwynd and Anne Seyle (who was the widow of the stationer who had entered into an agreement with Heylyn). A bill and an answer have been preserved in the National Archives of the United Kingdom, record number C5/498/82, 3 November 1670. The documents are described and partially transcribed in Harry Farr, *Philip Chetwynd and the Allott Copyrights*, 15 THE LIBRARY 131, 146-147, 152 (1934). The suit was apparently brought in order to recover payments for subsequent editions due to Heylyn according to the agreement with his publishers. *Id.* This case would not have shown up in searches for early copyright infringement suits because the basis for this claim is not copyright infringement, but rather breach of contract. The record in the National Archives catalogue codes the subject as "money matters."

73. GREG, *supra* note 35, at lxx-lxxi. The description of the dispute is based on Greg's account and on the record itself, unless otherwise cited.

74. Jackson and Dexter printed the first edition in 1596, STC 5711.

transferred his half of the copy to Burby. Later that year, Burby and Dexter each printed an edition, apparently without accounting to each other. The court ruled that Dexter, who had printed the greater number of copies, had to “deliver unto Mr. Burbye so many of his said booke as will make Mr. Burbie’s said ympression equall with his.”<sup>75</sup> Dividing up the physical copies was one of the typical mechanisms used by the Court of Assistants to resolve disputes.<sup>76</sup> By the late seventeenth century, we know that this was also the method by which booksellers shared the cost and profit amongst multiple shareholders of a copy, by dividing the number of physical copies printed in the impression according to the fractional shares of ownership.<sup>77</sup> That is, each shareholder paid in what his physical copies would cost and received the finished product in return. So we should expect the Court of Assistants to order the Stationers to share costs and this is what happened: “And all charge aswell to the Auctor as otherwise to be equally borne between them parte and parte like.”<sup>78</sup> The extraordinary part of the ruling is that there were still costs to be paid to the author following the first edition. We can only assume that Coote had made an underlying agreement with Jackson and Dexter when the first edition was published in 1596 that he would be paid for some number of subsequent editions. The court explicitly calls out those costs to be shared as equally as all costs usually were between partners (“as well to the author as otherwise”). This was perhaps necessary because payments to authors for subsequent editions were relatively rare, but it might also have been necessary because of the special issue caused in this case by the transfer of the copy after the underlying agreement with the author. The court implies that when Burby bought the rights to the copy from Jackson, he also incurred the obligations created by Jackson’s agreement with the author. The court sums up the relationship between Dexter and Burby by clarifying: “And the said copie shalbe equally to them bothe parte and partelyke at all Impressions hereafter.”<sup>79</sup>

We once again cannot know the circumstances that led to Edmund Coote’s ability to exact such an agreement from the Stationers. The work in question turned out to be tremendously popular, going through at least sixty-four editions between 1596 and 1737.<sup>80</sup> A surprisingly low number of copies have survived, perhaps indicating that the book was used as a textbook in schools.<sup>81</sup> At the time the copy was entered into the register, Coote was the master of the Free School in Bury St. Edmunds, a prestigious position that is referred to on the title page of the

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75. GREG, *supra* note 35, at 88. Dexter had printed 1500 copies and Burby, 500 copies. Thus, Dexter was to turn over 500 copies to Burby in order to give them equal shares of the impression. *Id.*

76. FREDERICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND: 1476–1776*, 80-81 (1952).

77. Terry Belanger, *Booksellers’ Trade Sales, 1718-1768*, 30 *THE LIBRARY* 281, 285 (1975).

78. GREG, *supra* note 35, at 88.

79. *Id.*

80. Brent Nelson, *Printing History*, in *EDMUND COOTE: THE ENGLISH SCHOOLE-MAISTER (1596)* (Ian Lancashire ed., 1997), <https://perma.cc/Y99S-2SWQ>.

81. *Id.*

first edition.<sup>82</sup> It is interesting to note that, if there was an agreement made between the Stationers and Coote at the time of the entry, then by the time the agreement was being enforced by the Court of Assistants, Coote had lost his position as schoolmaster, having apparently been forced out only months after the first edition of *The English Schoolmaster* was published.<sup>83</sup> So the enforcement of such an agreement could not have been dependent on any special sense of Coote's prestige as master.

Later in 1602, the Court of Assistants similarly ordered that John Stow be remunerated for subsequent editions of his *Survey of London* and a "brief c[h]ronicle," which has been identified as the *Abridgement*.<sup>84</sup> The Court's ruling reads:

Yt is ordered that m<sup>r</sup> Stowe shall haue iii<sup>li</sup> & xl<sup>l</sup> copies for his paynes in the booke called the survey of London, And xx<sup>s</sup> & L copies for his paynes in the brief cronicle.<sup>85</sup>

As Greg notes, there was an important difference in Stow's case, which was that both books had been substantially revised, to the extent that the new edition of the *Summary* was entered in the Register as a new book.<sup>86</sup> The work in updating the edition is probably what the Court is referring to when it notes that Stow should receive the payment "for his paynes."<sup>87</sup> Therefore, this case seems less likely to indicate bargaining *ex ante* for payment in the event of subsequent impressions of the same book, which makes sense given the fact that the *Summary*'s first edition had appeared nearly forty years before.

Stow's case does, however, provide direct evidence of an agreement to pay an author. By 1602, the copy in the *Abridgement* was held by the Company itself.<sup>88</sup> Greg surmises that the same must be true of the *Survey*, "else why would the Court decide Stow's remuneration?"<sup>89</sup> In other words, here we have a short record of the holder of the copy determining how an author should be paid for his labor in updating the works. The partial payment in physical copies of the edition recalls the method by which Stationers paid each other for their shares. This dual structure of part cash and part physical copies is also not unlike the combination of an advance payment on a modern copyright license plus a stream of royalties that is a percentage of revenue from books sold. Here, note that as the amount of cash paid

82. Linda Hutjens, *Life of Edmund Coote*, in EDMUND COOTE: THE ENGLISH SCHOOLE-MAISTER (1596) (Ian Lancashire ed., 1997), <https://perma.cc/Y99S-2SWQ>.

83. *Id.* Scholars have surmised that Coote was forced out of the position because *The English Schoolmaster* is a textbook in English and the Free School was devoted to Greek and Latin. At least now, his legacy as a grammarian and lexicographer of the English language is appreciated. *Id.*

84. GREG, *supra* note 35, at lxx-lxxi. IAN GADD & MERAUD GRANT FERGUSON, 'For His Paynes': *John Stow and the Stationers*, in JOHN STOW (1525-1605) AND THE MAKING OF THE ENGLISH PAST 37, 38 (Ian Gadd & Alexandra Gillespie eds., 2004) (noting that the "brief cronicle" referred to in the record has been "identified . . . as the 1604 edition of the *Abridgement*").

85. GREG, *supra* note 35, at 90. It is interesting to observe that Bishop was serving as Master and Windet as an Assistant in the Court that day. *Id.*

86. *Id.*

87. *Id.* at 90.

88. GADD & FERGUSON, *supra* note 84, at 44.

89. *See id.* at lxxi, n.1.

for the work goes up, the number of physical copies included in the remuneration goes down. For modern authors, a large advance that must be paid back, or “earned out,” before royalties are paid to the author has the same effect of reducing the royalties or the contingent part of the payment. In fact, from a cash flow perspective, Stow’s deal is a somewhat better deal than the modern advance, since the seventeenth-century author need not “earn out” the upfront payment before getting profits from the sale of the copies with which he was paid. The revenue from the sale of the copies could even be calculated as a percentage of the revenue brought in by sale of the full print run, a concept similar to that of a royalty. It is just that, instead of the Stationer selling the books and returning a percentage of the revenue from the entire print run, the author must undertake the effort of making the sale himself and, if successful, will retain one hundred percent of the revenue for a percentage of the copies in the print run. Even if the author has no plans to sell the copies (though we will see there is evidence that some seventeenth-century authors did just that), the payment in copies forces the author to carry some of the risk as to how the work will be received. This assumption of risk is an important hallmark of entrepreneurship. To the extent that authors did sell the physical copies with which they were paid, they were acting as retailers of the work and assuming some level of proprietorship in it.

It has long been known that payment in copies was one of the earliest forms of payment for authors, but it has been considered the least desirable way to be compensated. For instance, the eminent book historian and bibliographer A.W. Pollard had this to say about the compensation of writers in the Elizabethan era:

The Elizabethan custom transferred to the publisher the entire property in a book for a single payment, which the possibility of future editions would and could only slightly affect. This was the publisher’s gain and the author’s loss, but for books of which only a single edition could be sold, there seems no reason to believe that the Elizabethan author obtained worse terms than he would at the present day. The worst payment which we hear of is the twenty-six copies of his book handed over to an obscure writer named Richard Robinson instead of cash; the best, the £40 in money, with maintenance for himself, two servants, and their horses during nine months, which Dr. Fulke received from George Bishop for his ‘Confutation of the Rhenish Testament.’<sup>90</sup>

Pollard’s two examples represent two ends of a spectrum. “Dr. Fulke” was a well-known theologian and master of Pembroke College, Cambridge.<sup>91</sup> Bishop, his publisher, provided the described support for Fulke and his two assistants during the period in which Fulke was writing the *Confutation*, when Fulke actually lived in Bishop’s house in London.<sup>92</sup> The form in which he was paid, cash up front and the *ex ante* support, represented a full assumption of the risk that the work would

90. A. W. Pollard, *Regulation of the Book Trade in the Sixteenth Century*, 7 THE LIBRARY 18, 42 (1916).

91. Richard Bauckham, ‘Fulke, William (1536/7–1589)’, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2008), <https://perma.cc/P8CX-HMMF>. Fulke died with substantial property, including 118 acres of land in Norfolk and two other pieces of real estate. *Id.*

92. *Id.*

not sell. It is worth noting that Bishop would of course take all of the upside if the book turned into a lasting classic, as Fulke is fully compensated at the outset, but Pollard's point is well taken that not every book will have the lasting appeal that makes multiple editions possible. On the other end of the spectrum, the Richard Robinson referred to here was likely the freelance scribe who signed his name, "Richard Robinson, Citizen of London."<sup>93</sup> Robinson ultimately published twenty printed books and his works enjoyed some modest success as source material for more prominent writers, including Shakespeare. Robinson was a good example of an early entrepreneurial author. In a petition to Queen Elizabeth, Robinson included a log of the compensation he received for each work and appears to have sold his own copies to friends for support.<sup>94</sup> He suffered damage to his reputation through slander later in life and began to struggle to get his works into print—we might imagine that he became a bad risk at that point and found it more difficult to persuade Stationers to take a chance on him. Thus, the payment strictly in copies with no cash upfront would have made sense under these circumstances. For Robinson, it was risky. If he was unable to sell the books, he would be unable to convert his work into economic support, but he may not have had much choice. At least the payment in copies gave him a continued interest in the commercial success of the work, essentially offering him a one hundred percent royalty rate in the first twenty-six copies he could sell himself, but nothing more.

We know that in some cases, authors were not even given all of the copies outright, but rather paid a discounted price for them. In 1673, Henry More wrote a letter to a friend regarding the deal for publication of a collection of theological works.<sup>95</sup> He was given twenty-five of the 525 copies in the first impression without cost.<sup>96</sup> Then, he was given the option of either (1) buying 100 copies at fifteen shillings each, "with the hope of selling them to his friends at the regular 'published price' of [twenty shillings] each" (for a profit of five shillings per copy, and a potential total of twenty-five pounds), or (2) he could avoid the need to commit to a certain number and buy copies at sixteen shillings apiece, which was likely the price paid by retail booksellers.<sup>97</sup> Assuming that he managed to sell 100 copies under the second option, he would profit only twenty pounds, but in the mean time

93. There were two Richard Robinsons active during the Elizabethan Era. The freelance scribe, however, left a record of the ways in which he was compensated in a manuscript that is still extant today (in the British Library, Royal MS 18.A.lxvi). This was likely the source of Pollard's knowledge. This Robinson signed his work as a citizen of London because he had become a member of the Leathersellers' Company (not the Stationers' Company), and turned to literary work only in his thirties. Unless otherwise noted, the details of Robinson's biography in this paragraph are based on this article. R. C. L. Sgroi, *Robinson, Richard (1544/5–1603)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2008), <https://perma.cc/5NJR-TUPL>.

94. W. W. Greg, *Richard Robinson and the Stationers' Register*, 50 THE MODERN LANGUAGE REVIEW 407 (1955); see also George McGill Vogt, *Richard Robinson's Eupolemia (1603)*, 21 STUDIES IN PHILOLOGY 629, 631–48 (1924).

95. R. B. McKerrow, *A Publishing Agreement of the Late Seventeenth Century*, 13 THE LIBRARY 184, 184–85 (1932). Patterson also discusses the arrangement. See PATTERSON, *supra* note 4, at 66–67. It is Patterson's sense that such deals were common. *Id.* at 67.

96. McKerrow, *supra* note 95, at 184.

97. *Id.* at 185.

would not be exposed to any loss because he could wait to invest in copies after he had secured someone to buy them. The first option entails more risk, but a higher prospect for profit. More chose the first option.

We do not know how well the book sold, but assuming he was able to sell all 125 copies under the first option, he would have made twenty-five pounds off the first twenty-five free copies, plus another twenty-five pounds off the 100 copies he had bought on discount, for a total of fifty pounds. The letter surmises that each copy cost the Stationer ten shillings to print, including paper costs. The cost to the Stationer of printing the 500 copies intended for him to sell would be 250 pounds (ten shillings cost per copy makes 5000 shillings, which converts to 250 pounds with twenty shillings per pound). Assuming that the Stationer sold out his share of 400 copies at the retail price of twenty shillings each and a profit of ten shillings each, he stood to take in 400 pounds and make 200 pounds' profit over the cost of printing those copies, plus five shillings' profit for each of the 100 copies sold to the author at 15 shillings each (500 shillings, which converts to another 25 pounds), less the costs of printing the remaining 25 copies given to the author (twelve pounds, 10 shillings), for a net profit of 212 pounds, 10 shillings (less the costs of any additional overhead involved in operating the retail shop). The author's fifty-pound compensation represents ten percent of the revenue the Stationer would have expected if he had sold all 500 copies at the retail price himself (500 pounds). Keeping in mind that this is a small print run, that percentage of "sticker price," while not princely, is also not far outside the bounds of the proportion of the sales at retail price a modern author might expect to make.<sup>98</sup> In the letter, More remarks that the terms are "very mean" but that times are bad. He remained, however, fairly confident that he would be able to sell the copies, saying, "But if I hav any book myself it will not prove very much I hoope."<sup>99</sup> As a consequence, he chose the option that required him to take on more risk of loss if the book did not sell well and also committed him to promote the work in the market vigorously enough to dispose of 125 copies.

These examples illustrate the extent to which an author's bargaining power and the anticipated commercial value of the work played into the way in which authors were compensated and thus into the structure of the deal authors made when they sold their copy. They also illustrate that even prior to the passage of the Statute of Anne, authors were acting as kind of proto-proprietors of their own work, even functioning at times as retail sellers. All of these commercial realities had an impact on the evolution of the idea of literary property. Thus far, we have seen evidence of authors in the marketplace not merely as sellers of physical manuscripts, but as parties to agreements that defined the scope of various rights. For instance, we have seen evidence that the parties agreed as to the scope of the

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98. Author Alan Jacobson reports that a typical New York publisher offers the following royalties on traditional print books: for hardback books, 10% of the retail price on the first 5,000 copies, 12.4% on the next 5,000 copies, then 15% for all further copies sold; for paperback books, 8% of retail price on the first 150,000 copies sold, then 10% thereafter. Alan Jacobson, *The Business of Publishing*, <https://perma.cc/E5QG-NDQ6> (last visited Nov. 10, 2016).

99. McKerrow, *supra* note 95, at 185.

author's right to revise the work (creating greater certainty via contract with respect to how long the Stationer could expect to be free of competition from a new edition). Other agreements returned to the author control over when to print the work after the first impression or in the event of a failure to publish, or arranged for additional payment for subsequent editions after the initial publication (dissolving the connection between the author's right to compensation and his possession of the physical manuscript). Finally, some agreements apportioned profit via a share in the physical copies in a print run (which is how Stationers who held a share of the "copy" were also paid).

This evidence bears out Peter Lindenbaum's observation that:

[M]any of the conditions we associate with mid- to late-eighteenth-century authorship were in fact already in place at least forty years before the Statute of Anne was passed, and that in their daily practice in the trade stationers were making all sorts of different arrangements, many of them quite formal and distinctively advantageous to their authors (and this despite the fact that it was the stationers who held virtually exclusive rights to reproduce the works in question).<sup>100</sup>

The more pressing question is what conclusion these observations should lead us to draw about the relationship between the Statute of Anne, the evolution of copyright, and the status of authors. Integrating the transactional evidence into a larger understanding of authorship's role in copyright history is challenging. Lindenbaum concludes that "[w]e might better view the Statute of Anne, then, not so much as the cause of any immediate change in the status and lives of authors, but as a mere symptom in the long-term rise in their status that came with the introduction of print."<sup>101</sup> Michael F. Suarez quotes the first part of Lindenbaum's observation (that late-eighteenth-century conditions of authorship were in place long before the Statute of Anne) but then puts Lindenbaum's observation alongside Ronan Deazley's analysis of other historical sources, in opposition to narratives that privilege the rise of the author:

In light of Lindenbaum's finding, we would do well to bear in mind that Ronan Deazley, approaching the question of copyright and authorship from the perspective of legal history, has rejected the all-too-common narratives interpreting the history of copyright in eighteenth-century Britain as the inexorable and intentional rise of the author's legal, intellectual, and financial sovereignty. In Deazley's investigation, "The traditional analysis of the development of copyright in eighteenth-century Britain is revealed as exhibiting the character of a long-standing myth, and the centrality of the modern proprietary author as the *raison d'être* of the copyright regime is displaced."<sup>102</sup>

Looking at the evidence of actual commercial dealings in the period prior to the passage of the Statute of Anne, however, seems to me to shift the picture closer to Lindenbaum's view, that the Statute was a sign of changes in authorial status that

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100. Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century, II: Brabazon Aylmer and the Mysteries of the Trade*, 3 *THE LIBRARY* 32, 50 (2002).

101. *Id.*

102. Suarez, *supra* note 3, at 62.

had already begun before the eighteenth century. The evidence seems unquestionably to support the idea that authors, to varying degrees, had places at the table in negotiating agreements that reflected on the nature of literary property, on what was being sold and how to divide it. While evidence from sixteenth-century transactional documents does not establish an “inexorable and intentional rise of the author’s . . . sovereignty,”<sup>103</sup> it does nonetheless put authors closer to the center of copyright’s evolution than perhaps analysis of other parts of the historical record would reveal. This is admittedly not because authors were the reason for the copyright’s existence, but because the transactional evidence suggests that authors were early partners in the use of literary property as a concept to order commercial dealings with publishers.

Given the evidence we have reviewed thus far, I think it is accurate to say that some concept of literary property was necessary to carry on the kinds of transactions the Stationers entered into, starting in the early years of the rise of the printing press.<sup>104</sup> This was the *raison d’être* of the concept of copyright developed by the Stationers.<sup>105</sup> In a market in which much of the stock in trade involved classic and scriptural texts whose authors were long dead, many transactions would not have involved an author. As the market grew an appetite for newly authored texts and translations, however, dealing with an author was necessary to bring previously unpublished work into the press. These were the transactions that would have posed problems requiring further evolution of copyright, because only the needs of a living author might have provoked consideration of a diligence obligation, consideration of the scope of an author’s right to revise the work, or an agreement for continued payment to an author for subsequent editions. In order to understand how authors and publishers made use of the concept of literary property, the paper now turns to close readings of their contracts.

### III. CONTRACTING COPYRIGHT: CLOSE READINGS OF AUTHOR-PUBLISHER CONTRACTS

While we have seen the way in which evidence of author-publisher agreements can be derived from the Stationers’ Register and the correspondence of authors, direct evidence in the form of surviving complete contracts is somewhat rare prior to 1700.<sup>106</sup> After 1700, greater numbers of contracts have survived, in large part due to the efforts of William Upcott, the Assistant-Librarian of the London Institution, who collected and saved three full volumes of publishing contracts

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103. *Id.*

104. Siebert cites examples of sixteenth-century deals between Stationers demonstrating that “[a] copyright could be sold, exchanged, assigned, subdivided, released by one partner to another or settled in trust.” SIEBERT, *supra* note 76, at 79.

105. Over against the Stationer’s concept of literary property was the printing privilege granted directly by the crown. I have argued elsewhere that the printing privilege’s reason for being, at least in theory, was to promote the progress of learning. Curtin, *supra* note 1, at 422-23.

106. *See, e.g.,* Lindenbaum, *supra* note 100, at 34.



dating from 1704 to 1822, primarily for their autograph value.<sup>107</sup> These volumes, known as the Upcott Collection, are held in the British Library (Additional Manuscripts 38728, 38729, and 38730).<sup>108</sup> Other contracts have survived as separate manuscripts, scattered or within the archives of authors or publishers.<sup>109</sup> This Section analyzes all of the contracts in the Upcott Collection that are dated prior to 1710 and a selection of the contracts dated prior to 1720. In addition, this Section deals with a number of prominent seventeenth- and eighteenth-century authors' contracts that offer meaningful reflection on literary property prior to the Statute of Anne.

#### A. JOHN MILTON'S PROPERTY IN *PARADISE LOST*?

The contract between John Milton and Samuel Simmons for the rights to print *Paradise Lost* is thought to be too sophisticated to be the first of its kind, but it has long been recognized as an early example of a full-text publishing agreement.<sup>110</sup> The contract begins by defining the basic structure of the agreement, a passage worth quoting in full:

These Presents made the 27<sup>th</sup> day of Aprill 1667 between John Milton, gen. of [the one part] and Samuel Symons printer of [the other part] Witness That the said John Milton in consider[con] of fieve pounds to him now paid by the said Sam Symons, & other the [sic] consideracons hereund[er] mencoed, Hath given, granted and assigned, and by these [presents] doth giue, grant & assigne vnto the said Sam Symons, his executors, and assignes, All that Booke, Copy, or Manuscript of a Poem intituled Paradise lost, or by whatsoever other title or name the same is or shalbe called or distinguished, now lately Licensed to be printed, Together w<sup>th</sup> the full benefitt, proffitt, & advantage thereof, or [which] shall or may arise thereby. . . .<sup>111</sup>

The passage is notable for the formality of the language, which favorably compares to contract language in eighteenth-century articles of agreement, for instance, for the purchase of a freehold.<sup>112</sup> There are careful efforts to identify both

107. William Upcott, *Finding Aid to Add MS 38728-38730*, BRITISH LIBRARY (2015), <https://perma.cc/ZBA5-RX7Q>; Bently & Ginsburg, *supra* note 9, at 1495. Documents that have survived in the Upcott Collection will be cited with reference to the Upcott Collection by manuscript and folio number.

108. Upcott, *supra* note 107; Add MS 38728-38730.

109. See, e.g., Lindenbaum, *supra* note 100, at 41 n.22 (explaining the provenance of the two contracts published in that article). A cache of seven of Locke's publication agreements have survived in the Bodleian Library's collection of Locke's papers. See John C. Attig, *MS. Locke b.1*, JOHN LOCKE MANUSCRIPTS (2010), <https://perma.cc/XVB3-NH5B>. For further information on surviving contracts, see Bently & Ginsburg, *supra* note 9, at 1495 & nn.87-88.

110. Peter Lindenbaum, *Milton's Contract*, in *THE CONSTRUCTION OF AUTHORSHIP* 175, 176 (Martha Woodmansee & Peter Jaszi eds., 1994). The full contract has been transcribed in print in *4 THE LIFE RECORDS OF JOHN MILTON* 429-31 (J. Milton French ed., 1956).

111. *4 THE LIFE RECORDS OF JOHN MILTON* 429 (J. Milton French ed., 1956).

112. Compare the grant section of such an agreement, as preserved in a book of model agreements published in 1778:

NOW THESE PRESENTS WITNESS, and the said A. B. for the consideration after-mentioned, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to

the work to be sold and the extent of the rights in the work that are being transferred. The work is referred to as the “Poem intituled Paradise lost, or by whatsoever other title or name the same is or shalbe called or distinguished.” It is relevant that the work was “now lately Licensed to be printed” both because it is a detail helping to define which work is being referred to and because failure to get a license to print following an assignment of rights could leave the Stationer flat, having paid for worthless rights to print.

The exact formulation used in the grant—“give, grant and assign unto”—is one used in an eighteenth-century grant of the next presentation to a living person, including the formulation of the past and present assignment language (“hath given, granted sold and assigned, and by these presents doth give, grant and assign unto”).<sup>113</sup> The similarity is interesting because a power of appointment is a valuable form of intangible property that had long been familiar under English law, going back to at least the sixteenth century. The grant of the right to print a work is similar to a power of appointment in that the author could be conceived as having the power to choose the printer of the work and Milton is here transferring that power via the copy assignment to the Stationer (who may, of course, appoint himself). The grant is explicitly transferable, by will or by *inter vivos* agreement. The use of present assignment language is still an issue in IP licensing jurisprudence today, which prefers present assignment language (e.g., “hereby assigns”) to a covenant (e.g., “shall assign”) when determining whether an assignee has standing to sue.<sup>114</sup>

The rights being transferred are referred to as “All that Booke, Copy, or Manuscript of a Poem intituled Paradise lost . . . together with the full benefit, profit, and advantage thereof, or which shall or may arise thereby.” This language initially struggles a bit with distinguishing between the physical manuscript and the rights in it, as there is some slippage caused by use of book, copy or manuscript as if they were all equivalents, indicating that “copy” here means the text, rather than the right to print it. The subsequent clause (“together with the full benefit, profit, and advantage thereof”) clarifies that the sale is for more than merely the physical book, but rather the transfer of the physical book and all the rights to exploit it (rather like a modern IP license that includes an explicit technology transfer obligation alongside the license to commercially exploit the invention).

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and with the said C. D. his heirs and assigns, in manner following, that is to say, that he the said A. B. and his heirs, and all and every other person and persons whatsoever, lawfully claiming, or to claim, any estate or interest in the said premises, or any part thereof, shall, and will, on or before the \_\_\_ day of \_\_\_ next ensuing, at the costs and charges of the said C. D. his heirs and assigns . . . , well and sufficiently grant, convey and assure unto the said C. D. his heirs and assigns, ALL, &c. (*the premises*).

THE COMPLEAT MODERN CONVEYANCER, BEING A SELECTION OF DRAUGHTS; DRAWN BY THE MOFT EMINENT SCRIVENORS SINCE THE YEAR 1740, 11 (W. Strahan & M. Woodfall, 1778).

113. *Id.* at 468. The exact language in the grant of the next presentation to a living is “for ever by these presents, they the said A.A.B.A. and C.A. and every of them, have given, granted and assigned, and by these presents do, and every of them doth give, grant and assign, unto the said D.D. and his assigns the next presentation and free disposition of and to the rectory of the parish church aforesaid, for the next avoidance of the same only.”

114. DRATLER & MCJOHN, *supra* note 71, at 8-58.9.

The grant of rights is bolstered by two further covenants. The first looks somewhat like a covenant of quiet enjoyment, that there will be no assertions of superior title arising from the actions of Milton or his heirs:

And the said John Milton for him, his executors and administrators, doth covenant with the said Samuel Symons, his executors and assigns that he and they shall at all times hereafter have, hold and enjoy the same and all impressions thereof accordingly, without the let or hindrance of him the said John Milton, his executors or administrators, or any person or persons by his or their consent or privity . . .<sup>115</sup>

Here the transferability of rights in the manuscript is again emphasized, as Simmons is careful to bind not only Milton, but his executors and administrators (in case any residuary rights in the manuscript transfer by will or intestacy), on the behalf of Simmons, his executors and assigns. The second covenant is an assurance of exclusivity in *Paradise Lost* combined with a non-compete clause covering similar works:

And that he the said John Milton, his executors or administrators or any other by his or their means or consent, shall not print or cause to be printed, or sell, dispose or publish the said book or manuscript, *or any other book or manuscript of the same tenor or subject*, without the consent of the said Samuel Symons, his executors or assigns . . . (emphasis added).<sup>116</sup>

This clause is probably meant to deal with the familiar problem of revised editions, but unlike the provision apparently negotiated by Timothy Bright, this provision perpetually binds Milton from ever returning to the manuscript or one covering the same subject.<sup>117</sup> This provision would seem to indicate low bargaining power on Milton's part and a relatively higher anxiety on Simmons's part regarding demand for copies of the poem, so Simmons has pressed to maximize his protection against competition from revisions.

In return, Milton received five pounds upfront, with five more pounds to be paid "at the end of the first Impression," defined as "when thirteen hundred books of the said whole copy or manuscript imprinted shall be sold and retailed off to particular reading customers."<sup>118</sup> The contract further required Simmons, his executors, or assigns to pay Milton (or his assigns) at the end of the second and the third impressions as well, with each payment coming due when thirteen hundred copies have been sold. No impression may include more than fifteen hundred copies. There is much disagreement about whether this was a fair price for the epic, which became a pillar of the Western canon.<sup>119</sup> On the one hand, as Lindenbaum notes, there were reasons why Milton's bargaining power might have diminished by the

115. 4 THE LIFE RECORDS OF JOHN MILTON 429 (J. Milton French ed., 1956).

116. 4 THE LIFE RECORDS OF JOHN MILTON 429 (J. Milton French ed., 1956).

117. Depending on how one interprets the "tenor or subject" of *Paradise Lost*, this provision might have stretched to include Milton's subsequent epic, *Paradise Regained*, that explores similar themes and theological questions, but that poem was published in 1671 by John Macock.

118. 4 THE LIFE RECORDS OF JOHN MILTON 429-31 (J. Milton French ed., 1956).

119. Lindenbaum, *supra* note 110, at 177-79.

time the agreement was made.<sup>120</sup> Since a king had been restored to the throne, Milton, as a committed Republican, had suffered a variety of consequences, from a brief imprisonment to having some of his works condemned to be burned.<sup>121</sup> On the other hand, the cap on the number of copies per impression was very fair-minded (so that Simmons could not perpetually milk the first or second impression without triggering the subsequent payment obligations) and the contract also includes a duty to either account before a Master in Chancery or pay as if the payment were due.<sup>122</sup>

The resulting remuneration does seem proportionately low, compared to the potential amount of revenue Simmons could bring in. We know that the first impression of 1300 copies took eighteen months to sell out, having been offered at three shillings per copy.<sup>123</sup> For that impression, Milton was paid ten pounds,<sup>124</sup> or a little more than five percent of the revenue from the marketed price (where 1300 x 3 shillings yields 3900 shillings or 195 pounds). His proportionate share of the two potentially subsequent impressions was reduced by half (where he was entitled only for an additional five pounds for each subsequent impression). In all, he was due a total of twenty pounds if 3900 copies sold,<sup>125</sup> which works out to only about 3.4 percent of the revenue (less than that if Simmons took advantage of his option to run each impression up to 1500 copies). Given the “mean terms” taken by Moore above, this seems low, but then it did give Milton some share of the “upside” if the poem did well, without asking him to risk any loss or take on any of the marketing of copies himself. The key missing information to understand the relative fairness of the allocation of the revenue is Simmons’s own profit margin.<sup>126</sup>

Ultimately, the exact amount of remuneration may not be the most important point we can take away from Milton’s contract for the publication of *Paradise Lost*. Lindenbaum urges that the number is less important than the professionalism manifested by the agreement:

[W]hat I think we must consider as most significant about the payment to Milton is not so much the sum agreed upon. . . but that it was agreed upon by means of a formal document between author and publisher. For in that alone we see an author who is fully acknowledging the condition of authorship, viewing himself as the possessor of property that gives him definite rights (for instance, the right to demand an accounting

120. *See id.* at 188.

121. *Id.*

122. *Id.* at 179.

123. *See* John Milton’s *Paradise Lost*, THE MORGAN LIBRARY & MUSEUM (last visited Nov. 15, 2016), <https://perma.cc/MWD9-E9FL>.

124. Lindenbaum, *supra* note 110, at 177. *See also* Helen Darbishire, *The Printing of the First Edition of Paradise Lost*, 17 R. OF ENG. STUD. 415 (1941) (noting that the deal between Simmons involved five pounds down and a “second five pounds due . . . when the first impression . . . was sold” and that a receipt survives dated April 26, 1669).

125. Lindenbaum, *supra* note 110, at 177 (noting that the total potential compensation for Milton was twenty pounds for three impressions of 1300 copies each).

126. For a discussion of the costs a publisher was likely to incur during the Early Modern period and the profit margins a publisher might expect, *see* BLAYNEY, *supra* note 8, at 405–13. One issue is that not all of the copies Simmons sold were necessarily sold at the retail price.

of sales), even as he lives and writes at a time when copyright is granted solely to stationers through entry in the Stationers' Company Register.<sup>127</sup>

To that astute observation, I would add that the contract shows a level of sophistication with respect to the interplay of provisions, of compensation structure, risk-sharing, and conceptualization of what the author was selling.

Commercially, the most crucial aspect of the transaction was its emphasis on the transferability of the rights on each side. After the first impression sold out, Milton was duly paid the five pounds to which he was entitled in April of 1669.<sup>128</sup> A second edition was prepared in July 1674, but Milton died in November of that year, leaving everything to his second wife, Elizabeth,<sup>129</sup> including the right to receive up to ten pounds more upon the publication of the second edition of *Paradise Lost*. She seems not to have received this money. Instead, according to a receipt that has also survived, Simmons bought her out of the rights for eight pounds up front.<sup>130</sup> Shortly thereafter, Elizabeth signed the following release in favor of Simmons:

Know all men by these presents that I Elizabeth Milton of London Widow, late wife of John Milton of London Gent: deceased—have remised released and for ever quit claimed And by these presents doe remise release & for ever quit clayme unto Samuel Symonds of London, Printer—his heirs & Executors and Administrators *All and all manner of Accion and Accions Cause and Causes of Accion Suites Bills Bonds writings obligatory Debts dues duties Accompts Summe and Sumes of money Judgments Executions Extents Quarrells either in Law or Equity Controversies and demands—And all & every other matter cause and thing whatsoever which against the said Samuel Symonds—I ever had and which I my heires Executors or Administrators shall or may have clayme & challenge or demand for or by reason or means of any matters cause or thing whatsoever from the beginning of the World unto the day of these presents.* In witness whereof I have hereunto sett my hand and seale the twenty ninth day of April in the thirty third Year of the Reigne of our Sovereign Lord Charles by the grace of God of England Scotland France and Ireland King defender of the Faith & Anno Domini, 1681 (emphasis added).<sup>131</sup>

It was a complete release of any form of claim Elizabeth might have had against Simmons, under the contract for publication or otherwise.<sup>132</sup> By April of 1681,

127. Lindenbaum, *supra* note 110, at 180.

128. The receipt has survived and is reprinted in JOHN MILTON, *THE POETICAL WORKS OF JOHN MILTON* cxiii (Hilliard, Gray, and Co., Boston 1839): "Rec'd then of Samuel Simmons five pounds, being the Second five pounds to be paid—mentioned in the Covenant. I say rec'd by me, John Milton."

129. Gordon Campbell, *Milton, John (1608–1674)*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2009), <https://perma.cc/J4C6-333J/>.

130. JOHN MILTON, *THE POETICAL WORKS OF JOHN MILTON* cxiii (Hilliard, Gray, and Co., 1839).

131. *Id.* at cxiii-cxiv. The release is also described in Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century: New Evidence on their Relations*, 17 *THE LIBRARY* 250, 257–58 (1995).

132. Curiously, this is not the only release a Stationer required Elizabeth Milton to sign. She was also approached by Joseph Watts, a Stationer who had acquired rights to a number of Milton's prose works from another Stationer, who had himself bought them from Simmons's estate. Watts paid Elizabeth ten guineas to sign a similar release waiving rights to those works. Lindenbaum, *supra* note 131, at 252–56.

however, Simmons had already sold the rights in *Paradise Lost* to Brabazon Aylmer for twenty-five pounds.<sup>133</sup>

What was Simmons so concerned about that he required Milton's widow to sign such a comprehensive release? Perhaps Simmons was seeking some additional protection against a suit from Milton's widow, now that he had transferred the rights to Milton's work and therefore could no longer make Elizabeth whole for any potential claim other than by paying cash. But what claim could she possibly have had? One possibility is that the crown could have granted Elizabeth, as Milton's heir, a royal privilege for sole printing of the poem. Kirschbaum cites one example of such a privilege being granted to an author after a Stationer had entered copy,<sup>134</sup> and a handful of others in which an author's child was granted a privilege after the author's death, once in spite of a prior claim by Stationers who were assigns of the author's original publisher.<sup>135</sup> In Milton's case, a privilege granted after his death seems unlikely, however, because of his relative lack of prominence at the time. It is also not clear that such a new claim would be covered by the release, which was limited to claims arising "for or by reason or means of any matters cause or thing whatsoever from the beginning of the World unto the day of these presents,"<sup>136</sup> that is, arising from a cause in existence on or prior to the day of signing. In any case, a claim arising from a newly granted printing privilege would more likely interfere with Aylmer's rights going forward, than with Simmons's past profits.<sup>137</sup>

Therefore, it seems more likely that Simmons feared some form of residuary right in the work that might have passed to Milton's heir, even after the initial publication, perhaps exacerbated by the fact that he bought out the contract rights

133. Lindenbaum, *supra* note 100, at 33 n.4.

134. Kirschbaum, *supra* note 1, at 49. This was a privilege given in 1626 to the translator George Sandys for the right to print his translation of Ovid's *Metamorphosis* for twenty-one years. Two Stationers, Lownes and Barrett, had already entered the work in 1621. *Id.* Sandys successfully defended the privilege in the Court of Assistants, which ruled that the assigns of Lownes and Barrett could not print the work. *Id.* at 49–50.

135. *Id.* at 50–51. Patents were granted to Arthur Golding's son in 1606, to Dr. Willet's son in 1630, and to Dr. Fulkes's daughter, Mistress Ogden, for the *Confutation of the Rhemish Testament* in 1618. *Id.* In the last case, two Stationers, who were assigns of the original publisher, objected. A statement by one of the aggrieved Stationers has survived and is transcribed in 3 EDWARD ARBER, A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554–1640 A. D. 39 (1950). Note that this Dr. Fulke is the author discussed *supra* text accompanying notes 86–88, who lived with his publisher George Bishop while composing the work in question. By the time his daughter was granted the privilege both Fulke and Bishop had passed away. The final resolution of the matter is unclear from Arber's transcript of the stationer's statement, though it appears that the stationers who were assigns of Bishop struggled to produce documentation of the chain of title.

136. JOHN MILTON, THE POETICAL WORKS OF JOHN MILTON cxiii (Hilliard, Gray, and Co., 1839).

137. Though, in the case of the privilege granted to Dr. Fulke's daughter, the daughter did attempt to seize books printed by the Stationers prior to the granting of the privilege: "And because ye words of the patent are doubtfull whether they looke backwards or forwards or only for the tyme to com[e] she by colour of ye sayd letters patents and by great meanes, intends to tak[e] away not only the copie but also those books which we have printed, before ye said grant from his Maiestie at ye price of paper and printing." ARBER, *supra* note 126, at 40.

Elizabeth inherited at a discount.<sup>138</sup> To this I would also add that there is one ambiguity in the contract, which is that it does not expressly contemplate a printing beyond the third impression. While the grant of “all that book, copy, or manuscript . . . together with the full benefit, profit and advantage thereof, or which shall or may arise thereby” makes clear who would be entitled to the commercial benefits of printing, does it fully assign all right and title in the copy (the formulation we later see contracts using) and thus cede the right to withhold consent to an additional impression? The question would have been problematic for Simmons only if he believed that authors might have a right in their work that survived first publication, or if he at least believed that the ambiguity in the contract somehow gave Milton such a right. If Simmons did not apprehend some such right, he was wasting time and resources on the drafting of this document. Evidently for Simmons, the language in the initial publication agreement that bound heirs and assigns of both parties ended up being the most important provisions commercially, enabling him to sell his rights, and commanding his attention to Milton’s widow thereafter. Once again, the conceptualization of rights in the work is far removed from physical possession of the manuscript and proves to be transferable, divisible, and devisable, all very property-like qualities.

The rights to *Paradise Lost*, purportedly transferred from the author Milton to Simmons in the contract analyzed here, had a curious afterlife. Simmons transferred the rights to Brabazon Aylmer in 1680.<sup>139</sup> Aylmer had apparently known Milton during his life and had served as one of the pallbearers at Milton’s funeral.<sup>140</sup> However, Aylmer, having never produced an edition, transferred the rights for an unknown sum to Jacob Tonson, senior, via two transactions, one half in 1683 and the other half in 1691, apparently in order to raise funds for an expensive publication of theological works by an author named Isaac Barrow.<sup>141</sup> In Tonson, the rights to *Paradise Lost* at last found a capable promoter: the poem became a bestseller and eventually entered the canon of great English literature.<sup>142</sup> Tonson parlayed those rights into the highest money-making asset in a brilliant publishing career.<sup>143</sup> He retired to a country estate and eventually died as a rich man, owning multiple houses and engaging in significant investments in stocks.<sup>144</sup> The son of his nephew, Jacob Tonson III, would later use the contract between Milton and Simmons to establish chain of title to *Paradise Lost* in a lawsuit, still

138. Lindenbaum reached a similar conclusion with respect to both the releases signed for Watts and for Simmons. See Lindenbaum, *supra* note 131, at 255–56, 257–58. Lindenbaum suggests that the eight pounds acknowledged in the receipt from Elizabeth Milton “probably represented the five owed for the second edition plus three corresponding to that portion of the third edition that had been sold by December 1680[.]” and Elizabeth may have been paid the remaining two when she signed the 1681 release, though the release neglects to reference any payment. *Id.* at 257 n.11.

139. Peter Lindenbaum, *Dispatches from the Archives*, 36 MILTON Q. 46 (2002).

140. *Id.*

141. *Id.*

142. *Id.* For more on the relationship between Tonson and *Paradise Lost* and its commercial success, see G. F. PAPALI, JACOB TONSON: HIS LIFE AND WORK, PUBLISHER 110–115 (1968).

143. Lindenbaum, *supra* note 139, at 47.

144. *Id.*; on Tonson’s investments in retirement, see KATHLEEN LYNCH, JACOB TONSON, KIT-CAT PUBLISHER 154, 157, 159–160 (1971).

seeking to enjoin the competition from printing the poem in 1739.<sup>145</sup> Aylmer lived a long life, surviving to be the oldest living Stationer of his generation, but he became destitute, dependent on a pension from the Poor Box, and died in the Charterhouse, a charitable institution for the elderly.<sup>146</sup> Though Lindenbaum has cautioned against making too much of the contrast,<sup>147</sup> it is difficult not to see the transfer of the rights to *Paradise Lost* as the turning point in the careers of these two Stationers. There is more about each of them below.

#### B. BRABAZON AYLMER AND SAMUEL CLARK: AUTHORIZING PUBLICATION, ALLOCATING RISK

In June of 1688, Brabazon Aylmer, whose publishing career met with “good but not outstanding success,” signed a contract to publish Samuel Clark’s annotated bible.<sup>148</sup> Clark was a nonconformist preacher whose steadfast commitment to his beliefs caused him, his father, and his brother to lose livings from the Church of England worth more than 600 pounds per year upon the passage of the Act of Uniformity in 1662.<sup>149</sup> The stipend he was able to receive for preaching later in life was comparatively meager at twenty pounds per year,<sup>150</sup> so compensation for his writing must have been important to Clark. Ultimately, Clark’s “reputation was made” by publications of biblical exegesis in the 1680s and 1690s.<sup>151</sup> For both parties, it appears that the allocation of risk associated with investing in the publication of Clark’s potentially controversial work was a key task for the negotiation.

Perhaps as a result, the contract differs from the contract between Milton and Simmons in a few important ways. First, rather than purporting to transfer all rights in the work, Clark’s contract merely authorizes Aylmer to print one impression:

Imprimis the saide Samuell Clark for the considerations herein after mentioned doth Covenant grant and agree to and with the said Brabazon Aylmer by these presents That he the said Brabazon Aylmer his Executors Administrators or Assignes at his and their owne proper cost and charges and to and for his and their own proper vse and behoofe shall and may Print or cause to be Printed one Impression (and noe more) of what number or quantity he the said Brabazon Aylmer his Executors

145. Lindenbaum, *supra* note 131, at 250. Apparently Tonson III succeeded in receiving a temporary restraining order. PAPALI, *supra* note 142, at 115–16.

146. Lindenbaum, *supra* note 129, at 46.

147. *Id.* at 47.

148. Lindenbaum, *supra* note 100, at 33. The contract survived in the papers bequeathed to a parish church in Bedfordshire in the nineteenth century and is now in the Bedfordshire County Record Office P11/28/2, fol. 323. *Id.* at 41 n.22. The contract is reprinted in full in Lindenbaum’s article. *Id.* at 52–54.

149. David Wilson, *Clarke, Samuel (1626–1701)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Oxford Univ. Press 2004), <https://www.oxforddnb.com/view/article/5529>.

150. *Id.*

151. *Id.*



Administrators or Assignes shall think fit of the said Samuell Clarks notes vpon the Old and New Testaments. . . .<sup>152</sup>

Unlike the deal described in Moore's correspondence above, here it is clear that Aylmer will bear the full cost of printing all copies: "at his and their owne proper cost and charges." In return, Aylmer may choose how many copies will be printed in the impression, thus allowing him to gauge how much the market will bear at the time of publication. The language of the grant is strikingly different from the language in Milton's contract. Where Milton's contract read that Milton "hath given, granted sold and assigned and by these presents doth give, grant and assign . . . All that Booke, Copy, or Manuscript . . . together with the full benefit, profit and advantage thereof, or which shall arise thereby," Clark's contract merely reads that "Clark . . . doth Covenant grant and agree . . . by these presents That . . . Brabazon Aylmer his Executors Administrator or Assignes . . . *for his and their own proper vse and behoofe* shall and may Print. . . one Impression" (emphasis added).

The right to print one impression for Aylmer's "proper use and behoof" echoes language used in eighteenth-century contracts for the transfer of life estates or terms of years, temporary estates transferring less than the whole estate in time, rather than complete transfers in fee simple.<sup>153</sup> This is another instance in which it appears that analogy to a form of essentially intangible property already familiar in the common law, an estate that gives rights to make use of real property for a defined period of time, helps the parties to find appropriate contract language. The difference in language is not accidental. We know that Aylmer could use language purporting to make a complete transfer of rights in a work because another of his contracts dated 1681 has survived. In this contract, made with the administrator of the deceased Dr. Isaac Barrow's estate, the administrator "granted bargain'd, sold, assigned, and set over, and by these presents do grant, bargain, sell, assign, and set over . . . [t]he several Bookes, and Coppys of Bookes . . . hereunder writ."<sup>154</sup>

The language in the grant in Clark's contract conceptualized the agreement as a limited grant to exploit the work for Aylmer's profit. As a result, Clark retained some control, for instance, over when, if ever, a second impression would be printed. Clark did not retain the ability to deal with another Stationer for subsequent editions, however. The limited grant is followed by a covenant to maintain Aylmer's exclusivity: "and that noe other person or persons whatsoever shall or may Print the same or any parte thereof in any manner of Wise by with or through the meanes privity Consent Assent leave lycence or procurement of the said Samuell Clark his Executors Adminstrators or Assignes directly or indirectly."<sup>155</sup> The exclusivity is obviously protective of Aylmer's investment in the initial impression, which could be significant in terms of the payment of compositors to set the text and procurement of any necessary plates for illustration.

152. Lindenbaum, *supra* note 100, at 52.

153. See THE COMPLEAT MODERN CONVEYANCER, *supra* note 108, at 368 (using the phrase "use and behoof" in connection with grants of terms of years and life estates).

154. The contract is reprinted in Lindenbaum, *supra* note 100, at 51-52.

155. Lindenbaum, *supra* note 100, at 53.

In theory, the covenant to maintain exclusivity also locks Clark into working with Aylmer again if the work turns out to be worth reprinting. In spite of the lock-in, the ability to refuse to allow a second impression remained valuable to Clark as long as he might condition his consent, for instance, on improvement of some textual flaw he found unacceptable in the first impression. Therefore, it makes sense that the parties also negotiated the price of subsequent editions in the event that Clark consented to them, at 100 pounds “at for and upon each and every future Impression of the said Books,” payable to Clark (or his executors, administrators or assigns) within two or three months of each impression’s completion, presumably in perpetuity, as no limit is addressed.<sup>156</sup>

Consideration for the right to imprint the initial impression was structured in both copies and cash. Clark was to receive a total of 139 pounds and fifteen cents divided into two equal payments, along with thirty bound copies of the Old Testament alone (half gilt and half plain) and twenty plain-bound copies of the Old and New Testament together. Interestingly, the contract requires that Clark’s copies be “of the first of them to be soe printed,”<sup>157</sup> perhaps to give him time to double check the final results, or perhaps to give him the first-mover’s advantage in the market, allowing him to begin selling his own copies before the full impression has been printed. Lindenbaum calculates the retail value of the copies at about fifty-six pounds, for a total value on the initial impression of 196 pounds.<sup>158</sup> Because there is no cap or floor on the number of copies Aylmer may print in the first impression, it is not possible to know how the parties anticipated this number would relate to Aylmer’s projected revenue or profit. Given that the sum was nearly ten times the annual stipend Clark would earn for preaching, though, it seems of significant value to Clark.

Finally, the contract contains a few interesting provisions allowing the parties to manage the risk that the licensor would reject the work. No part of the cash sum will come due or payable “unless the said Books be suffered and permitted by Publique Authority to be printed and finished without lawfull let denial or interrupcion.”<sup>159</sup> In the event that the Old Testament was approved, but the New Testament was not, then Clark would be paid thirty-two pounds and five cents and the thirty copies of the Old Testament as described above. Finally, the contract finishes with a liquidated damages clause:

For the true performance of all and every the covenants clauses Articles and Agreements herein conteyned by the said parties respectively to be performed . . . each and either of these parties bindeth himselfe . . . unto the other . . . in the summe of Three hundred pounds sterling (Nomine penae) firmly by these presents . . .<sup>160</sup>

Lindenbaum observes that the phrase “nomine penae” is “a legal term meaning the penalty incurred for not paying rent, etc., upon the day appointed by a lease or

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156. *Id.*

157. *Id.*

158. *Id.* at 45.

159. *Id.*

160. *Id.* at 54.

agreement,” here apparently the phrase indicates that 300 pounds would be the penalty payable to the other party, should either party breach the agreement.<sup>161</sup>

In sum, Clark’s contract with Aylmer once more shows a sophistication in dealing with the risk entailed by publication. The deal has divided control of the work in a way that facilitates a kind of partnership between author and publisher for a long time to come. Although we do not see direct obligations written in for the author to provide edits or the publisher to provide advance copy, for instance, we do see a deal structured to incentivize both parties to produce an edition that pleases author, publisher, censor, and public. When, as here, we see the same publisher making different decisions on the kind of contract language he employs, we can surmise that the special circumstances surrounding the author and his work fueled the difference.

### C. DEALING WITH EXCEPTIONAL AUTHORS: DRYDEN, POPE, AND LOCKE

Thus far, we have dealt with the surviving evidence of author-publisher contracts in roughly chronological order. This Section analyzes contracts from the 1690s and the early eighteenth century that are yet more complex, particularly with respect to how the author is compensated. These contracts also involve authors who became major pillars of the English canon: Dryden, Pope, and Locke. The goal of this section of the Article is to put this evidence into the context of the course of business we have already established from the analysis of earlier evidence in the commercial dealings of less prominent authors. Pope in particular has long been considered exceptional in his professional development.<sup>162</sup> One scholar has characterized Pope’s commercial dealings as “highly atypical in almost every respect.”<sup>163</sup>

However, when considered alongside the contracts analyzed above, as we will see, Pope’s contract with Bernard Lintot in 1713 for a translation of Homer’s *Iliad* does not seem atypical at all. Rather, Pope’s contract can be characterized as a foreseeable evolution of the business dealings we have already seen, and its developments were largely anticipated by the contract between Dryden and Tonson for the translation of Virgil’s works in 1694. The similarities between the contracts for the translations by Dryden and Pope are notable because Dryden’s contract was executed in 1694, just before the Printing Act of 1662 expired and left the Stationers without a statutory backstop, while Pope’s contract was executed in 1713, after the passage of the Statute of Anne.<sup>164</sup> The similarities in the business dealings confirm the sense of book historians that the Statute of Anne did not change the status quo. Similarities in the language and in the role of the author in sharing the proprietorship of the work, however, confirm that the status quo

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161. *Id.* at 54 n.40.

162. *See, e.g.*, FEATHER, *supra* note 14, at 5.

163. Suarez, *supra* note 3, at 62.

164. On the expiration of the Printing Act of 1662 and the passage of the Statute of Anne, *see, e.g.*, FEATHER, *supra* note 14, at 50, 63.

included a concept of authors' rights in literary property well before the Statute of Anne.

Similarly, Locke's publication contracts garner special interest as executed by one of the great English philosophers on the subject of property rights, but the conclusions to be drawn from them are familiar. As we will see, the contracts give the impression of Locke as a partner in the promotion of his work, with a sophisticated understanding of the technical details of the print publishing business. The deals Locke struck with his publisher were diverse in a variety of ways, including how Locke was compensated and whether all rights to the copy were assigned outright. In some of these contracts, we have evidence that Locke took exceptionally strong positions with respect to retaining rights in his work and controlling its dissemination. I will argue, however, that the contracts themselves can be understood as logical extensions of ideas we have already seen deployed in earlier contracts. The diversity of Locke's contracts shows once again that, even before the close of the seventeenth century, parties were capable of modifying terms to suit a particular work, that parties were sensitive to the distinctions created by the different provisions in a contract, and that authors and publishers used transactional tools to navigate the commercial realities of the publishing market long before the Statute of Anne.

### 1. Translating Contract Language with Dryden and Pope

Alexander Pope's agreement with the Stationer Bernard Lintot to produce a translation of Homer's *Iliad* has been heralded as "one of the most lucrative in literary history."<sup>165</sup> Though terms of the contract have been famously thought "very liberal" to the author,<sup>166</sup> the modern consensus is that the deal was commercially successful for both author and publisher.<sup>167</sup> In the context of the deals we have analyzed here, the agreement between Pope and Lintot is remarkable for the years-long partnership it created, as poet and publisher worked together for the next five years to bring multiple volumes of the translation to market.<sup>168</sup>

Much of the innovation in the structure of the deal was driven by the fact that, at the time of signing, the text to be published did not yet exist.<sup>169</sup> Therefore, the parties needed to contemplate not only the after-print marketing of the text, but also the writing process. Under these conditions, the rights bargained for could not be reduced to rights in a physical manuscript. First, the language of the grant from

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165. James McLaverty, *The Contract for Pope's Translation of Homer's Iliad: An Introduction and Transcription*, 15 THE LIBRARY 206, 206 (1993).

166. E. MARSTON, SKETCHES OF SOME BOOKSELLERS OF THE TIME OF DR. SAMUEL JOHNSON 58 (1902).

167. See McLaverty, *supra* note 165, at 206 (noting that the contract "marked [Lintot's] success in rivalling Jacob Tonson as the leading literary bookseller"); DAVID FOXON, POPE AND THE EARLY EIGHTEENTH-CENTURY BOOK TRADE 51–61 (1991) (calculating that Lintot turned a profit, but at a lower return than he had hoped).

168. McLaverty, *supra* note 165, at 206.

169. *Id.* at 214 (noting that, as of 1714, "Pope had not begun to translate").

Pope to Lintot conceptualizes the rights granted to Lintot both as “property” in the translations and also as a right of publication:

Alexander Pope his Executors or Administrators shall and will Grant and Assigne unto the said Bernard Lintot his Executors Administrators or Assignes All and every the Copy and Copies of the said Translation and Notes and *the sole and absolute property thereof the Copy of each Volume* to be from time to time delivered unto the said Bernard Lintot. . . as soon as the same shall be ready for the Press *To have and to hold all and every the said Copy and Copies and the sole and absolute property thereof and the sole right of printing and disposing of Copies* unto the said Bernard Lintot his Executors Administrators and Assignes *for and Dureing all such time terme and termes of years and in as large ample and beneficiall manner to all intents and purposes as he the said Alexander Pope* his Executors or Administrators or any or either of them may can might or could use have or enjoy the Same (emphasis added).<sup>170</sup>

It is notable that the scope of the rights transferred to Lintot is explicitly tied to the scope of rights in Pope and his estate. Such a robust grant was likely drafted to deal with the anxiety of residual rights we saw above in the repeated waivers that Milton’s widow was asked to sign.

In return for those rights, Pope was to be paid in two different ways. First, he was to receive upfront payments of cash, one hundred guineas in advance and one hundred guineas upon delivery of each volume, with six volumes planned.<sup>171</sup> The advances and the milestone payments upon delivery were the tools the contract used to deal with the writing process over time, incentivizing Pope to deliver the volumes according to a particular timeline. In the event that Pope missed a deadline, the contract calls for Pope to pay Lintot interest at six percent per annum on any advance he had already received for the late copy.

Second, Pope was also entitled to 750 copies of each volume. Those copies were marketed to subscribers in advance, according to terms (referred to as “proposals”) published in the third edition of Pope’s very successful poem, *The Rape of the Lock*.<sup>172</sup> The proposals called for subscribers to pay two guineas in advance for the first volume and then one guinea annually upon the delivery of the second volume and each volume thereafter through the fifth volume, with the sixth volume to be delivered without further payment, for a total of six guineas.<sup>173</sup> Thus, though there is significant evidence that Pope’s inner circle participated heavily in the subscription,<sup>174</sup> the ability to support the translation in advance was not limited to Pope’s personal friends. The advertisements were offered to Pope’s readers at large, to anyone who had already shown enough interest in his work to pick up a copy of *The Rape of the Lock*. Though Lintot was listed as the agent taking subscriptions, the money Lintot collected was directly paid to Pope.<sup>175</sup> Pope

170. *Id.* at 220-21 (the contract is transcribed in full at 220-23).

171. *Id.* at 221-22.

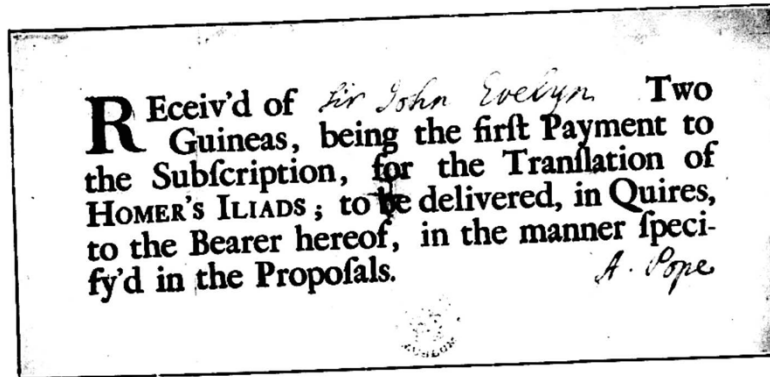
172. FOXON, *supra* note 167, at 51.

173. *Id.* at 51-52.

174. *Id.* at 61-63.

175. *Id.* at 52.

himself issued receipts to subscribers. Below, one of the receipts signed by Pope, which was preserved in the Upcott Collection, is reproduced:<sup>176</sup>



Pope served, in some sense, as the public face of the subscription. Meanwhile, the private terms of his deal with Lintot protected the marketability of subscription copies by providing a measure of exclusivity to the subscribers. Only Pope's 750 copies would be printed on royal paper or with the same engravings and, in addition, no copies would be sold at all until a month after the subscription copies were available for delivery.<sup>177</sup>

Finally, Pope's contract with Lintot is remarkable for the creative control it guarantees to Pope over the physical appearance of the edition. The contract calls for Pope to "chuse or direct" the "kind and [s]ize" of font used to print the work.<sup>178</sup> Lintot and Pope agreed on the paper to be used for the subscription copies and affixed a sample to the contract. Pope was also to have control over the engravings that were to set apart the subscribers' copies: the 750 copies to be delivered to Pope's subscribers "shall have head pieces and tail pieces and initiall letters at the beginning and end of each Book and of the Notes engraven on Copper *in such manner and by such Graver as the said Alexander Pope shall direct and appoint*" (emphasis added).<sup>179</sup>

As remarkable as the contract for Pope's *Iliad* translation seems, many of the innovative provisions in it were anticipated by Dryden's 1694 contract with Jacob Tonson, senior, for a translation of the works of Virgil. Most prominently, the contract structured Dryden's compensation in similar tiers of milestone payments and subscriptions.<sup>180</sup> Dryden was to receive two hundred pounds in cash payments, divided into fifty-pound installments payable upon completion of certain amounts

176. Upcott, *supra* note 107. © British Library Board, Add MS 38728, f.179.

177. McLaverty, *supra* note 165, at 221.

178. McLaverty, *supra* note 165, at 221; *see also* FOXON, *supra* note 162, at 64–67.

179. FOXON, *supra* note 167, at 64–67.

180. The contract has been transcribed in Appendix A of VI JOHN DRYDEN, *The Works of Virgil in English*, in *THE WORKS OF JOHN DRYDEN* 1179–82 (William Frost & Vinton A. Dearing eds., 1987).

of the translation. For instance, the first fifty pounds were due “upon his the Said Iacob Tonson his Executors or Administrators receiving from the Said Iohn Dryden the Ecclouges and Georgicks of Virgill translated by him into English Verse.” In addition, Tonson covenanted to use “all his interests and endeavor to procure” at least one hundred subscribers, who would pay five guineas to Dryden, three guineas upfront and two more upon delivery of the book.<sup>181</sup> Finally, the contract contemplates that patrons may wish to pay more than the subscription price merely to support Dryden’s endeavor. Tonson agrees to hand over these amounts directly to Dryden: “It is herein further agreed by and betweene the Said Parties to these presents that whatsoever money Shall be given by any person over and above the Said Five Guineys Shall be likewise paid to the Said Iohn Dryden.”<sup>182</sup>

The subscription terms in deals like those made by Dryden and Pope helped to reduce risk to both author and publisher by gauging or engaging public interest in the project and by partially funding it in advance.<sup>183</sup> Like Pope’s contract, Dryden’s contract protected the marketability of the initial subscriptions by providing some exclusivity to subscribers: “It is further agreed by and between the Said Parties . . . that there Shall not be any more Copies of the Said Translacion printed upon fine paper than those only which Shall be Subscribed for.”<sup>184</sup> Dryden’s subscription terms, however, additionally contained a more protective measure than Pope’s contract had. Tonson agreed that, if he failed to secure at least one hundred subscribers prior to the completion of the translations, then Dryden could choose to claw back rights to the work, return to Tonson any money paid up to that point, and thereafter be free to bargain with another Stationer. The provision is complex enough to warrant full quotation below:

It is further Covenanted granted Concluded and agreed upon by and betweene the Said Parties to these presents that if the persons who Shall Subscribe . . . in manner aforementioned doe not amount to the number of one hundred . . . by the time that the Said Translacion of the afore-said Ecclogs Georgicks and Six books of the Eneids Shall be perfected that then upon the Said Iohn Drydens his Executors or Administrators returning back to the Said Iacob Tonson all the mony aswell for Subscriptions as what he Shall otherwise have reciv’d from the Said Iacob Tonson . . . for Copy mony or otherwise *then the Said Iohn Dryden Shall be at the liberty of making a new agreement with the Said Iacob Tonson or any other person whatsoever for the Said Translacion . . .* (emphasis added).<sup>185</sup>

Tonson further retained an option to match the terms Dryden was offered from any other Stationer, agreeing to return the translation without printing it, “unless the Said Iacob Tonson will pay to the Said Iohn Dryden Soe much for his

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181. *Id.* For a detailed description of the financial results of the subscription, see John Barnard, *Dryden, Tonson, and Subscriptions for the 1697 Virgil*, 57 PAPERS OF THE BIBLIOGRAPHICAL SOC’Y OF AM. 129 (1963).

182. DRYDEN, *supra* note 180, at 1181.

183. Lindenbaum, *supra* note 131, at 260.

184. DRYDEN, *supra* note 180, at 1181.

185. *Id.* at 1182.

Translacion as any other person will pay him any thing herein contained to the Contrary thereof in any wise notwithstanding.”<sup>186</sup>

Because the compensation in the contract both consisted of “Copy mony”<sup>187</sup> and contemplated support from patrons, Dryden scholars have viewed the commercial arrangement as less than fully professional. Barnard once described it as “a transitional phase in the changeover from patron to bookseller.”<sup>188</sup> Yet, as part of the balance between patronage and proprietorship, the contract also contemplated Dryden investing in a subsequent print run by buying copies at a reduced price.<sup>189</sup> Dryden ultimately marketed the copies he bought to a second list of subscribers. Like Pope, Dryden was personally involved in the subscription process: a draft advertisement for the proposal to subscribers survives in his own hand.<sup>190</sup>

As with Pope’s contract, Dryden’s contract also contained provisions that dealt explicitly with the timeline of the writing process and gave Dryden some creative control over the physical appearance of the edition. In the opening provision, for instance, Dryden agreed to work exclusively on the Virgil translations, except for a limited number of specifically named projects.<sup>191</sup> Dryden was given the power to direct the “manner and order” in which engraved plates would illustrate the volume.<sup>192</sup> In the event of either party’s failure to perform, the contract provided for a “penalty of Two hundred Pounds of lawfull money of England.”<sup>193</sup> This penalty payment was similar to the provision we saw above in Aylmer’s contract with Clark.<sup>194</sup> In the context of the ongoing translation work, the penalty payment was the “stick” that corresponded to the “carrot” of the milestone payments. It is a provision that is less flexible than the interest payments due on advances in Pope’s contract, but it plays a similar function in the structure of Dryden’s deal. In the event of disagreement, Dryden’s contract gave him the right to seek an accounting before a Master in Chancery and also provided for a kind of binding arbitration.<sup>195</sup> Both parties agreed that any difference would “be left to the final determinacion of three person to be chosen by the parties aforesaid whose determinacion therein in writing Shall be Conclusive and binding to both the Said Parties hereunto.”<sup>196</sup>

In conclusion, the complexity and professionalism of Dryden’s contract at the very least compares favorably with Pope’s contract, which was drafted about twenty years later. In both contracts we can observe a level of sophistication in the

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186. *Id.*

187. *Id.*

188. Barnard, *supra* note 181, at 130.

189. John Barnard, *The Large- and Small-Paper Copies of Dryden’s The Works of Virgil (1697): Jacob Tonson’s Investment and Profits and the Example of Paradise Lost (1688)* 92 PAPERS OF THE BIBLIOGRAPHICAL SOC’Y OF AM. 259, 259-60 (1998). Dryden and Tonson later disagreed on how to interpret the clause of the contract that set the price Dryden was to pay for these copies. *Id.* at 260-61.

190. The manuscript is preserved in the Cambridge University Library as Cambridge MS Add. 4429 and is reproduced in DRYDEN, *supra* note 180, at i.

191. *Id.* at 1179.

192. *Id.* at 1180.

193. *Id.* at 1182.

194. See *supra* note 145 and accompanying text.

195. DRYDEN, *supra* note 180, at 1181.

196. *Id.*



use of transactional tools to order the partnership between author and publisher, from negotiation around creative control to tiered compensation structures. In each case, there was clearly deep thinking about the roles each party would play in the production and promotion of the works in question, thinking which had unquestionably evolved far beyond a simple transfer of the physical manuscript from author to publisher. In the next set of contracts I analyze, between John Locke and his publishers, the same depth of thinking about how authors and publishers can share in the publication of literary property is in evidence.

## 2. Locke's Literary Property

John Locke's philosophy on the origins and justification for property rights in natural law has long played an influential role in modern copyright theory.<sup>197</sup> In his own time, Locke's views on the expiration of the Licensing Act of 1662, which he greatly desired, and on the deleterious effect of the Stationers' monopoly on classical literary property were well known and remain of note in the accounts of copyright historians today.<sup>198</sup> Locke counted among his close friends a member of Parliament, Edward Clarke, and a lawyer, John Freke, who both corresponded with Locke at length regarding these issues and various draft bills that were before Parliament in the 1690s.<sup>199</sup> As Astbury has noted, Locke expressed the idea that "the period of copyright in books which had been purchased from living authors should be limited to fifty or seventy years after the death of the authors or the first printing of the books," while rejecting as "very absurd and ridiculous" a system in which Stationers held exclusive rights in "the 'writings of authors who lived before printing was known and used in Europe.'"<sup>200</sup> Ronan Deazley summarizes Locke's view as one in which "what property existed in a book was to be statutorily defined as well as temporally limited in extent."<sup>201</sup> Raymond Astbury similarly detects in Locke a view that considered the needs of authors and readers at an individual level: "[T]hough Locke spelt out in detail the ill-effects on the book trade, and on authors and readers, of the monopoly system and powers . . . of the Stationers' Company, most of his complaints reveal directly or by implication his concern for the intellectual, economic, and social freedoms of the individual."<sup>202</sup>

While a full exploration of the relationship between Locke's commercial dealings and his views, political and philosophical, is beyond the scope of this Article, the publication contracts that have survived in the collection of Locke's

197. See, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1992–1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990); Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891 (2005–2006).

198. See DEAZLEY, *supra* note 7, at 1–4; Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 THE LIBRARY 296, 305–14 (1978).

199. DEAZLEY, *supra* note 7, at 1–4, 9–10.

200. Astbury, *supra* note 198, at 309.

201. DEAZLEY, *supra* note 7, at 10.

202. Astbury, *supra* note 198, at 308.

papers in the Bodleian Library<sup>203</sup> offer a slightly different nuance to the picture. In these contracts, we see that Locke at times maintained strong control of his rights in his work, with exceptionally clear contract language, but we also, in some instances, see an author who seemed reluctant to press rights to his work after his death and who would transfer copyright to his publishers under certain conditions. The essence of what we can learn from the contracts is that Locke was willing to work within a variety of different frameworks to achieve consistent goals of controlling his work and profiting from his writing within reasonable limits. The resulting contracts are exceptional in their precision and technicality, but they are also logical extensions of the developments we have already seen.

In 1689, Locke contracted with Thomas Bassett to publish the *Essay Concerning Human Understanding*. The language covering the grant of rights conceptualizes the rights being transferred as a limited right to publish the work in a particular time and manner:

Whereas the said John Locke hath composed and written a Boooke or Treatise in English Entituled an Essay concerning Humane Understanding the said John Locke doth grant & Agree to & with the said Thomas Basett *that he the said Thomas Basett shall have the same to Print & Publish on ye Times & in the Manner & forme following*. That is to say the same shall be Printed on as good Paper & in a volume of the size and Character of the History of the Council of Trent Printed in English in the yeare 1676 (emphasis added).<sup>204</sup>

This limited language, as opposed to language that transfers, for instance, all right and title to the copy, might be attributable to Locke's friends, Edward Clarke and John Freke. They each witnessed the document, and Freke is nominated as "umpire" in "Case any Controversy shall arise . . . by whose judgment & Award in the Case they will be concluded."<sup>205</sup> In their later correspondence with Locke regarding the expiration of the Licensing Act, Freke and Clarke would express the opinion that unlawful copying "may be recompensed in damages in an action on the case."<sup>206</sup> That is, they seemed to conceive of the rights in copy as protected by a tort-like action, which would be consistent with the contract granting the publishers a right to use the property in question without liability: "that . . . Thomas Basett shall have the [book] to print and publish on the time and in the manner and form following."<sup>207</sup>

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203. Seven contracts have survived, all in Bodleian Library Locke MS b.1. I have obtained images of the contracts from the Bodleian Library. The contracts are briefly described in Lindenbaum, *supra* note 131, at 262, and Lindenbaum, *supra* note 100, at 57.

204. Locke MS b.1, f.109.

205. *Id.*

206. DEAZLEY, *supra* note 7, at 9.

207. Locke MS b.1, f.109. It is somewhat ambiguous from this language whether Locke conceived of having transferred the right to print the work in perpetuity, because the contract specifies when the "time" of printing should begin (immediately), yet also clearly contemplates Bassett reprinting at an unspecified time ("when ever he shall Reprint the said Treatise"). The question is somewhat cleared up by subsequent agreements, discussed *infra*, following Bassett's bankruptcy. Lindenbaum, *supra* note 100, at 47 n.33.

The reference to the *History of the Council of Trent* as an exemplar for the size and character of the *Essay* suggests that Locke, like Dryden and Pope in their later contracts, cared enough about the physical appearance of the book to bargain for some form of control. For Dryden and Pope, a right to direct or appoint was the tool used. Here, the parties have agreed upon the details *ex ante*—but the result is the same, which is a level of certainty for the author that the volume will be of the quality he expects it to be.

The compensation in the contract consisted of three tiers. First, Bassett agreed to pay Locke (or his executors, administrators, or assigns) ten shillings for each sheet contained in the book, where the size of a sheet is calculated according to “a sheet of Milton’s *History of England* in octavo.”<sup>208</sup> The use of Milton’s book as a benchmark requires fairly technical calculations based on the number of ems on each sheet, which are noted and signed by Bassett and Freke under the text of the contract.<sup>209</sup> Second, Locke (or his assigns) is to have twenty-five copies of the book, unbound in sheets. Third, Locke has the option, for up to twelve months following the publication, of buying up to twenty-five more copies at the price of a halfpenny per sheet, with any such money spent to be repaid to Locke whenever Bassett reprinted the treatise. When describing the provisions for Locke’s compensation, Lindenbaum remarks that “what remains, then, particularly striking about this contract . . . is how seriously, precisely, and straightforwardly Bassett, Locke, and Freke conducted themselves in adhering to its complex stipulations.”<sup>210</sup>

Finally, the contract specified the timeline for the production of the book, by which Locke and the press would exchange copy:

And the said John Locke doth promise to ye said Thomas Bassett to deliver to him on demand from time to time so much of ye said Booke or Treatise as shall make five sheets to be Printed as above said upon the said Thomas Bassetts delivery of a Copy in Print to the said John Locke of what he then last received from him.<sup>211</sup>

This provision contemplated Locke working in tandem with the printer, delivering manuscript copy five sheets at a time, in exchange for clean printed copy of the text he had previously delivered. This provision, too, bears out Lindenbaum’s sense of an effort in concert to adhere to formal terms.

There are two more contracts in the manuscript that deal with the *Essay Concerning Human Understanding*. In 1693, Bassett and Locke agreed to adjust the compensation for the second edition of the *Essay*, adding a calculation for payment for additional text or tables:

“Agreed then with Mr. John Locke . . . I will give him ten shillings for each sheet of the bigness of the sheets of the former edition that shall be added to this second edition whether in the text or Table.”<sup>212</sup>

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208. Locke MS b.1, f.109.

209. Lindenbaum, *supra* note 100, at 57.

210. *Id.*

211. Locke MS b.1, f.109.

212. Locke MS b.1, f.168.

Then, instead of delivering twenty-five copies as previously agreed, the new deal required Bassett to send Locke twenty copies of the second edition only “and moreover present him with Spencer’s book *de Legibus Rituale* by me fairly bound.”<sup>213</sup> Thus, under the new agreement, Locke traded five unbound copies of his own work for one bound copy of *de Legibus Rituale*. A memorandum was added beneath the contract, stating “that if the said John Locke shall have need of any more copys I will let him have them cheaper than I allow them to booksellers.”<sup>214</sup> We cannot know what caused the parties to drift from the originally agreed price of a halfpenny per sheet for additional copies (to be repaid upon reprinting), but the new provision in the memorandum at least would have guaranteed Locke the ability to undersell the retail booksellers if he needed to market his copies for cash.

The rights in the *Essay Concerning Human Understanding* apparently changed hands when Thomas Bassett went bankrupt in March of 1694. One of Bassett’s assignees, Samuel Manship, contacted Locke by letter to let him know that they had acquired Bassett’s interest in the *Essay*.<sup>215</sup> In June of 1699, Manship delivered a new compensation agreement to Locke.<sup>216</sup> Given that the second agreement analyzed above contained compensation terms only for the second edition, the new agreement for further compensation would be necessary only if Manship and his new partner, Awunsham Churchill, understood Locke to have retained some form of residuary right, unless the prospect of coaxing more new material out of Locke brought the new publishers to the table. In any case, Manship and Churchill each promised to deliver to Locke (or anyone whom he shall appoint) six copies, well-bound in calfskin and gilt “as soon as the next edition of the *Essay* shall be so printed and six other such books *for every impression that shall hereafter be made of the said Essay during the life of the said Mr. John Lock* for my half share in the Copy of the said *Essay*” (emphasis added).<sup>217</sup> They also agreed to pay ten shillings per sheet for additions to the text. The way in which the deal had evolved over time is interesting. The shift to a lower number of copies that are more elegantly finished (from copies in sheets to bound and gilt copies) perhaps signals that the Locke was no longer worried about disseminating the *Essay*. The fact that the provision for payment of copies applied not only to the current edition but to all future editions during the life of Locke obviated the need for further negotiation, but also arguably left Locke’s estate with no claim for compensation from future editions. Why explicitly limit the payment obligations to Locke’s lifetime? We have already seen examples in which heirs, such as Peter Heylyn’s son, pursued compensation for their parent’s work via a contract claim.<sup>218</sup> Locke may simply have lacked the bargaining power for a longer stream of payments, or, we may be observing a principled stance on Locke’s part, keeping the term of his own claims

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213. *Id.*

214. *Id.*

215. Lindenbaum, *supra* note 100, at 47 n.33.

216. Locke MS b.1, f.218.

217. *Id.*

218. Farr, *supra* note 72, at 146, 152.

in check. Though Locke was a proponent of author's rights,<sup>219</sup> he viewed perpetual copyright as an absurdity.<sup>220</sup>

The 1699 agreement was not the first in which Locke agreed to similar provisions, limiting compensation to editions produced during his lifetime. His publication agreement for *The Reasonableness of Christianity as Delivered in the Holy Scriptures* was drafted in 1695 as a promise to pay ten shillings per sheet "for evry Impression wee shall print of the said booke during his Life . . . & no Edition to be made during his Life without his knowledge and Consent" (emphasis added).<sup>221</sup> There is no grant language in the agreement with respect to rights in the copy until the final line of the agreement: "[A]nd if it shall happen that he the said John Locke shall dy before the second Impression of the said booke, then we promise and covenant to pay to his Executors, Administrators or Assigns, ten shillings per sheet *in full consideration of the said Coppy*" (emphasis added).<sup>222</sup>

This provision made explicit that, in the event of Locke's death before the second edition, the estate would only have a claim to a single payment in return for complete assignment of the copyright. During Locke's lifetime, however, not only would payment be necessary for each edition, but also his consent. The structure of this agreement betrays an anxiety on Locke's part to control the timing of the dissemination of the work, which makes sense because of the sensitivity of the subject matter of *The Reasonableness of Christianity as Delivered in the Holy Scriptures*.<sup>223</sup> Indeed, when the work was published, amidst contemporary controversy about the nature of the Trinity, orthodox clergy accused Locke of heresy.<sup>224</sup>

Similarly, Locke's contract with Awnsham and John Churchill for the publication of *Some Thoughts Concerning Education* called for payments to Locke "during his Life five pounds . . . upon every Impression we shall print or cause to be printed . . . and ten shillings per sheets printed for all additions" (emphasis added).<sup>225</sup> The contract is silent about the ownership of rights in the copy, until the final provision, which requires Locke's consent for the publishers to transfer any right to the copy:

Wee doe also hereby *oblidg & bind ourselves*, heyr, Executors, Administrators & [Assigns] *to the said John Locke during his Life* that neither we nor they will or shall

219. Lindenbaum, *supra* note 131, at 262.

220. DEAZLEY, *supra* note 7, at 10.

221. Locke MS b.1, f.178.

222. *Id.* There is ambiguity with respect to what will happen to ownership of the copy if Locke dies after the second edition. Presumably, the parties intended the Stationers to retain the copyright in that event, without further obligation to pay, because they would have already paid at least the same amount as would count for full consideration in the event of Locke's death before the second edition was printed.

223. Astbury, *supra* note 198, at 313.

224. *Id.*

225. Locke MS b.1, f.173.

dispose of the right or Title to the Copy of said Booke to any person whatever *without the consent of the said John Locke* (emphasis added).<sup>226</sup>

The implication was that the publishers held title to the copy, yet the restraint on their ability to alienate the rights without Locke's consent allows Locke to retain some control. This provision is a slightly different tool than the consent to publish required above in Locke's contract for *The Reasonableness of Christianity*. Rather than controlling the timing of dissemination, here, by requiring consent to transfer the title to the copy, Locke could control *who* disseminated the work during his lifetime. In other words, he could control with whom he would have to work to revise and promote his writing. Lindenbaum notes that, by the mid 1690s, Locke "had a particularly close personal and business relationship" with Awnsham Churchill.<sup>227</sup> This would have perhaps spurred the parties to think in such relatively personal terms. Transfer of copy against his will may also have been on Locke's mind when this contract was signed in June of 1694, because he had heard of Thomas Bassett's bankruptcy, and its subsequent unmooring of the rights to the *Essay Concerning Human Understanding*, only months before, in the previous March.

The most extraordinary contract terms deployed by Locke, however, were the terms that reserved all rights in himself. The remaining two contracts in the manuscript are remarkable for the clarity with which they forcefully reverse the traditional view of copyright transactions in this period. The first of these is dated March 1691/2 and witnessed by Edward Clarke. It reads:

"We doe hereby declare that the Sole right of and in the Copy or booke called *Considerations of the Consequences of the Lowering of Interest & Raising the value of money* is & remains in Mr. John Locke witness our hands 2d March 1691/2, A & Jn Churchill" (emphasis added).<sup>228</sup>

The most common form of copyright transaction in this period was probably a complete assignment of rights from the author to the publisher in short receipt form, usually signed only by the author.<sup>229</sup> This transaction reversed the usual pattern. Here, the publishers were the ones called upon to sign a waiver of sorts, in the form of a declaration confirming the author's rights to the work. The second example of Locke obtaining such a declaration is pictured below, followed by a transcription:

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226. *Id.*

227. Lindenbaum, *supra* note 131, at 262.

228. Locke MS b.1, 161r.

229. *See* Bently & Ginsburg, *supra* note 9, at 1496-97.

Wee doe hereby declare that the *Sole Right of and in ye Coppy or book* called a General History of the Ayr begun by the Honorable Rob't Boyl Esq. *is and remains in Mr. John Locke after the Impression wee are now printing.* Witness our hands 25 July 1692 (emphasis added).

A & Jn Churchill<sup>230</sup>

If provisions dealing directly with ownership of literary property were merely implied or faint in Locke's other contracts, here the claim to property rights in the work was full-throated. Particularly interesting is the assertion that the sole right "is and remains in Mr. John Locke after the Impression wee are now printing."<sup>231</sup> The "Sole Right" being referred to was clearly not just the right of first publication, as it explicitly survived publication, at least in the minds of the parties here.

In these last two contracts, it is jarring to see such a forthright claim that a sole right to the copy might remain in the author after first publication, but it is in another sense merely the logical extension of the early evidence of authors' agreements in the Stationers' Register above, in which consent was required for a subsequent reprinting. Somewhat more remarkable is the range of tools Locke deployed, from retaining full rights, to requiring consent to print, to merely requiring consent to transfer the copy. Mastering the diversity of transactional tools available in structuring deals with their publishers was crucial to the rise of the author as proprietor, as crucial as achieving statutory recognition of author's rights.

#### D. LESSONS FROM THE UPCOTT COLLECTION

We now turn directly to the author's contracts that have survived in The Upcott Collection. Discounting the facsimile of Milton's contract for *Paradise Lost* that was included in the collection, there are four documents that date prior to 1710, only three of which involve living authors. As Lionel Bently has observed, "[t]he

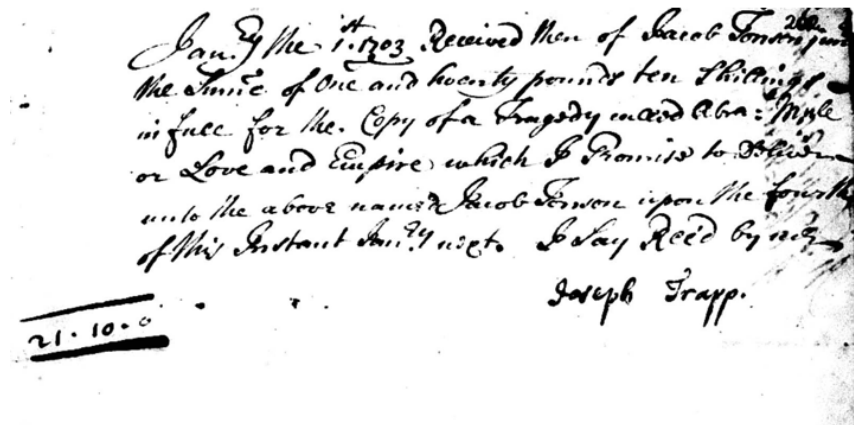
230. Locke MS b.1, 161r.

231. *Id.*

variety of documents [in the collection] makes generalization hazardous.<sup>232</sup> In addition, in the portion of the collection dating to the early years of the eighteenth century, the documents disproportionately memorialize the work of just a few Stationers,<sup>233</sup> with Edmund Curll heavily represented. Given that Upcott was in part interested in the autograph value of the documents, the authors represented in them may also skew toward Upcott's nineteenth-century tastes. As a result, again, we deal with these contracts primarily as evidence of what was possible in the period, rather than what was generally the case.

### 1. Tonson and Trapp: Receipts Recording Delivery of "Copy"

The earliest of the documents is a small note, like a receipt, given by author and playwright Joseph Trapp to Jacob Tonson, junior. It is pictured below, followed by a transcription:



January the 1<sup>st</sup>, 1703 Received then of Jacob Tonson, junior, the sume of one and twenty pounds ten shillings in full for the Copy of a tragedy entitled Abra Mule or Love and Empire, which I promise to Deliver unto the above named Jacob Tonson upon the fourth of this Instant January next. I say rec'd by me.

Joseph Trapp<sup>234</sup>

At the time when he signed the receipt, Joseph Trapp was a young man of twenty-four, having just graduated with his master's degree.<sup>235</sup> *Abramulè* was his second dramatic work and he had only just begun to be known as a minor poet, having previously published some Latin hexameters and a couple of

232. *Id.* at 1496.

233. *Id.*

234. Upcott, *supra* note 107. © British Library Board, Add MS 38728, f.202.

235. Richard Sharp, 'Trapp, Joseph (1679-1747)', in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (Oxford Univ. Press 2004), <https://www.oxforddnb.com/view/article/27666>.



commemorative poems in Oxford verse collections.<sup>236</sup> The play was a critical success.<sup>237</sup> For Trapp, getting it into print was likely the top motivation, as he was making his reputation. He was to be elected a fellow of Wadham College, Oxford, that same year and eventually become the first professor of poetry at Oxford.<sup>238</sup> Meanwhile, Jacob Tonson, junior, the nephew of the powerful and extremely successful Jacob Tonson, senior, had recently joined his uncle's business with no shortage of knowhow backing his ventures.<sup>239</sup> It is an early deal for them both, at the start of careers that became solidly successful.

This form of receipt is a common form of document to have survived. In Lionel Bently's analysis of the complete collection in addition to some later eighteenth century contracts, he observed that about two thirds of the archive consists of documents like these acknowledging receipt of payment, which may or may not make reference to rights in a particular work.<sup>240</sup> He notes that one "difficulty in having so many receipts is inferring whether there would have been a lengthier, more formal contract accompanying such a receipt, or whether these rudimentary written documents operated in lieu of such formal documents."<sup>241</sup> I share his suspicion that the answer varied according to the needs of the parties. Where the amounts of money involved were relatively small, a receipt might do, but where the amount invested increased, or there were other reasons why the relations between the parties were more complex, formal documentation was likely worth the trouble. Bently estimates that only about a quarter of surviving documents take the form of "more formal" contracts "purporting to assign copyright from authors."<sup>242</sup>

Here, Joseph Trapp acknowledges receipt of twenty-one pounds and ten cents "in full for the Copy of a Tragedy call Abra : Mule," which he promises "to Deliver" to Jacob Tonson, junior, in about three days. While the receipt uses the word "copy," there is again some slippage between its meaning as the "exclusive right to print" and a reference to the physical copy. Depending on how one parses the phrase, Trapp is promising to deliver (physically) the tragedy, or the copy. If he was physically delivering the written copy of the text, then that would seem all that Tonson was buying (surely, however, this was not what Tonson merely intended to get with this sum of money, which would be ridiculous to pay for a personal reading copy). It is also notable that the receipt contained only a promise to deliver in the future, not the more rigid acknowledgement of past and present grants we saw in some of the seventeenth-century contracts. Yet confusion was

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236. *Id.*

237. *Id.*

238. *Id.*

239. Aldis, *supra* note 61, at 292.

240. Bently & Ginsburg, *supra* note 9, at 1496-97.

241. *Id.*

242. *Id.* Before we assume that receipts were truly that much more prevalent as documents that functioned alone, however, it is worth noting that the Upcott Collection itself skews the statistics on what has survived. It may have been easier for Upcott to get his hands on stray receipts and preserve them in the early nineteenth century, while more formal contracts were kept in the files of businesses only to fall victim to the ephemeral nature of commercial records when those businesses closed. We cannot know for certain.

unlikely to occur between the parties, as this was not a deal that required much precision in its record. As long as Tonson had a memorandum from Trapp recording receipt of payment and when he had promised to deliver the manuscript, which Trapp no doubt understood Tonson intended to publish, further need for documentation was unlikely.

Where terms were more complex, even a receipt could be used to memorialize the essentials of the deal. Compare the language above to the language in this receipt, which is a record of a deal among Stationers:

Sept. the 4<sup>th</sup> 1708

Memorandum that I have agreed and sold this 4<sup>th</sup> Day of September 1708 an Impression of five hundred Bruyere's Characters. (being the 4<sup>th</sup> Edition) to Edmund Curll and Egbert Sanger for the Summe of Thirty Pounds and I do likewise make over all my Right & Title to the Coppy of the Said Book in Consideration of the Thirty Pounds before mentioned & that I am to Reprint the said Book whenever there shall be Occasion, for which Considerations I do hereby Promise to secure the Coppy to the aforesaid Edmund Curll and Egbert Sanger against the Claim or Demands of any Person whatsoever.

Witness my Hand

Dryden Leach

Witness

Tho Twining—Master of Tom's Coffee-House in Devereux Court, Temple.<sup>243</sup>

Here, Dryden Leach was careful to make a distinction between physical copies and rights in copies, as this deal encompassed both. He sold “an Impression of five hundred Bruyere's Characters,” so must deliver 500 physical books for the sum of thirty pounds. He also transferred to the exclusive right to print new copies of the book: “and I do likewise make over all my Right & Title to the Coppy of the Said Book.” As an additional part of the consideration, Edmund Curll and Egbert Sanger agreed to give Leach the job whenever they wished to reprint the book: “& that I am to Reprint the said Book whenever there shall be occasion,” as booksellers often did not have their own presses and hired out the job when they wanted to print a book for which they held copy.<sup>244</sup> An additional layer of formality is added by the witness, Thomas Twining, a respectable businessman in his day whose coffee house was frequented by “savants,” including important lawyers, and whose name is still used today on a tea brand derived from his eighteenth-century business.<sup>245</sup>

243. Upcott, *supra* note 107; Add MS 38730, f. 116.

244. RALPH STRAUS, *THE UNSPEAKABLE CURLL* 208 (1927). This edition does not appear in the English Short-title Catalogue. But, according to an advertisement in the *Post Boy*, Curll and Sanger did have the book reprinted in 1709, but it is not clear whether Leach printed it for them.

245. T. A. B. Corley, *Twining, Richard (1749–1824)*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (Oxford Univ. Press 2004), <https://www.oxforddnb.com/view/article/27908>.



And I do hereby promise and agree to warrant and maintain my said Right . . . against the Claim or Demand of any other Person or Persons whatsoever . . . . And I do hereby authorize & appoint the Master and Wardens of the Company of Stationers of the City of London or their proper Officer to enter into their Register-book the said Part or share of the Copy . . . pursuant to an Act of Parliament in that behalf made & for their so doing This shall be to Them & Every of Them a sufficient Warrant.<sup>248</sup>

These references to registration, however, are fairly exceptional. There is ample evidence that in the eighteenth century most Stationers did not register their works at all and apparently did not regard registration as indispensable for the protection of their copies even after passage of the Statute.<sup>249</sup>

The most interesting point about the inclusion of such covenants in both pre- and post-1710 contracts is that it points to a concern on the part of some Stationers with respect to proof of copy ownership. The inclusion of covenants promising to defend the seller's claim to the copy might be read as a time-saving short cut between the parties, allowing them to skip such formalities as entry in the Stationer's Register until such time as copy ownership was challenged. However, that reading does not fit well with Swale's use of the covenant in the 1712 receipt above, as the receipt acknowledges that entry had already been made in the Register. Perhaps the inclusion of the covenant in that case was merely a tic of contract language, but it might also betray a lingering anxiety about proof of copy ownership that the parties attempted to assuage by binding the seller to aid the buyer in any future dispute. The seller, being closer to the "root of title," was in a better position to provide evidence of the chain of ownership. But then who was the root of title? In the case of the parties to the Swale contract, it seems likely that the parties were thinking of the author because Swale identified the author of each work in addition to the Stationers who had been involved in the publication of each work in the receipt. This is perhaps not surprising after the passage of the Statute of Anne.

Other parties, however, conceived of the author as the ultimate root of title even prior to the passage of the Statute of Anne, as evidenced in the next contract we will analyze. This evidence is borne out by records of copyright infringement suits before the Chancery. Tomás Gómez-Arostegui has discovered records of cases as early as 1682 in which the plaintiff Stationer alleges title to copyright by claiming to have bought it for good consideration from the author.<sup>250</sup>

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248. Upcott, *supra* note 107; Add. MS 38730 f. 123. The contract is between Mary Matthews, the widow of stationer John Matthews, and Edmund Curll. It purports to transfer a one-half share in "a translation of Justin by the late Thomas Browne."

249. Suarez, *supra* note 3, at 57 (calculating that only about 4% of the output of the book trade was registered).

250. Gómez-Arostegui, *What History Teaches Us*, *supra* note 5, at 1225–26. He also cites one case from 1729 in which a defendant's answer alleged that "the plaintiff's chain of title was deficient for failing to trace itself back to the original author," *Gilliver v. Watson*, C11/2581/36 (Ch. 1729). *Id.* at 1231. The defendant in that case succeeded in getting a temporary restraining order dissolved based on the defect in the chain of title. *Id.* at 1239.

## 2. The Tonsons and Echard: Authorship as Root of Title

In 1707, Jacob Tonson, senior, and his nephew, Jacob Tonson, junior, entered into an agreement with Laurence Echard to publish his voluminous history of England, *The History of England from the First Entrance of Julius Caesar and the Romans to the End of the Reign of King James the First*. Echard has been colorfully described as “a minor cleric, a prolific hack, and an historian.”<sup>251</sup> Tonson and Echard had dealt with each other before, as the elder Tonson had published the first edition of Echard’s *The Roman History* in 1695 (in partnership with several other booksellers), his *A General Ecclesiastical History* in 1702, and his revisions of *The Roman History* in five volumes between 1703 and 1705.<sup>252</sup> The sheer volume of work that Echard was able to produce in his early years has been described as “astonishing,” and he quite frequently hit upon works that had lasting appeal.<sup>253</sup> Tonson, for his part, was a giant of the industry, the well-connected secretary of the Kit-Cat Club and long-time publisher of such major figures as John Dryden.<sup>254</sup>

In contrast to the deal described above, between Joseph Trapp and Jacob Tonson, junior, here we have a deal between two very savvy repeat players. The contract language is worth walking through because it shows every indication that the parties have a sophisticated sense of the tools at their disposal to create as much certainty for the parties that it was possible to create when the state of the exclusive right to print was legally uncertain. First, the contract is highly formal, opening with a recital:

To All To Whome these presents shall come  
The Reverend Laurence Echard of Louth in the  
County of Lincoln [*Clerk*] sendeth Greeting.

Whereas the said Laurence Echard hath lately written a Book Intituled the History of England from the ffirst Entrance of Julius Ceasar and the Romans to the end of the Reigne of King James the ffirst—containing the Space of 1678 years with a Compleat Index.<sup>255</sup>

The contract repeats the full title of the book, including the mention of the index, every time the book is referenced. Some part of the formality of the contract is explained by the hefty consideration of 370 pounds and ten cents:

Now—Know yee That the said Laurence Echard ffor and in Consideration of the Summe of three hundred Seventy pounds & ten shillings of good and Lawfull money of England to him in hand paid at and before the [sealeing] and Delivery hereof by

251. JOHN BARNARD, *Introduction to LAWRENCE ECHARD, PREFACES TO TERENCE’S COMEDIES AND PLAUTUS’S COMEDIES* (1694), at ii (The Augustan Reprint Soc., 1968).

252. KATHLEEN LYNCH, *JACOB TONSON: KIT-CAT PUBLISHER* 105, 113 (1971).

253. R. T. Ridley, *Echard, Laurence* [pseud. *T.B.*] (*bap. 1672, d. 1730*), in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (Oxford Univ. Press 2004), <https://www.oxforddnb.com/view/article/8374>.

254. Aldis, *supra* note 61, at 292.

255. Upcott, *supra* note 107; Add MS 38729 f. 110.

Jacob Tonson Senior & Jacob Tonson junior of London Booksellers or one of them. The receipt whereof He the said Laurence Echard Doth Hereby Confesse and acknowledge.<sup>256</sup>

Throughout, the contract juggles the partnership of the two Tonsons with language like that above, “Jacob Tonson Senior & Jacob Tonson junior . . . or one of them,” in order to maximize their flexibility if either one of them should pass away or otherwise be unavailable at the time this deed-like contract is delivered.

Language that maximizes the flexibility of the Tonsons continued in the portion of the contract granting the rights in the copy:

He the said Laurence Echard *Hath Bargained Sold Assigned and Sett over and By these presents Doth Bargaine Sell Assigne and Sett over* **unto the said Jacob Tonson Senior & Jacob Tonson junior or either of them, their or either of their Executors, Administrators or Assigns**—*All that his full and Sole Right Title Interest property Just claim and demand of in and To the above said Copy of the Book Intituled The History of England from the ffirst Entrance of Julius Caesar and the Romans to the end of the Reigne of King James the ffirst—containing the Space of 1678 yeares with a Compleat Index written by the said Laurence Echard To Have and To hold the said Hereby Bargained provisions* **unto the said Jacob Tonson senior & Jacob Tonson junior his or their executors, administrators or assignes equally Share and Share alike To his and their own proper use or uses**—respectively for Ever (emphasis added).<sup>257</sup>

The grant language (in italics above) is exceptionally thorough, using past and present grants and multiplying the synonyms indicating an outright sale (“doth bargaine, sell, assigne and sett over”). The property is referred to as the “full and sole right title interest property just claim and demand of in and to the above said copy.” Because there was no further payment to Echard after delivery of the initial payment, there is no need to deal with the transferability of the right to payment that Echard was receiving under the contract, but the transferability of the rights he was selling is a prominent preoccupation of the language (in bold above).

Finally, the contract finishes with an additional covenant on behalf of Echard and his assigns:

and Lastly He the said Laurence Echard for himself his heires Executors administrators & assignes Doth hereby further Covenant & agree to and with the said Jacob Tonson Senior junior their Executors administrators and assignes That He the said Laurence Echard *now at the time of the sealing and Delivery hereof hath in himself good Right full power and Lawfull authority To Bargaine Sole assigne & sett over the before mentioned provisions according to the True intent and meaning of these presents* (emphasis added).<sup>258</sup>

The italicized language takes a step beyond the covenant of general warranty or further assurances that we have seen in previous examples. Here Echard was warranting that he owned what he said he owned and that he had the right to sell it

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256. *Id.*

257. *Id.*

258. *Id.*

“according to the true intent” of the contract. This sounds more like a covenant of seisin and of the right to convey.<sup>259</sup> The covenant might merely have constituted a promise that he had not previously conveyed exclusive rights to the work. In the context of the legal uncertainty as to the validity of Stationer’s copyright in 1707, however, the covenant might have operated to shift the risk that the rights would not be protected from the Tonsons to Echard, in the event that piracy pushed the Tonsons into court to protect their exclusivity. That is, the covenant might well have created liability for Echard if it turned out that there was no common law copyright to be conveyed from the author to his publisher and that, therefore, Echard did not have the right to solely assign the copy according to the intent of the contract.

If this is a viable reading of the covenant, it seems sharp dealing to expect the author to bear any risk, especially given that, by the time the deed was signed and sealed, Tonson had already obtained an exclusive privilege from Queen Anne to print the work for a term of fourteen years.<sup>260</sup> The text of the privilege states that Tonson had informed the Queen that the “Sole Right and Title of the Copy of the said Work is vested in the said Tonson.”<sup>261</sup> Thus, Tonson appears to act as if the right to seek the privilege is dependent on first having obtained “title,” apparently from the author. Given the large cash payment to Echard and the likely not insignificant investment in preparing to print a book of this massive size, the Tonsons may have wanted to find some additional ways to mitigate or at least share the risk of piracy. For Echard’s part, Echard reportedly struggled with debt and it was likely worth it to him to take the deal with the Tonsons in particular.<sup>262</sup> Joseph Addison, a connection of the elder Jacob Tonson’s,<sup>263</sup> helped to secure a royal dedication for the second and third volumes of the work, which apparently resulted in a payment of another 300 pounds to Echard from the crown.<sup>264</sup>

At the very least, the covenant in the contract between Tonson and Echard clearly conceptualized Echard as the root of title, having in himself “good right, full power, and lawfull authority to bargain, sole assign, and set over” all his “full and

259. Cf. the covenants of seisin and right to convey as described in *DUKEMINIER ET AL.*, *supra* note 227, at 590.

260. The full text of the privilege is recorded at SP 44/353 f.118. State Papers Online, available at <http://www.columbia.edu/cgi-bin/cul/resolve?clio7201506>. The privilege is dated February 1705/6, approximately a full year before the contract is dated. Tonson appears to have petitioned for a handful of other privileges or licenses to be the sole printer, during this period in the run up to the passage of the Statute of Anne. See SP 44/350 f.131 (a license to print Baile’s dictionary circa 1701), SP 44/353 f. 106 (a license to be sole printer of the works of Saint- . . . vremond, dated December, 1705), SP 34/11 f.53 (possibly a draft of a grant of a license to be the sole printer of Dugdale’s *The Baronage of England*, dated October 1709).

261. SP 44/353 f.118, State Papers Online, *supra* note 260, at f.118.

262. BARNARD, *supra* note 251, at iii-iv. See also Field’s remark about Tonson’s reputation for among authors, “being published by Tonson was soon seen as an author’s shortcut to the richest, most powerful readers, thanks to the publisher’s gift for networking.” OPHELIA FIELD, *THE KIT-CAT CLUB* 12 (2008).

263. LYNCH, *supra* note 252, at 83 (recounting how Addison had acted as a “sort of literary agent for Tonson” in 1695).

264. Ridley, *supra* note 253.

sole right, title, interest, property, just claim and demand” in the copy.<sup>265</sup> It was an exceptional use of language in which the author himself represented and warranted that he had transferable property in his work. It was all the more exceptional coming before the passage of the Statute of Anne nominally recognized such a right in an author. This contract indicates that by 1707, Stationers like Tonson were well-prepared to conceptualize copyright as a form of property, an exclusive right originating with the author.

It was then no coincidence that Jacob Tonson was among the booksellers who petitioned Parliament in February of 1706 (one month before Tonson entered into the contract with Echard) seeking legislation that would “secure” property in books.<sup>266</sup> The petition of 1706 was the first that described the needs of the bookselling trade in terms of their transactions with authors.<sup>267</sup> The petition began by asserting that authors invested a great deal in writing their books: “that many learned Men have spent much Time, and been at great Charges in composing Books.”<sup>268</sup> The petition goes on to explain that these men have been accustomed to secure a return on that investment in one of two ways: “who used to dispose of their Copies upon valuable Considerations, to be printed by the Purchasers, or have reserved some Part, for the Benefit of themselves, and Families.”<sup>269</sup> In light of all the evidence we have seen of the contracts between authors and booksellers, disposing of their copies outright, or reserving some form of right (such as further payment) for themselves or their families, this part of the petition no longer sounds like a politically expedient cover story. It was a business plan. The petition then explained where the book trade came in:

And the Purchasers also have, by such their Property, made Provision for their Widows, or Children; but of late Years such Properties have been much invaded, by other Persons printing the same Books . . . to the great Discouragement of Persons from writing Matters, that might be of great Use to the Publick, and to the great Damage of the Proprietors.<sup>270</sup>

The transferability (and devisability and descendability) of the property in books was seen to link the book trade both to the work of authors and to the public benefit generated by that work. The petition concluded by proposing legislation in which authors would be recognized as the root of title to literary property: “And praying, that Leave may be given to bring in a Bill for the securing Property in such Books, as have been, or shall be, purchased from, or reserved to, the Authors thereof.”

### 3. Holdsworth and Curll: Alternative Ways to Manage Piracy Risk

265. Upcott, *supra* note 107; Add MS 38729 f. 110.

266. XV H.C. JOUR. 313, <http://parlipapers.proquest.com/parlipapers/search/basic/hcppbasicsearch> (search for “26 February 1706”); *see also* PATTERSON, *supra* note 4, at 142.

267. PATTERSON, *supra* note 4, at 141-42.

268. XV H.C. JOUR. 313.

269. *Id.*

270. *Id.*



Of course, appealing to an exclusive legal right to print was not the only way publishers could insulate themselves from the risk of piracy. As the last document dated prior to 1710 in the Upcott Collection illustrates, booksellers could leverage marketing strategies to compete against their piratical foes, and authors had a role to play in those strategies. The small receipt pictured below is a relic of a deal between Edward Holdsworth and Edmund Curll for the publication of Holdsworth's enormously popular satire, *Muscipula*. The receipt appears to be in Holdsworth's own hand, reading:



May the [9<sup>th</sup>] 1709

Received of Edmund Curll the sum of Five Guineas in full for the sole Right & Title of a Compleat Copy of a Latin Poem intituled *Muscipula*, & fifty copies of my own use.

Ed. Holdsworth<sup>271</sup>

There are a few details worth noting. First, the sum is calculated in guineas rather than pounds. A guinea was a gold coin originally intended to have the same value as a pound, but which tended to be worth a bit more because of the rising price of gold in the period, rising to as much as thirty shillings.<sup>272</sup> In 1717, its value was pegged at twenty-one shillings (as opposed to the twenty-shilling pound).<sup>273</sup> It is often said that the guinea was considered a more gentlemanly form of currency, used to pay for art, luxuries, and lawyer's fees.<sup>274</sup> The switch to guineas here is probably a sign of respect for the author, or perhaps it is a nod toward his status as

271. Upcott, *supra* note 107. © British Library Board, Add MS 38728, f.120.

272. H. G. Stride, *The Gold Coinage of Charles II*, 28 BRIT. NUMISMATIC J. 386, 393 (1955).

273. *Id.*

274. See, e.g., Paul Lewis, *Victorian Coinage: What's a Guinea?*, <https://perma.cc/8E8W-53B7> (last visited Oct. 20, 2016). Lewis cites multiple examples of nineteenth-century authors whose fees were calculated in guineas.

a poet who, as we will see, was likely still in the amateur-gentleman mode of circulating his work in manuscript.

Rather more interesting than the exact details of the deal between Curll and Holdsworth is the fact that there was a deal at all. *Muscipula* was the eighteenth-century equivalent of a student's joke going "viral." At the time when he wrote the poem, Holdsworth had just completed his BA at Magdalen College, Oxford, and begun work on his MA at the age of twenty-four.<sup>275</sup> The poem is an extended mock-heroic satire in neo-classical Anglo-Latin, describing how the mousetrap was invented by a Welshman named "Taffy", when he fell asleep while eating cheese and awoke to find a mouse trapped in his mouth.<sup>276</sup> The poem was an instant hit. Bernard Lintot advertised an edition of the poem, with an English translation appended, in November of 1708,<sup>277</sup> and several more editions by various printers appeared in 1709.<sup>278</sup> It was not until May of that year that Curll paid Holdsworth for the copy. Therefore, unless Holdsworth was playing several Stationers off of each other, it seems likely that the poem had circulated around the college in manuscript and found its way to Lintot second or third hand, perhaps even without Lintot knowing who the author was, as his edition was anonymous.<sup>279</sup>

So why would Curll bother to pay Holdsworth anything? In part, because the two of them contrived to compete against Lintot's edition by leveraging the authenticity of their text. Curll advertised the edition in *The Tatler* on the 4th of June, noting: "This poem is now first printed with the Author's consent."<sup>280</sup> Three days later, Holdsworth himself published the following notice in the *Post Boy*:

In some measure to prevent the like Imposition upon many other Gentlemen, I do publicly declare, That I never saw, nor am any way acquainted with Mr. Lintott, a Bookseller; but that the several Editions he has printed of my *Muscipula*, were wholly without my Consent, and are very defective, mangled, and full of Faults.  
E. Holdsworth.<sup>281</sup>

Historian Ralph Straus has observed that we cannot always assume that what we read in Curll's advertisements was necessarily true.<sup>282</sup> But in this case, the receipt is a relic that would seem to prove the connection between Holdsworth and Curll. Of course, Holdsworth was holding fifty copies of Curll's edition and stood to gain financially if the copies sold well. However, because the books were advertised at

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275. D.K. Money, *Holdsworth, Edward (1684–1746)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Oxford Univ. Press 2004), <http://www.oxforddnb.com/view/article/13498>.

276. *Id.*

277. STRAUS, *supra* note 244, at 209.

278. The English Short Title Catalogue lists fifteen editions from 1709, including those by Lintot and Curll. See <http://estc.bl.uk> (go to ESTC search; then search for "Holdsworth" and "Muscipula" and sort by year).

279. See the English Short Title Catalogue entry for STC T41627, <https://perma.cc/4G5X-S8S4>.

280. STRAUS, *supra* note 244, at 209.

281. *Id.*

282. STRAUS, *supra* note 244, at 201-02.

a price of only sixpence, the copies were worth less on the market than the five guineas he had received in cash.<sup>283</sup>

The partnership between Curll and Holdsworth accomplished particular goals for each of them and is a fine example of an author publicly representing his work in the market. Even in the absence of clear legal recognition of “author’s copyright,” there were commercial reasons for Curll to remunerate Holdsworth and seek his collaboration in the preparation and marketing of the book. Curll apparently hoped to be able to compete against Lintot’s edition with the public backing of the author. Evidently, the copies sold well, as Curll brought out a second edition of the poem accompanied by an English translation.<sup>284</sup> If we can take Holdsworth’s notice at face value, Holdsworth hoped to improve the quality of the text circulating, or, at the very least, to drum up interest in the poem and claim authorship of it at the same time. It was a winning strategy for Holdsworth, too, who enjoyed a reputation as a fine Latinist for the rest of his life, as the poem was so widely read and republished for decades that it appeared in colonial Annapolis, Maryland, in 1728, and in Florence, Italy, in 1765.<sup>285</sup>

#### IV. SPEAKING OF “COPYRIGHT”: CONCLUSIONS ON THE EMERGENCE OF A LANGUAGE OF COPYRIGHT

By the time the Statute of Anne was passed, it now seems fair to say that “business as usual” for the book trade involved commercial dealings that, to varying degrees, put authors in the position of acting as proprietors of their work. In the transactions between authors and publishers, we can see the embryonic development of the idea that authors hold a kind of property in their work. Much has been written on whether there was or was not common law copyright prior to the Statute of Anne and particularly whether such a right survived initial publication.<sup>286</sup> The contracts analyzed here cannot answer that question with respect to whether such a right was legally recognized, but they do suggest that publishers conceived of what they were buying from authors in terms of a

283. Assuming a value of a guinea at roughly 21 shillings, the five guineas work out to 105 shillings. Fifty copies of the book at sixpence each works out to 300 pence, which, at twelve pence per shilling, works out to only twenty-five shillings. At only sixteen octavo pages, including one plate, the books were likely relatively cheap to produce. See the description of the edition in the English Short Title Catalogue at STC T41628, <https://perma.cc/QN5U-VDSW>.

284. STRAUS, *supra* note 244, at 209.

285. Money, *supra* note 249. The publisher of that edition claims to have received the poem in manuscript. This is perhaps evidence that Holdsworth, who made many trips to Italy later in life, continued to promote the poem this way. Holdsworth stepped down from his position at Magdalen College in 1715, because he refused to take an oath of allegiance to George I. But Holdsworth’s reputation as a fine Latinist was made, and he spent the rest of his life travelling Europe and tutoring the sons of wealthy Jacobite families. His will, which included legacies of at least one thousand pounds, indicates that he had “sufficient private means for a comfortable existence.” *Id.*

286. See, e.g., Ronan Deazley, *The Myth of Copyright at Common Law*, 62 CAMBRIDGE L.J. 106 (2003); H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1 (2014). For an example of the stakes such a question might have for arguments regarding current copyright doctrine, see Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC’Y U.S.A. 585 (2011).

transferable, divisible property right. They created and enforced contract rights for authors that survived initial publication. The stage was set for the recognition of authors' copyright long before the Statute of Anne. The Stationers' petition in fact suggested the idea of authors' copyright precisely because they were already familiar with a form of it in practice. It has been the primary goal of this Article to promote transactions between authors and publishers as key pieces of evidence in these historical developments.

There are further implications of this work, regarding the long history of the copyright lobby, the development of copyright policy and the public domain,<sup>287</sup> and the role of the author in the evolution of copyright. For now, I would like to close with a look at an exchange of letters between Edmund Curll and an author whose works he hoped to print. The exchange illustrates nicely how far the relationship between author and publisher had come. The author was White Kennet, the Bishop of Peterborough. The works were somewhat bawdy translations the Bishop had done when he was a student many years before and which the Bishop apparently did not want to see revived. Dated 1721, the exchange illustrates how comfortable author and publisher had become, jousting with copyright claims. Curll wrote to the Bishop of Peterborough:

My Lord [White Kennet, Bishop of Peterborough],

Having lately Purchased the *Copy-Right* of Two Pieces formerly Translated by yr Lordship (Erasmus's Praise of Folly, and Pliny's Panegyrick) both which I intend speedily to reprint, but will not send them to the Press till I know yr Ldship's mind whether you would be pleased to revise them, or whether they may be reprinted as they are (emphasis added).<sup>288</sup>

Note that the word "copyright" has emerged, finally dissolving the linguistic connection between the physical book and the right to copy. Uses of the word in formal court documents have been discovered as early as 1682,<sup>289</sup> but this instance is notable as an early use of the word in ordinary, workaday correspondence between a bookseller and a relatively obscure author.<sup>290</sup> The bishop readily responded in only two days:

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287. For instance, by no means do I think it is necessarily true that a strong view of authorial rights (such as they were) prior to the passage of the Statute of Anne necessarily equates to a weak view of the public benefit in early copyright policy. I have argued elsewhere that the earliest royal privileges were granted with a view toward advancing "the progress of learning." In some sense, the Statute of Anne united that policy with a recognition that, at least with respect to the composition of new works, authors had a significant role to play, but there were signs that their rights would be limited. For further comments on how the copyright might have evolved under the common law, see Christopher Newman's comments in response to Tom Bell's Intellectual Privilege (May 7, 2014), <https://perma.cc/WMY4-K3YU>. On the early history of the public domain, see, e.g., Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371 (2011); Simon Stern, *Creating a Public Domain in Eighteenth-Century England*, ENGLISH HANDBOOKS ONLINE (2015), <https://perma.cc/Q7BW-QQQP> (last visited Oct. 30, 2016).

288. Transcribed in STRAUS, *supra* note 244, at 88.

289. Gómez-Arostegui, *What History Teaches Us*, *supra* note 5, at 1225–26.

290. Donald W. Nichol, *On the Use of 'Copy' and 'Copyright': a Scriblerian Coinage?*, 12 THE LIBRARY 110, 114 (1990) (noting the use of the word "copyright" in correspondence dating from 1728).

Mr. Curll.

I received Yours of Nov. 4<sup>th</sup>, and should be glad to know from whom You purchas'd the *Copy Right* of the translations of Erasmus and Pliny, and I think they had no power of assigning them w<sup>h</sup>out the Author's consent, who had invested them in the Right of a single Impression (emphasis added).<sup>291</sup>

First, the Bishop claimed that Curll could not have purchased the copyright in the works because he had never transferred full rights. The Bishop picked up the language of "Copy Right," apparently without difficulty, indicating that the usage was likely not new to him. What is interesting about his claim is that the two works in question were printed in the 1680s.<sup>292</sup> If the Bishop is telling the truth, then he reserved rights to reprint at that time, having "invested" in the purchaser only the right to print one impression. The author here appears as the full master of the finer points of the divisibility and transferability of copyright, even prior to the passage of the Statute of Anne. Next, the Bishop made a purely commercial argument in the alternative:

If You had a just Right to the Copies, I cannot think the reprinting of them will lend much to the service of the world or to your own Interest. Such Trifles cannot be vendible, especially when Mr. Smith has publisht a later translation.<sup>293</sup>

He noted the importance of other competing editions, again displaying awareness of the market and the dynamics inherent in the book trade. Finally, the Bishop concluded the letter with this observation, confirming the value of his own reputation as an author:

In short I cannot think it advisable for You to reprint them, nor can I possibly take the pains to revise them. . . . If You despise my Advice You had best however take care to insert no Name of a writer but what You find in the old title pages, for You know property and privilege are valuable Things.<sup>294</sup>

The original title pages did not include Kennet's name. Apparently, Curll did not despise the Bishop's advice, as Straus could find no evidence that Curll ever printed the pieces. In the exchange between Curll and the Bishop, we can see the author fully functioning as legal claimant, commercial dealer, and guardian of moral rights to a valuable name. The picture at this point in history is clearest in the private orderings of author and publisher.

291. STRAUS, *supra* note 244, at 89.

292. The Erasmus (bibliographic name/number: Wing / E3215) has a citation and a full set of images available online through Early English Books Online, at [http://gateway.proquest.com/openurl?ctx\\_ver=Z39.88-2003&res\\_id=xri:eebo&rft\\_id=xri:eebo:image:49853](http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:49853). The translation of Pliny (Wing / P2573) also has a citation and a full set of images available online through Early English Books Online, at [http://gateway.proquest.com/openurl?ctx\\_ver=Z39.88-2003&res\\_id=xri:eebo&rft\\_id=xri:eebo:image:65520](http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:65520).

293. STRAUS, *supra* note 244, at 89.

294. *Id.*