

MILLAR V. TAYLOR (1769) AND THE NEW PROPERTY
OF THE EIGHTEENTH CENTURY

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ABSTRACT

The reception of copyright in the English common law in the eighteenth century provides a unique opportunity to study the jurisprudential concept of property rights at a moment of change. While copyright, or to use the contemporary term, the "right of copy", had been in the process of development since the introduction of the printing press into England in 1476, it was not until 1709 that Parliament enacted the first copyright statute, the Statute of Anne 8 Anne, c. 19. Sixty years later in Millar v. Taylor 4 Burr 2303, 98 Er 202, the Court of King's Bench considered the nature and purpose of copyright for the first time. The case arose in the course of the "literary property debate", a commercial struggle between rival booksellers for predominance in the emerging book trade.

This paper proceeds through a detailed study of the genesis and theoretical background of Millar v. Taylor to address two questions: (1) in what sense did copyright constitute a "new property" in the common law, and how did it contribute to a conceptual change in property rights; (2) how did English courts conceive of "authorship" during the evolution of copyright, and how, in turn, did copyright as it emerged from the literary property debate alter the role of the author ?

The judgments of Justice Joseph Yates and of William Murray, Lord Mansfield, offered particular insights into each

of these questions. Justice Yates, in dissent, perceived that copyright posed a challenge to traditional property theory, especially to arguments grounded in natural law. As its subject matter was the intangible of literary ideas and expression, he argued the need for limits to be imposed on copyright in the interests of the public domain. The property right could not be derived from value, as it was the right itself which created value. Lord Mansfield adopted a natural law approach, but located it largely in the personal, as opposed to proprietary, interests which copyright served. The author's interests in privacy and in controlling the product of his intellectual labour formed, for him, a principal justification for the property right.

The paper explores these ideas, first, by giving a close reading to the precedent cited in Millar v. Taylor (1769), and tracing back through precedent cited therein to the roots of intellectual property in English law. Second, the insights of Justice Yates and Lord Mansfield are taken forward through subsequent developments in legal theory and copyright.

In particular, the recognition, which followed Millar v. Taylor and vindicated Justice Yates' position, of copyright as a statutory property designed and limited by political choice is shown as characterising the leading theoretical approaches to property rights-- including utilitarian, Realist and critical approaches--which now predominate in jurisprudence. Further, Lord Mansfield's understanding of the dual purpose of

copyright is examined in relation to a personhood justification of property, and in terms of the evolution of copyright as a property regime for protecting factual works of information, and fictional works of imagination. The paper endeavours to highlight both the concern for public domain and for personal interests of authors which had such significance in the early development of copyright.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
A. SOURCES OF THE INQUIRY	1
1. Law: The Forgotten Source	1
2. The Challenge Of The Printing Press	2
B. "PROPERTY"	5
1. Property in Political Theory and Law	5
2. A Definition of "Property"	8
(a) "Property" and "Property Right"	10
(b) Three Attributes of Property	11
(1) Exclusivity	11
(2) Alienability	13
(3) Externality	13
C. "COPIES"	14
1. A New Property ?	14
2. Defining "The Copy"	16
D. "AUTHORS"	17
E. APPROACH AND OUTLINE OF INQUIRY	22
1. <u>Millar v. Taylor</u> (1769) as a Focus	22
2. Method and Outline	23
II. THE LITERARY PROPERTY DEBATE	26
A. THE BOOKSELLERS' WAR	26
B. THE OVERTURNING OF <u>MILLAR V. TAYLOR</u>	33
1. The Result in <u>Donaldson v. Beckett</u>	33
2. Lord Camden and Lord Mansfield	36
C. AUTHORS AND PUBLISHERS	38
1. Interests in Conflict ?	38
2. Economic Interests and the Value of Single Case Analysis	41

III. PROPERTY AND POLITICS: CROWN PREROGATIVE AND THE RIGHT OF COPY	43
A. CROWN CONTROL OF PRINTING AND CENSORSHIP . . .	43
B. ANALYSIS OF THE PREROGATIVE CASES	45
1. The Pre-Revolution Cases Cited in <u>Millar v. Taylor</u>	46
2. <u>The Post-Revolution Cases</u>	51
3. The Subsidiary Prerogative Cases: Property in Patent Grants	53
(a) Patents For Office Holders	53
(b) Doctrines of Patent Construction . .	55
(c) Nature of Property Rights	55
4. The Scope and Nature of Crown Copyright .	57
C. <u>DARCY V. ALLEN</u> AND PATENTS FOR INVENTIONS . . .	59
D. <u>MILLAR v. TAYLOR</u> AND THE CITIZEN KING	65
1. The Issue of Inventions	65
2. The Prerogative Cases in <u>Millar v. Taylor</u>	68
E. SUBSEQUENT DEVELOPMENTS IN CROWN COPYRIGHT . .	74
1. Crown Prerogative Copyright	74
2. Public Domain and Government Publications	75
IV. PROPRIETARY AND PERSONAL INTERESTS IN EARLY COPYRIGHT: THE EQUITY INJUNCTION CASES	80
A. INTRODUCTION	80
B. REVIEW OF THE CASES: VICISSITUDES OF AUTHORS AND PRINTERS	81
1. Injunctions for Published Works	82
2. The First Publication Cases	86
C. PROPRIETARY INTERESTS: THE SCOPE OF THE RIGHT OF COPY	87
1. Scope of the Right in the Injunction Cases	87
(a) Type of Work	88
(b) Uses by Third Parties	90

D.	PERSONAL INTERESTS OF THE AUTHOR: LORD MANSFIELD AND THE LITERARY PROPERTY QUESTION .	103
1.	The First Publication Cases	103
2.	Personal Interests After <u>Donaldson V. Beckett</u> (1774)	106
3.	Personal Interests and Copyright Law . . .	107
4.	Lord Mansfield: Authors and Property Rights	111
E.	A CONTEMPORARY COUNTERPART: MISAPPROPRIATION OF PERSONALITY AND PUBLICITY RIGHTS	114
V.	THEORIES OF PROPERTY IN MILLAR V. TAYLOR	118
A.	LIMITS OF PRECEDENT AND THE RESORT TO REASON .	118
B.	NATURAL LAW THEORY OF PROPERTY RIGHTS AND COPYRIGHT	119
1.	The Political Theory of Natural Rights . .	120
2.	Locke and the Natural Law Theory of Property	121
3.	Blackstone On Property Rights and Copyright	124
4.	The Majority Opinions in <u>Millar v. Taylor</u> .	129
C.	JUSTICE YATES' CRITIQUE OF THE NATURAL LAW POSITION	132
1.	Public Domain: Natural Rights of the Public	132
2.	The Argument Over Incorporeal Property . .	134
3.	Value as Property or Creation of Law . . .	138
4.	Statutory Property	141
D.	COPYRIGHT AND THE BREAKDOWN OF ABSOLUTE PROPERTY RIGHTS	145
1.	Intangible Property and The Transformation of Legal Theory	145
2.	The Politicisation of Property in Modern Legal Theory	149
E.	THE CONTINUING DEBATE OVER THE NATURE OF COPYRIGHT	153
VI.	COPYRIGHT AND THE JUSTIFICATION OF PROPERTY FROM PERSONHOOD	158
A.	LORD MANSFIELD AND THE LABOUR THEORY	158

B.	PROPERTY AND PERSONALITY: TWO THEORIES	160
1.	Property and Possessive Individualism . .	162
2.	Hegel's Theory of Property and Personal Will	163
3.	Contemporary Scholarship on the Personhood Basis of Property	167
4.	The Appeal of a Theory of Personhood . . .	169
C.	COPYRIGHT AND PERSONHOOD	170
1.	The Justification From Personhood	170
2.	Problems with a Personhood Justification of Property	171
3.	A Preferred Use of the Theory	175
D.	LABOUR AND CREATIVITY IN COPYRIGHT	177
1.	Originality in Modern Copyright Law . . .	177
2.	The Protection Afforded 'Informational' Works	180
3.	The Protection Afforded 'Creative' Works .	184
E.	RETRIEVING A PERSONAL INTERESTS PERSPECTIVE . .	189
	ENDNOTES	193
	BIBLIOGRAPHY	246

I. INTRODUCTION

A. SOURCES OF THE INQUIRY

Prior to outlining the course of research and argument found in the body of the paper, this Introduction highlights the questions which excited the inquiry. Whether these questions have received the discussion they deserve, whether indeed the discussion which ensues suggests useful answers to the questions, remains for the reader to determine.

1. Law: The Forgotten Source

Political theory shares an intimate historic relationship with law and legal theory. The concern of theorists whose work forms the corpus of Western political and social thought is the stuff of law: the rights, rules and obligations which shape the relations between sovereign authority and citizens, and between citizens inter se. Many of the great writers in the Western tradition of political theory were themselves trained in the law, while most demonstrated a sophisticated understanding of the workings of ancient and contemporary legal systems.¹

Scholars in law, as well as lawyers and judges to a lesser degree, have long shown an understanding of the interdependency of law and legal theory on the one hand, and theories of politics and epistemology on the other. This

interest in political theory has increased with the arrival in recent years of critical, theory-based perspectives on legal systems-- such as the feminist and critical legal studies movements-- which have placed emphasis on understanding the dynamics of historical change in jurisprudence. Somewhat neglected in the study of political theory, however, is a recognition that the law, comprised of statutes, judicial decisions and doctrinal commentary, very much represents a working out of theory on the ground of everyday practice. Few studies in the history of ideas seek to connect works in theory with the work courts do in devising solutions to discrete problems of comprehending and balancing conflicting social interests.²

This lacuna in the study of political theory and the history of ideas partly inspired this paper, which admittedly seeks its place within the traditions of legal scholarship and the history of law. Further, the very way in which the common law incorporated ideas, in and of themselves, as objects of property provides an opportunity to reflect on issues in the history of ideas, and of legal ideas specifically. The field for this inquiry will be the roots of copyright theory and practice in the common law.

2. The Challenge Of The Printing Press

This paper takes advantage of the English legal system's recognition that it was dealing with a new kind of property

right to examine a historical moment when theories and conceptions of property were drawn into the process of judicial decision-making. The moment in question is the 1769 decision of the Court of King's Bench in Millar v. Taylor 4 Burr 2303, 98 ER 201.³ That decision constituted the penultimate moment in the litigious centre of the literary property debate of the mid-18th century. The debate raised the question of whether a right of copy, that is, an exclusive, alienable and perpetual right in the author of a literary composition to make or authorise the making of copies of the composition, was a common law right of property that existed prior to, and survived the enactment in 1709 of An Act for the Encouragement of Learning by the Vesting of the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned ⁴ (hereafter the Statute of Anne). In short, the English courts faced this question: "is copyright property" ? By examining answers they gave to that question this paper intends to address two issues:

- (1) In what ways did the 'right of copy' constitute a new type of property, and how did its appreciation as such affect legal theory ?
- (2) How were the role and interests of 'the author' understood in the literary property debate, and how in turn did the 'right of copy' re-make those interests ?

These issues came for consideration before the English bench and bar two centuries after they were put in play by a mechanical invention: the printing press.

We live in times frequently and fashionably described as the information age. The technologies of the age-- computers, reprographic devices, telecommunications, and so on-- are claimed to be changing the way humans think and interact, and making "information" the most valuable resource in the international economy.⁵ Law and legal institutions are repeatedly exhorted to overcome traditions drawn from an earlier culture to keep pace.

Considerable scholarship suggests that the twentieth century is not witness to the first transformative events in the history of human communications brought about by technology. Almost thirty years ago Marshall McLuhan speculated about a revolution in human affairs wrought by the invention of the printing press in the late fifteenth century⁶, an insight he elaborated into a theory of the formative powers of different media of communications. His argument that media are more than instruments of communication, that their very nature and characteristics shape communication itself and therefore social life, has been taken up by numerous subsequent scholars.⁷

This paper does not seek, however, to involve itself in the question of whether and to what extent developments in technology drive social change. The answer that must suffice

here, is that the process is dialectical: technology precipitates change in economic production and social relations, and existing social relations determine the manner in which technology is received and incorporated into human affairs. The possibility for mass distribution of the products of authorship created by the printing press could conceivably have resulted in a full-scale public domain in texts, or perhaps 'ownership' of the presses by a priestly cast; that it did not in the England and Europe of the time should hardly seem accidental or surprising. Certainly for the common law, itself a creature of incrementalism, the initial challenge presented by new phenomena is always to comprehend them within existing terminology and categories of analysis. In this inherently conservative practice, talk of revolutions is a risky enterprise.

B. "PROPERTY"

1. Property in Political Theory and Law

On a philosophical level, the level of political theory, discussions of property comprise an honoured tradition. Indeed, the "problem" of property rights, their delineation, justification and critique, may be seen as one of the constitutive issues in modern secular political theory. In political theory, "property" generally connotes the means of allocating resources in nature, whether land or physical

objects, including rights to control the cultivation, production, use and exchange of those resources. It is of the nature of philosophy to universalise, to define terms in a general and abstract way to make philosophic discourse possible. It is of the nature of common law, however, to particularise. When the question "what is property ?" or "what interests can be justified as proprietary ?" arise in law, that is, in the courts, it is important to recognise the unique demands imposed by the context. In the adversarial system, such questions arise in the course of particular disputes between particular parties. The answers resolve, or attempt to resolve, those disputes. A classic instance in which "what is property ?" comes to be addressed by a court occurs when the word "property" is used in a contract or statute, and resolution of the dispute demands its interpretation. The Supreme Court of Canada, for instance, recently ruled in a case involving the alleged theft of confidential information in the form of photocopied lists of employee names and addresses, that "property" must be a tangible object.⁸ In a different circumstance in which "property" has become a category entitling the right-holder to a specific civil remedy, the term may receive a different interpretation. This is simply to point out that while theories of property meet the ground in the legal protections actually accorded interests resembling an ideal of property,

lawyers and judges are engaged in an activity distinct from that of philosophers.

Defining "property" often seems an exercise of limited utility in the common law tradition. An English "law of property" in the generic sense did not exist prior to 1709, and perhaps never has. "Real" and "personal" property have represented two quite separate legal regimes. That both concerned the use and control of 'things' in the material world did not result in conceptual or procedural unity. The English law of real property owed its character to the feudal system of land tenure. In that system, land could not be owned outright by any private party, but was held of the Crown, subject to the obligations and strictures imposed by incidents of tenure. Holders of estates in the land struggled over a period of centuries to carve out rights of alienation and to devise in order to avoid feudal incidents and strict rules of primogeniture. The doctrine of uses, which separated legal from beneficial ownership and title from actual use and benefit of land, arose in the course of that struggle. Incorporeal rights in the form of incomes and offices were recognised, as rights running with land.⁹

The law of personal property had a more straightforward genesis. Blackstone, writing in 1763, felt able to state that moveables gave rise to property rights sooner than land

...principally because few of them could
be fit for use, till improved and

ameliorated by the bodily labor of the occupant, which bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.¹⁰

The law of ownership of things, with its concomitant developments in the law of theft and conversion, evolved without reference to feudal incidents. The concept of property in English law did not involve a concept of outright ownership; rather, title to land or to goods had a comparative quality: the party with the best claim to title was viewed as the owner. Another feature of property in the common law tradition was the importance of possession as an indicium of title.

2. A Definition of "Property"

With these caveats in mind, we turn to the hazardous task of giving meaning to the term "property". It may seem odd to offer a definition at an early moment in a paper one of whose purposes is to explore changes in the concept of property that occurred as a result of the common law's encounter with claims to the ownership of intangibles in the form of ideas and reproducing the material expression of ideas. The title of the paper implies "property" to be a historical construct, capable of being defined only in reference to the understandings of time and place. It is useful, however, to have an idea of what sets rights of property apart from other interests known to

law, and further to have a sense of what is meant throughout the paper when the word "property" is used. The definition proffered here names three attributes of property rights which have been important through the course of the development of private property in the common law tradition:

- (1) exclusivity
- (2) alienability
- (3) externality

The first attribute has remained the most constant feature of property rights in modern Western societies. The attribute of "alienability" is more problematic, seeming specific to certain societies and historical periods, but becoming increasingly dominant in property relations as vestiges of feudal traditions disappeared, and market arrangements took over. The attribute of "externality" is more problematic still, and in many ways represents the story that will be told in this paper. At the outset of the literary property debate, it was generally thought that property pertained only to objects in the physical world. Copyright challenged that notion. Copyright became "property" through judicial recognition that 'internal', personal interests could ground exclusive rights of property.

This definition of "property" is, then, more of a signpost than a definition. These three attributes have played central roles in the concept of private property into which the literary property debate fell in seventeenth and

eighteenth century Britain. The changes they have gone through reflect in part the arrival of intellectual property rights like copyright in law. They serve as the writer's understanding of "property" throughout this paper; context and attribution will indicate when other uses and meanings are intended. This definition accords with what the English courts of the eighteenth century meant at a minimum¹¹ when they asked: is the 'right of the copy' a 'right of property' ? In so saying, however, one must remain conscious that this understanding has changed, partly because of developments in legal history to which much of this paper is addressed, partly because of the influence of theorists like Wesley Hohfeld¹².

(a) "Property" and "Property Right"

Two ambiguities about the relationship of "property" to the word "right" deserve attention. First, in philosophical terms the phrase "right to property" can denote a moral claim to property. In his book The Right to Property¹³ Jeremy Waldron explores several theories to identify whether they make out a moral (as opposed to purely utilitarian) justification of "property rights". The latter phrase, frequently used synonymously with "right to property", indicates a legal entitlement to property, that is, an interest enforceable by legal remedy. It is that meaning which is intended throughout this discussion, and for that reason references to "right to property" have generally been avoided.

Second, "property rights" contains a redundancy: "property" refers not to an object but to a type of legal right. The former is a colloquial meaning which, as C.B. Macpherson points out¹⁴, was never satisfactory for theory. The idea that property refers to objects is nevertheless tenacious and continues to cause difficulties, not least when statutes using the term "property" require interpretation. This paper uses "property" and "property rights" synonymously unless otherwise indicated.

(b) Three Attributes of Property

What constitutes "property" as opposed to other kinds of rights ? In the common law tradition at the time of Millar v. Taylor in 1769, and in major part since then, three elements have been central in making something "property"; each calls for brief explanation.

(1) **Exclusivity** -- a property right necessarily involves the exclusion of non-rights-holders from the activities covered by the right. That is, the right-holder is the only person who may engage in the activity protected, or consent to others engaging in it. Felix Cohen provides the following definition:

Private property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those

activities and in either case secure the assistance of the law in carrying out his decision.¹⁵

Property is, in this sense, private property. Macpherson points out that state-owned property is equally as 'private' in this respect as is property owned by individuals or corporations.¹⁶ He goes on to argue that "property" has been given too narrow a meaning by liberalism, that it should be extended to include a right not to be excluded:

Exclusiveness is not logically entailed in the concept of property as an individual right needed to enable men to realize their human essence as moral or rational beings....An individual right not to be excluded from something held in common is as much individual property as the right to exclude.¹⁷

While a definition of property as both a right to exclude and a right not to be excluded can be internally consistent, it lacks some precision; it seems to follow from Macpherson's theory, for instance, that a right not to be excluded is inalienable. His definition has an overtly political purpose: to retain "property" as a norm of the good society, while infusing it with a new possibility for human relations. Despite his critique of private property, he wishes to retain the term for its hortatory value. For explanatory purposes, however, it seems more useful to distinguish between property as a right to exclude, and a public domain or commons as the source of individual rights not to be excluded. Exclusivity in

the Western tradition has meant 'exclusive to legal persons', and not groups. In the consideration given copyright in the literary property debate, the courts never contemplated a property that could be 'owned' by a collectivity, as may well have been the case in societies organised around tribal or kin-group structures.

(2) **Alienability** -- this criterion clearly raises the issue of historicity. The English law of real property was for centuries dominated by the efforts of lawyers to get around the rule-bound inalienability of feudal land.¹⁸ Further, one can think of innumerable circumstances-- from agricultural land preserves to the regulation of insider trading-- in which rights of property are restricted by limits on the power to sell. Restricted, but rarely eliminated; almost all such instances involve limits for a period of time, on the class of persons with whom exchange can be made, or on the uses a buyer may make of the property sold, but not an absolute bar to alienation. In Hohfeldian terms, alienability may be a 'power', not a right, and a power which can be limited in various ways, but if so it has become the constitutive power of a property right in the commercial age.¹⁹

(3) **Externality** -- a property right is generally thought to pertain to resources in the material world, external to the right-holder. In his 1917 article Hohfeld listed five things

to which rights may pertain: tangible objects, intangible objects, the right-holder's own physical person, another person, and what can be called for lack of a better term 'moral interests.'²⁰ In the literary property debate, a key issue was whether only the first category could be a subject of property. Copyright was one of the intangible objects which, by the time Hohfeld wrote, had become property. But copyright in its origins had also had characteristics of moral interests; in the course of the debate, those aspects became subsumed within a property right. This raises questions about the nature and purposes of the "new property" which this paper will endeavour to answer. The fundamental distinction between property and personal rights had been that property encompassed activities performed on resources in the objective world, and property was alienable. With copyright, that distinction became much less clear.

C. "COPIES"

1. A New Property ?

The chief attribute of intellectual property is that apart from its recognition in law it has no existence of its own. It is in fact as well as in definition the stuff of an intellectual, rather than a feeling accord. Lacking tangible substance altogether, its boundaries cannot be recognized through the medium of the human senses.²¹

In what senses was copyright a new property ? The principal problem for the judges who first grappled with the nature of an exclusive right to copy written texts concerned its intangibility, the separation of the right claimed from the physical object to which it pertained. If possession evidenced a claim to property for realty or chattels, it had little significance for copyright; the very purpose of a right to copy was that it pertained after an author or assignee had ceded possession of each physical copy of a published composition.

The printing press presented traditional concepts of property with a number of related paradoxes. Property, in Blackstone's view²², was made necessary by scarcity. The printing press largely eliminated scarcity of texts as a factor. The press could reproduce books in as great a number as the market demanded. A recognition of property in copying books actually imposed an artificial scarcity, a scarcity produced by law rather than nature. Similarly, copying a book without its author's permission did not deprive him of any physical thing; concepts of trespass and theft did not aptly describe an invasion or taking that left the putative owner of a text unaffected, save for the profits he might otherwise make. The problem of copying or reproduction might be seen more generally as a problem of industrial processes which made replication of physical objects a relatively straightforward matter. That an 'industrial property debate' did not take

place in English law, at least not in the same way as the literary property debate, raises interesting questions of comparison.²³

2. Defining "The Copy"

Just as "property" connotes "objects owned" in common parlance but "rights of property" in legal theory, the word "copy" in the eighteenth century had both colloquial and legal meaning. One "owned" a copy, or copies, as a physical object. In law, however, the "copy" was understood to mean "the right of copy" or "copy-right." This usage started with the members of the Stationers' Company, the London printers' guild, who developed their own internal system for registering 'copies' claimed for exclusive ongoing publication.²⁴ The Statute of Anne recognised this meaning, as did eighteenth century courts.²⁵

Copying had a particular commercial connotation by that time. When done by someone alleged not to have authorisation from the 'owner' of the copy, it was often called 'piracy.' This latter term should be distinguished from 'plagiarism', which referred to copying another's work and claiming it as one's own. What constitutes plagiarism has varied considerably over time, with the scope of "legitimate" copying or borrowing of another's work without attribution generally and steadily declining since the introduction of the printing press.²⁶ Piracy is the particular concern of publishers,

plagiarism the concern of authors; in the literary property debate, piracy was the clarion call of the plaintiff printers and booksellers.

D. "AUTHORS"

The author as an individual creator of literary works is a relatively modern conception.²⁷ The status of the 'author' has varied greatly from society to society, and over time. Oral traditions of storytelling exist in all cultures, and predominate before mechanical means for multiple recording of written language become available. Richard Wincor describes how performers rather than authors, theatre and ritual rather than texts, hold centre stage in the transmission of symbolic language within pre-literate societies. Knowledge of the stories is a source of power and influence, and is bound up with the status of the priest:

In ancient society it was the exclusive province of a privileged few to recite special words and perform certain ceremonies. It follows that the subject matter of their performance was a thing of value....These ritual plays were nothing less than implements of sovereignty, their corporate owners used them as stock in trade to preserve status...²⁸

Michel Foucault writes:

In our culture--undoubtedly in others as well-- discourse was not originally a

thing, a product, or a possession, but an action situated in a bipolar field of sacred and profane, lawful and unlawful, religious and blasphemous.²⁹

To Foucault, the modern concept of the author, or in his words the "author-function"³⁰, commenced roughly when books became "objects of appropriation...whose legal codification was accomplished some years ago."³¹

Elizabeth Eisenstein traces changes in the concept of authorship in Europe to the technological breakthrough represented by the printing press.³² Eisenstein does not propose a technological determinism. Rather, she states her intention as righting a balance that, in her view, has tilted too far in the direction of seeing human agency, whether in the guise of philosophy or the dynamics of social classes, as master of man's fate.³³ In her view, the printing press made some activities possible that were not possible before; those activities bore on intellectual life itself; and they profoundly affected the structure of human relationships, dependent as they are on communication and intellectual exchange. Among the institutions which Eisenstein suggests the printing press irrevocably altered was that of authorship, both as an economic and psychological endeavour.

Eisenstein's points include the following. Prior to the advent of the press, the copying of texts was done by hand, and copyists were respected craftsmen.³⁴ Book production was heavily labour intensive, and most books copied were classic

texts. Original composition consequently had little value. Indeed copying, and not composition, represented the essential activity in the world of producing texts for a relatively small class of scholarly readers and theologians. So paramount was the physical text that medieval law did not recognise a distinction between a literary work and the paper on which it was written. With the printing press came a division of labour, characterised first by the virtual disappearance of copyists. The writer became valued as someone who could provide the presses with material to print. As books increased in availability, the task of scholarly writing itself changed from the exegesis of single texts to a combining of sources and ideas. The printing press made wide-scale literacy feasible and worthwhile, which led to the creation of a mass readership. Eventually, it became possible for authorship to be conceived as a profession³⁵, at least for writers achieving a measure of success.

With the creation of an audience for books, however, came an entirely new concept of the author as a creator, an originator, of compositions. Eisenstein speculates on a number of factors which may have contributed to a new emphasis on individualism in writing: the standardisation of typefaces led to a counterbalancing search for more idiosyncratic personal expression³⁶; print gave writing a physical permanency it had not had before, permitting much greater certainty in attribution of authorship³⁷; print permitted for the first

time a "silent", in-depth communication between a wide readership and a living author, resulting in a more confessional mode of writing ³⁸; engravings and figurative drawings could be reproduced in printed books, making it possible for readers to become familiar with the portraits of authors ³⁹. Eisenstein goes so far as to suggest that the Romantic movement itself, with its image of the author as artist-genius, was the work of authors who quite naturally praised the sensibility of their readers, while disparaging that of the philistines who did not.⁴⁰

How did law encounter the new phenomena of printing and the role, and career, of the author that printing spawned? Two important responses occurred in the related areas of libel and censorship. As areas of legal concern, these largely⁴¹ responded to the harm which the new technology and its animators threatened to do, be it harm to the state's security, or harm to the private reputation of the powerful.⁴² In terms of defining the status and rights of the author, however, the law's response appeared with copyright: a form of exclusive right in the author over the reproduction of his or her literary work.⁴³ Foucault sees a connection: the state's desire to punish or restrain authors constituted the reason for their recognition as named individuals, and for books becoming the subject of property.⁴⁴

The link between copyright and the Romantic movement has been noted by several scholars.⁴⁵ As will be shown in greater

detail, copyright rewarded the author for his originality, and proscribed the unauthorised copying of texts which prior to the printing press, and for some time after its invention, had been the backbone of book production. Several studies have examined the extensive 'borrowing' from earlier texts which characterised authorship through the time of Shakespeare ⁴⁶; the classical concept of artistic endeavour had exalted imitation, not originality. Copyright, then, as a form of property is plausibly implicated in the constituting of the author as a romantic figure, the self-expressive hero. It should be noted, however, that the copyright system has continued to thrive during a time when the most influential movements in literary criticism--structuralism and deconstructionism-- have disparaged the role of the author in the birth and life of texts, even declaring the death of the author.⁴⁷

A second purpose of this paper, then, is to examine through the development of copyright and its apotheosis in Millar v. Taylor the degree to which images of "authorship" made their way into legal thinking, and how copyright has played a part in guiding its subsequent configuration. It will be argued that copyright has constructed the author as 'owner' of his original expression; this property relationship to the work both celebrates an individualistic notion of creativity, and serves to meet material and personal expectations of the author in sending (publishing) his work into the world.

E. APPROACH AND OUTLINE OF INQUIRY

1. Millar v. Taylor (1769) as a Focus

Taking a single case as the focus for a study poses certain risks. For one thing, there is a danger of making the case stand for more than it did in reality; as noted above, the context of a case is a particular dispute in which parties make arguments not for the sake of aesthetics, but to win. The parties in Millar v. Taylor did not approach the literary property question with philosophic detachment. Their debate represented a long-standing struggle of commercial interests; the plaintiff Millar was one of several major London booksellers who pressed the debate in an effort to retain predominance in the book trade.⁴⁸ Further, the single case which provides the focus must be sufficiently interesting to bear the attention given it. There are reasons for believing the decision in Millar can bear such attention. The case has been noted for a number of reasons: as one of only two instances during Lord Mansfield's 26-year tenure as Chief Justice (1756-1782) when the four judges in King's Bench failed to achieve unanimity⁴⁹; and as a pivotal moment in the jurisprudential debate over the doctrine of stare decisis.⁵⁰ Most important for our purposes, the opinions of the judges in Millar represented responses to extensive theoretical positions developed by several of the more impressive legal

figures of the age.⁵¹ They stand up well as theory after 200 years of evolution in a complex area of law.

The Millar case was the penultimate chapter in the literary property debate because five years later the House of Lords in Donaldson v. Beckett⁵² effectively reversed the ruling in Millar, and settled the course of Anglo-Canadian and American copyright law as a statutory regime. This paper concentrates on the earlier decision because it contains the more extended and thoughtful elaboration of the issues raised in the debate. The advisory opinions of the twelve judges in Donaldson in large part cover the same ground, as do those opinions of the Lords which are reported.⁵³

In deciding the literary property issue, the Court of King's Bench also provided a sense of the place of authors and their work in society. Particularly in the opinion of Lord Mansfield, an appreciation appears of the personal nature of many of the most important interests implicated in copyright. That appreciation, which later developments betrayed by conceiving literary property as a purely commercial right, has relevance for explaining various neglected but important features of copyright and of intellectual property as a whole.

2. Method and Outline

This paper approaches Millar v. Taylor by examining the legal sources from which it arose. Specifically, it traces the precedent cited by the King's Bench judges in Millar, and the

sources of that precedent, as far back as the reporting of cases and limits of law French allow. In that way, legal doctrine which influenced the reception of the products of the printing press into the common law can be readily identified. When analysed, the precedent cited in Millar divided itself into three broad categories, which give the structure for Parts II, III and IV of the paper:

Part II -- Cases which comprised the literary property debate leading up to Millar; in these cases the parties developed the strategies and arguments they used in interpreting copyright to the courts; this Part also considers the outcome of the debate in Donaldson v. Beckett and its implications for the subsequent development of copyright law.

Part III-- Cases dealing with Crown rights and powers in and over the book trade, and prerogative powers in general; the interpretation of the political history of publishing represented one of the two major grounds of dispute in the debate; Part III also reviews in brief the comparable development of the law of patents as a Crown-granted right.

Part IV -- Cases involving applications for injunctions to prevent unauthorised uses or takings of literary compositions, and to protect the interests of authors and/or publishers; Lord Mansfield's use of the recognition of a privacy interest in the protection given unpublished manuscripts receives particular attention, and leads to a short discussion of moral rights and publicity rights in contemporary law.

Notable by its absence from the precedent in Millar was precedent drawn from the fields of real or personal property,

with a single exception.⁵⁴ This reflected the Court's awareness that the issues posed by copyright presented unique problems, not easily assimilated by analogy to existing principles of common law property. The judges in Millar did, however, deal at some length with principles of property rights. That discussion forms the basis for Part V, which attempts to explore the theoretical implications for the law of property of the earlier findings, particularly those in Part III.

Part V -- A study of the competing theories of property raised by the majority and dissenting opinions in Millar, with emphasis on the challenge to a natural law explanation and justification of property by Justice Yates for intangibles; the effect of this insight on the positivist reinterpretation of property rights and the politicisation of property in modern legal theory.

The paper concludes in Part VI with an analysis of how the dual interests of copyright reflected in Millar-- proprietary interests of commercial exploitation, and personal interests related to authorship-- continue to play themselves out in the law, drawing in particular on aspects of Lord Mansfield's opinion examined in Part IV.

Part VI-- A reexamination of Lord Mansfield's position as a third justification of property in light of Hegel's theory of property as constituting personhood, and an analysis of the subsequent evolution of copyright's use of originality as a basis for a property right.

II. THE LITERARY PROPERTY DEBATE

A. THE BOOKSELLERS' WAR

Cases are not philosophical debates, but immediate responses to particular disputes between two parties. Not only does the dispute before a court, with its untidy facts of varying social generality, determine the terms of judicial decision-making, but the court's need to provide an answer drives the terms of its inquiry. Legal realists might argue that judges find theory to justify the decisions they wish to make; it is not necessary to go so far simply to recognise that, for judges, theory represents a means to the end of dispute resolution, not an end in itself.

Millar v. Taylor (1769) required the Court of King's Bench to decide whether the common law of property incorporated an exclusive right to make copies of literary compositions. The question forced the Court to consider the nature of property rights, and the rights of authors. It came before the Court, however, in the context of a lengthy commercial dispute between rival groups of booksellers. This Part of the paper seeks to outline that more narrow dispute, noting aspects of the English legal system's ultimate resolution of the it.

Legal protections for printers' interests⁵⁵ evolved from the late fifteenth century introduction of the printing press

and have been described elsewhere, not least in the opinion of Willes J. in Millar.⁵⁶ In 1694 the last in a series of Licensing Acts, which combined censorship with a system of book registration, came to an end, and with it the only formal means for the London printers' guild, the Stationers Company, to regulate the book trade. Faced with an increasing problem of 'pirated' editions of works they had printed, booksellers-- primarily those located in London-- pressed for legislation recognising exclusive rights in the printing of books. In 1709 they succeeded, as Parliament enacted the Statute of Anne. The Statute provided an exclusive, assignable right to the author of a printed book to make or authorise the making of copies of the book, for a period of 14 years; after 14 years, should the author still be living, the right of copy extended for a further 14 years. For books published prior to 1709, the Statute provided an exclusive right of copy to the "owner" for 21 years, with no extension.

This meant that for many of the most valuable books, including the works of Milton and Shakespeare, statutory copyright did not expire until 1730 (subject, of course, to argument over assignment and ownership prior to 1709). These pre-1709 works formed the basis of several publishing empires, most located in London. With the expiry of old copyrights in 1730, the London booksellers agitated for further protection. A campaign in the late 1730s to put legislation through Parliament extending the period of copyright and increasing

protection from imported copies failed.⁵⁷ In the mid-1740s, often with William Murray (later Lord Mansfield) as counsel, the London booksellers started to pursue their objectives in the courts.⁵⁸

A principal sore point for the London booksellers was the burgeoning book publishing industry in Edinburgh and Glasgow. Scottish booksellers did not consider themselves part of the existing trade and refused to respect the conventions of London; they built much of their success on reprinting popular books after the expiry of the 21 or 28-year statutory copyright periods. In 1746 Andrew Millar and several other London booksellers launched an action for damages in the Scottish Court of Sessions against a number of upstart publishers in an action known both as Millar et al. v. Kincaid et al.⁵⁹ and Midwinter et al. v. Scots Booksellers⁶⁰. The Londoners raised for the first time the argument that they had property in the copies they claimed distinct from any rights accorded by the Statute of Anne; specifically, they argued that an action for damages for trespass of their property in copies existed quite apart from statutory penalties.

This action failed. In Millar v. Taylor, Justice Willes went to some lengths to distinguish the decisions of the Court of Sessions and of the House of Lords on a writ of error on the basis that the parties had restricted argument to a narrow issue of statutory interpretation.⁶¹ Indeed, and not surprisingly given the nationalities involved, the

'monopolists' met with no success in the Scottish courts over the course of their litigation strategy, losing again in 1773 in Hinton v. Donaldson⁶² when the Court of Sessions voted 10 to 1 against finding the principle of Millar v. Taylor applicable in Scots law.

Following defeat in Midwinter (1750), the London booksellers only intensified their legal campaign. The 'literary property theory' re-emerged in Tonson v. Walker and Merchant (1752) 3 Swan. 672, 36 ER 1017 over an edited version of Paradise Lost. Lord Hardwicke LC declined to rule on the point saying it was a matter for the common law judges to decide, but granted the plaintiff a temporary injunction on other grounds.⁶³ The booksellers sought a ruling at law in Tonson v. Collins (1762) 1 Black W 321, 96 ER 180. The case, brought before Lord Mansfield's Court of King's Bench, featured Joseph Yates as counsel for the defendant and William Blackstone as counsel for Tonson. Blackstone presented the essence of the argument he would make in Millar v. Taylor in 1769, and which he supported as an advisory judge before the House of Lords in Donaldson v. Beckett five years thereafter. In brief, the literary property theory maintained that the Statute of Anne had merely been declaratory of an existing common law right of property in the multiplying of copies of published books. As property, common law copyright was said to be perpetual. The Statute, rather than extinguishing rights, had confirmed this right and provided remedies and penalties

in addition to those available at common law, albeit remedies applying only to books still within the statutory periods for protection. In every case that came before the courts over the two decades of the debate, the plaintiff was a bookseller claiming as ultimate assignee from the author with in the right arose.

Did copyright exist only by virtue of the Statute of Anne (in which case it gave way to a public domain in books after no more than 28 years from registration in Stationers' Hall) or did copyright exist by virtue of the common law (with the 1709 statutory limitations applying only if the plaintiff sought its additional remedies) ? This central question, and the issues of law on which it depended, occupy much of the discussion in Parts III, IV and V of this paper. Here we only need to outline the course of the litigation.

In Tonson v. Collins, King's Bench decided to put the issue before all the common law judges. The further argument never took place, however, because the judges learned that the litigation was collusive: the plaintiff had sponsored the defendant in order to bring the case to court.⁶⁴ The issue returned in Millar v. Donaldson and Osborne (1765), becoming a preliminary skirmish to Millar v. Taylor in 1769. In the latter, the Court of King's Bench by a majority of three (Lord Mansfield, Justice Aston, Justice Willes) to one (Justice Yates) found for the London booksellers, ruling that copyright

existed prior to, and continued after, the Statute's passage in 1709.

The collusion in Tonson v. Collins (1762) typified the rough way in which the booksellers played this game. James Oldham notes this period as a litigious age, in which test cases frequently were brought in commercial matters.⁶⁵ Certainly the London booksellers exhibited a concerted legal strategy. The same names crop up throughout the literary property debate. Jacob Tonson⁶⁶ and Andrew Millar owned two of the larger printing houses in London, and frequently initiated action against alleged 'pirates' of their copies. The Donaldson who appeared frequently as a defendant was Alexander Donaldson, an Edinburgh bookseller who moved his operations, characterised by inexpensive reprints of older works, to The Strand in London in 1759 precisely to challenge the London monopoly. One of Donaldson's champions was James Boswell, whose poetry Donaldson encouraged and published, and who acted as his counsel in Hinton. Donaldson appended to an article he wrote on the literary property debate copies of three letters intercepted in 1759 from London publishers in which they outlined a strategy to prevent the importing of books from Scotland and Ireland. In one letter, a bookseller wrote to Millar's son:

We have a scheme now entered into, for totally preventing the sale of Scotch and Irish books, which were first printed in England; and near two thousand pounds is

already subscribed for carrying it into immediate execution. And every person in England, selling such books, will be proceeded against in Chancery, with the utmost severity.⁶⁷

Part of the London booksellers' strategy involved seeking Chancery injunctions to stop the printing or sale of copies alleged to infringe their property. The granting of injunctions by Chancery in a number of instances then became one of the booksellers' principal legal arguments: recognition by the Lord Chancellor of a right sufficient to support an injunction should constitute good authority for the common law.

By the time Millar v. Taylor came to be argued before King's Bench, no court of common law had yet granted protection to literary property. The legal contest had taken place almost exclusively in equity. Injunctions had been granted frequently, going back to a number of seventeenth century cases involving Crown or Crown-granted rights. This had continued in the eighteenth century in cases between private parties. The Lords Chancellor rarely gave reasons that were reported, nor any indication whether the injunctions they granted were intended only to enforce post-1709 statutory rights.

B. THE OVERTURNING OF MILLAR V. TAYLOR

1. The Result in Donaldson v. Beckett

Andrew Millar had sued John Taylor over the latter's edition of a collection of James Thompson's poems, Seasons. Millar had bought and published the poems from Thompson in 1729, meaning that the statutory term expired in 1757. Millar v. Taylor turned out well for the London booksellers, as King's Bench recognised a perpetual common law copyright. Millar himself died shortly before the ruling was made; his interest in Seasons was sold at auction to another London bookseller, Beckett. Donaldson decided once again to throw down the gauntlet, and put out his own edition of Seasons. Beckett obtained an injunction on the strength of Millar, and Donaldson appealed to the House of Lords.⁶⁸

The Lords ordered that the twelve judges of the common law courts⁶⁹ provide opinions on the following questions:

1. Whether at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed published and sold the same without his consent ?
2. If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition: and might any person afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author ?

3. If such action would have lain at common law, is it taken away by the Statute of 8th Ann. ? And is an author, by the said statute precluded from every remedy, except on the foundation of the said statute and on the terms and conditions prescribed thereby ?
4. Whether the author of any literary composition and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law ?
5. Whether this right is any way impeached restrained or taken away by the Statute 8th Ann. ? " 70

Questions 4 and 5 appear to be restatements of questions 2 and 3, and the judges responded in like fashion.⁷¹

Determining the precise outcome of Donaldson remains difficult; a recent reassessment of the decision by Howard Abrams ⁷² suggests that it may have given rise to an epic misinterpretation. The first difficulty lay in putting together the 'votes' of the judges on the five questions put to them. Lord Mansfield chose not to give an opinion, believing it inappropriate for a Peer to support his own judgment on appeal to the Lords. The 'vote' therefore comprised eleven opinions. The breakdown of answers to each question is, as Abrams points out, reported differently in different sources.⁷³ The account generally accepted in subsequent judgments interpreting Donaldson, was as follows--

the results in brackets indicate the hypothetical answers given the same questions by the Millar court-- :

1. Yes - 8 No - 3 (Yes 4-0) ⁷⁴
2. Yes - 4 No - 7 (No 3-1)
3. Yes - 6 No - 5 (No 3-1)
4. Yes - 7 No - 4 (Yes 3-1)
5. Yes - 6 No - 5 (No 3-1)

The effect of this outcome, if the judges' opinions were held to be dispositive, would be that a common law copyright existed prior to 1709 but was extinguished by the Statute of Anne with respect to published books-- since the Statute only purported to deal with printed books. Indeed, the Supreme Court of the United States subsequently consecrated this interpretation.⁷⁵ In the 1854 case Jefferys v. Boosey ⁷⁶, however, the English judges sitting in appeal expressed doubts. The case involved the issue of whether the publisher for a foreign artist, the opera composer Bellini, could claim copyright in England under the 1842 copyright statute ⁷⁷ for musical compositions first published outside England. If copyright was wholly a statutory right and not property at common law, the judges agreed, then foreign artists did not acquire English copyright. After reviewing Millar and Donaldson, a majority stated that copyright never existed at common law; several judges added that even if it had, the Statute of Anne was ruled in Donaldson to have extinguished

it.⁷⁸ From that point forward in Anglo-Canadian law copyright was deemed to be entirely statutory. The holding in Millar no longer applied, save for the point that authors had a common law right to first publication of their works-- and therefore to withhold publication.⁷⁹

Abrams establishes, however, that the ambiguity about common law copyright should never have survived Donaldson. He argues convincingly that the U.S. Supreme Court in Wheaton v. Peters⁸⁰ wrongly assumed that the advisory opinions of the judges decided the issues in Donaldson. In fact, the power to decide the case lay with the House of Lords.⁸¹ The Lords did not follow the advice of the judges, voting 22-11 that copyright never existed at common law, but originated with and was embodied in its entirety by the Statute of Anne.

2. Lord Camden and Lord Mansfield

Lord Camden led the charge in the House of Lords in Donaldson. The literary property debate revealed profound disagreement between Lord Camden and Lord Mansfield over the appropriate sources for the common law, a disagreement heightened by their political differences as Whig and Tory, respectively.⁸² Lord Camden's speech had a hortatory quality suitable for the political arena of the House of Lords, most evident in the relish with which he attacked the position identified with Lord Mansfield, that judges could divine common law rights in the 'fitness of things'. To the contrary,

Lord Camden argued, judges must hew to precedent or else they would be free to say the law was anything they chose it to be. In the instance of the alleged copyright, judges would be called on to determine, without aid of precedent, whether the right was assignable and whether it extended to the lending and circulating of books, as well as to their copying:

What a Code of Law yet remains for their
Ingenuity to furnish, and could they all
agree on it, it would not be Law at last,
but Legislation.⁸³

Lord Camden also expressed himself freely about the private interests standing behind the litigation. He was not impressed by Beckett's argument that a perpetual copyright was the only appropriate reward for the author's labour. The statutory period of fourteen years was too long for the "Scribblers for bread" that made up much of the writing craft, while the true creators found their reward in glory. Bacon, Milton and others did not publish for gain and "it would be unworthy such men to traffic with a dirty Bookseller"; a perpetual copyright would result in "all Learning [being] locked up in the Hands of the Tonsons and the Lintots of the Age."⁸⁴ The position for which Lord Camden spoke so forcefully had been stated in the more circumspect language of the courtroom by Justice Yates in dissent in Millar v. Taylor. That opinion receives detailed consideration in Parts III and V of this paper.

As a postscript to Donaldson, the London booksellers, shocked at the instant rearrangement of their affairs effected by the decision ⁸⁵, immediately had a Bill placed before the House of Commons extending all copyrights otherwise expired for a further fourteen years. Donaldson and his Edinburgh colleagues petitioned to defeat the Bill. The House of Commons passed it, but the Lords, again led by Lord Camden, defeated the Bill by a vote of 21 to 11, a result almost identical to their vote as a judicial body a few months earlier.⁸⁶

C. AUTHORS AND PUBLISHERS

1. Interests in Conflict ?

Lyman Patterson argued in his 1968 study Copyright in Historical Perspective⁸⁷ that the literary property debate resulted in a distortion of copyright theory that has bedeviled Anglo-American law ever since. His thesis was that publishers and authors have different interests related to literary compositions that deserve separate legal recognition. The publisher's interest is the commercial exploitation of the composition through sale of copies, while the author in addition to material reward has a legitimate interest in controlling the 'integrity' of the composition. The former, he argued, calls for legislation regulating the publishing trade, i.e., a statutory "copyright", that includes limits on exclusive rights to copy, while the latter should most

appropriately be developed over time by common law jurisprudence. The literary property litigation initiated by the London booksellers damaged the possibility for such an approach by conflating publishers' and authors' interests; that is, the booksellers dressed their commercial rights (granted by statute) as authors' rights to perpetual ownership, in the hope of presenting a more sympathetic face to the courts. Indeed, the court in Millar discussed copyright wholly in terms of its being an author's right, with scarcely a mention of the interests of the bookseller who was plaintiff. In order to overcome the booksellers' avarice, Patterson argued, the House of Lords in Donaldson was forced to declare the author's rights to be wholly subject to statute. The corollary was that publishers, with their interests now permanently associated with the author's interests, could use the legislators' predictable desire to help impoverished artists to expand unconscionably the commercial rights in copyright.

This thesis presents an arresting challenge to mainstream copyright theory, and Patterson has used this insight to develop persuasive attacks on American case law that erodes the public domain in information.⁸⁸ The question of the dual interests at play in copyright, and the general neglect and misapprehension of the personal interests of authors in copyright, forms a significant part of the discussion which ensues in Parts IV and V of this paper. At this point, two

weaknesses of Patterson's argument deserve attention. First, he exaggerated the degree to which authors and publishers have distinct commercial interests with respect to copyright. The broader the rights of publishers in copyrighted works, the more valuable the work is in the hands of the author prior to assignment. To suggest an indifference by authors to the scope of copyright as a commercial right (to use a recent example, the issue of library photocopying⁸⁹) is somewhat misguided, if not patronising. Second, Patterson discounts the fact that the Statute of Anne termed the right it conferred a right of the author. That had as much or more to do with the structuring of the legal arguments as any strategy by booksellers to hide behind the author.

The actual role of authors in the literary property debate is difficult to determine. Boswell wrote that Samuel Johnson at first supported the London booksellers, but came to see the harm a perpetual ownership of copyright might entail.⁹⁰ Edmund Burke supported the Bill sought by the booksellers in 1774 after Donaldson was lost. However, materials reprinted from the debate do not indicate a groundswell of support for the London booksellers by authors.⁹¹ This may reflect the fact that authors had not achieved the economic clout to set their own terms for sale of their rights, or a cynicism about the goals of the publishers.⁹² Further research into the involvement of

writers of the day in the debate would be needed to properly assess this issue.

2. Economic Interests and the Value of Single Case Analysis

The literary property debate had a specific commercial genesis. Certain well-established publishing interests had tried to ignore the time limitations on the right to copy set out in the very legislation for which they lobbied after the last Licensing Act expired in 1694.⁹³ When rival Scottish publishers called their bluff in the mid-eighteenth century, the London interests responded with a litigation strategy premised on an alleged extra-statutory copyright. In that light, the defeat of those interests in Donaldson seemed merely a vindication of legislative intent, and Millar v. Taylor an aberrant footnote in the legal history of book publishing.

The intellectual significance of Millar v. Taylor cannot, however, be so easily dismissed. The social and economic context in which private litigation takes place may explain a great deal about its motivation and about the forces operating behind judicial decision-making: but merely exposing the interests of the two parties cannot wholly account for the judicial reasoning in a specific case that leads to a particular decision. The reasoning process retains a relative autonomy derived from the style and traditions of jurisprudence itself. In their effort to consolidate a

commercial pre-eminence, the London booksellers required the English judiciary to consider the nature of the new property right in "the copy", and give it a place in the scheme of accepted legal categories. That consideration occurred in Millar v. Taylor. The vitality of the response of the King's Bench judges was reflected in the cogency of their arguments to ongoing debates concerning the nature of copyright and intellectual property.⁹⁴ Lord Camden's remarks about the disinterestedness of artists and thinkers in material rewards has had, for instance, significantly less echo in the development of intellectual property⁹⁵ than Lord Mansfield's discussion of the author's interest in exerting a degree of control over the products of his activity.⁹⁶ We turn now to examine the contentious issue in Millar v. Taylor of Crown prerogative, which provided the foundation for Justice Yates' insights into the nature of copyright.

III. PROPERTY AND POLITICS:

CROWN PREROGATIVE AND THE RIGHT OF COPY

A. CROWN CONTROL OF PRINTING AND CENSORSHIP

Till the year 1640, the Crown exercised an unlimited authority over the press; which was enforced by the summary powers of search, confiscation and imprisonment, given to the Stationers Company, all over the realm and the dominions thereunto belonging, and by the then supreme jurisdiction of the Star-Chamber, without the least obstruction from Westminster-Hall, or the Parliament, in any instance. (Millar v. Taylor, at 206)

Mr. Justice Willes' provided an apt description of the early regulation of the printing industry in England. The printing press was introduced into England in 1476, and Henry VII named the first King's Stationer in 1485. The number of working presses remained small for several decades. By a Star Chamber decree of 1538, the administration of Henry VIII introduced a system of licensing books that, in different forms, governed the trade until 1694. The decree required that printers obtain the approval of the Privy Council prior to publishing any book. In 1556 Queen Mary conferred a Charter on the Stationers' Company, the printing guild to which printers and booksellers belonged; the Company became an active participant in the licensing system through a decree of 1558 that gave its Master and Wardens the authority to search for and confiscate

unlicensed publications.⁹⁷ Only licensed books could be entered in the register of the Company. In this fashion, commercial interest was married to government's concerns with suppressing heretical and seditious publications.

The Stuarts continued and expanded the censorship system. A Star Chamber decree in 1637 expired with the demise of that Court in 1640. Two years later the Restoration Parliament passed the Licensing Act 13 & 14 Car. II, c.33, which embodied most of the provisions of the 1637 decree. The Act, renewed several times, finally expired in 1694; the House of Commons, the author of its argument being John Locke, refused an attempt by the Lords at the behest of the Company to draft new legislation confirming the Crown printing patents they held and the Company's role in licensing books. Petitioning for legislation protecting copyrights, not based on any form of censorship, began a few years later and resulted in the adoption of the Statute of Anne in 1709.⁹⁸

'Copyright' during most of this period, as Willes J. pointed out, took place within the self-governance of the Stationers' Company. Printers and booksellers entered in the Company's register the titles for which they claimed the copy, and 'pirates' were subject to the guild's sanctions. Blackstone apparently argued from the records of the Company in Millar, but none of the judges based common law copyright on this custom.⁹⁹ Justice Willes alone referred to the practice, saying the fact it operated entirely outside the

concern of the Crown, Parliament or the courts of law, confirmed

[i]t could be done only on principles of private justice, moral fitness, and public convenience; which, when applied to a new subject, make common law without a precedent; much more, when received and approved by usage. (at 206)

The history of the early entangling of private copyright interests and state censorship partly explains the distrust of the monopoly aspects of the common law right expressed by Yates J. and several of the speakers in Donaldson v. Beckett (1774), particularly Lord Camden.

B. ANALYSIS OF THE PREROGATIVE CASES

The history of publishing to 1694, showing it to be the preserve of royal prerogative, patent grants from the Crown, licensing for censorship purposes and guild monopoly, presented a difficult challenge to the advocates of a property right in the copy. The task of demonstrating the right to exist in common law prior to the enacting of the Statute of 1709 required them to deal with this history, and to find in it a plausible basis for a private copyright. In Millar, the court adopted an interpretation that found in the exercise and judicial recognition of prerogative rights over printing a right of property in the King and his patentees analogous to

the right claimed by the plaintiff. To do otherwise, to see in the royal rights and patents the mere manifestation of sovereign authority over the printing trade, would subvert the endeavour by acknowledging that the right to the copy had existed at the command of authority, not as a right at law arising from the activity of private subjects.

1. The Pre-Revolution Cases Cited in Millar v. Taylor

The Court in Millar dealt with nine cases involving Crown prerogative rights over printing; of these, seven dated from the Restoration, "times when", Willes J. noted, "prerogative ran high" (at 209). All nine cases involved disputes between parties in the trade, some of them patentees, others guild members or importers, none of them authors. This section identifies the respective themes of prerogative and property in the pre-1688 cases, the scope of the asserted rights to copy, and related themes from cited case authority.

The earliest prerogative case cited in Millar, The Stationers against the Patentees for Roll's Abridgment (1666) Carter 89, 124 ER 842, dealt with a dispute between two members of the Stationer's Company and Atkins, the holder of a patent for the printing of "all law books that concern the common law", first granted in 1558, over the right to publish the Abridgment. In this instance, the Company members were in the position of challenging a printing patent as a monopoly grant, the irony of which did not escape counsel for

Atkins.¹⁰⁰ The House of Lords confirmed an injunction granted by the Lord Chancellor in favour of Atkins; while the report does not indicate the reasons, the patentee argued on the basis of a strong prerogative. The King, counsel maintained, had a prerogative over the printing trade

...necessary as to religion, conservation of the publique peace, and necessary to preserve good understanding between King and people. (at 843)

The prerogative was time out of memory, pre-dating the printing press which was only the most recent means of "communicating our thoughts" (at 843). To the objection that the patent represented a monopoly over printing as a trade, counsel replied "True, where the King hath not a prerogative" (at 844). Also cited as justifications for the prerogative were the King's ownership of the printing trade derived from his first bringing it to England from the continent¹⁰¹, and his particular ownership of the laws of England due to his paying the salaries of the judges, and formerly the reporters.

Whether the Lords decided the case on the latter, narrower grounds for upholding Atkins' patent is unclear. A similar issue came before them a short time later in Roper v. Streater (1670) (available only as described in Company of Stationers v. Parker (1685) Skinner 233, 90 ER 107.), where the assignee of Justice Crook's executors obtained judgment in King's Bench against the holder of a royal patent for law

books for the printing of Crook's Reports. The Lords overturned the judgment, again ruling in favour of a patentee. Occurring in the context of a contest between the assignee of the author's estate and a patentee, Roper represented a strong statement for a prerogative over printing.¹⁰²

The fate of law books decided¹⁰³, three cases followed dealing with the publishing of almanacs. In the most influential of these, Company of Stationers v. Seymour (1677) 1 Mod 257, 86 ER 865 and 3 Keb 792, 84 ER 1015, the defendant challenged the authority of a Crown patent for the printing of almanacs before the Book of Common Prayer. The two reports of Seymour differ importantly on the reasons for the decision in favour of the patentees (i.e., the Company.) Keble leaves little doubt that King's Bench was prepared to acknowledge a broad prerogative in printing of all books, regardless of subject matter:

That albeit printing in England be but of late, yet publication of books was before, and both before and since that hath been under the regulation of the Government.... it is impliedly granted [by the Licensing Act 1662] that the printing of all books is restrainable, or grantable by the Kings patent. (at 1015)

The Modern report is more ambiguous. It provides Pemberton's argument for the patentees, in which he referred to a debate over whether a Crown patent could stand against a claim of "property in the copy, paramount to the King's grant" (at

865). The Court is reported as finding first that almanacs came under "a public constitution", and under Church governance, and for that reason were subject to prerogative. Further, the Court accepted a 'residual' basis for the prerogative, similar to the Crown's position vis-a-vis realty: where a work has no particular author, as with an almanac, "then, by the rule of our law, the King has the property in the copy" (at 866). Expressly following the House of Lords in Roper ("the ultimate resort of law and justice being to them"-866), the Court also based its decision on the historical fact that the Government had always had care of the printing trade.

In The Company of Stationers v. Lee (1681) 2 Show K.B. 258, 89 ER 927, and 2 Chan. Cas. 66, 22 ER 849, and the related case Company of Stationers v. Wright, referred to in Lee at 2 Show K.B. 258, the Company relied on a patent originally granted by James I to enjoin the sale of almanacs and psalm-books imported from Holland. Plaintiffs argued both the Crown prerogative "in restraining and licensing prognostications of all sorts; and were it otherwise it would be of dangerous consequence to the Government" (at 928), and their own commercial interest in the protection of domestic industry:

...it would be of dangerous consequence, that the Hollanders and other foreigners should print our primers, psalters, almanacks, and singing psalms, for they

may and actually do abuse them, for being at no charge for correcting, and printing in a worse character and paper, they will undersell the English, and destroy our manufacture. (at 927)

Company of Stationers v. Parker (1685) brought before King's Bench the perplexing issue of parties claiming under competing grants from the Crown.¹⁰⁴ The stationers, claiming under their Charter from James I for the printing of "omnes & omnimodos libros Psalmorum", took action against Parker, who printed under a patent granted by Charles I to Oxford University for "all books not prohibited." Relying on Seymour (1677)¹⁰⁵, counsel for the stationers argued that the later patent to Oxford allowed the university

...to print books for their use there, and not to come to London for them;...for in making these charters the King did not intend the university to be booksellers, but gave them the power to print for their own convenience. (Parker, at 108)

In other words, the King could not have intended to set the university up as a commercial competitor. The 'sole right' granted to the Company conformed with the long-standing view that "printing is a thing of publick use [and] matters of law and religion ought and always was under the immediate care and government of the King" (at 107). Holt for the defendant distinguished between the King's granting under a prerogative of power and a prerogative of interest; the former, more personal to the King, could not bind subsequent monarchs. The

Court said it "enclined for the defendant" but because of Seymour would hear more argument. Aside from the Court's evident discomfort with the Company's near-monopoly claim, the case is significant for showing an implied narrowing of the prerogative over printing to the category of works of state.

2. The Post-Revolution Cases

Two of the nine prerogative cases discussed in Millar occurred after 1688, and both show a distinctly different approach to the prerogative issue. Company of Stationers v. Partridge (1711) 10 Mod 105, 88 ER 647 represented a reprise of Seymour (1677); the Crown's grant to the Company of the sole right to print almanacs was again put in issue as an unlawful restraint the subject's liberty. The Court, as in Parker (1685), refused to make a final ruling, but put the case over for argument on whether the Crown had a "special interest" in almanacs, implicitly rejecting the stationers' use of Roll's (1666) and Seymour to argue for a patent over the printing trade as a whole.

Baskett v. University of Cambridge (1758) 2 Keny 395, 96 ER 1222, involved a dispute between the King's printer for statutes, and the University under a patent, like Oxford's, for all books 'not otherwise prohibited', over the University's printing and selling in London an edition of the statutes of the realm. The circuitous arguments of counsel arrived at the issue of the nature of prerogative in this

fashion: if the Crown, by virtue of prerogative, had the right to grant letters patent for any and all printed books, then this 'general' grant to Cambridge must fall to the specific grant for statutes to Baskett; if, on the contrary, the prerogative extended only to certain works of state, including the statutes, then the patent to Cambridge must cover the latter. Solicitor-General Yorke, arguing for the University's patent, attacked the idea that there was ever a prerogative over printing:

The prerogative right of the Crown is not in monopolizing the art of printing; but it claims a copyright of all Acts of State, as Acts of Parliament, proclamations, Orders of Council, etc. as having the executive part of Government.

Besides which general ground, the Crown has a right to some copies from expense. Thus Grafton's great Bible was the first that was translated into English, and was done at the King's expense. So of the Year Books, which were compiled at the expense of the Crown, as appears by the preface to Plowden's Com. In these the Crown claims a copyright, the same as authors have to their works. (at 1226)

Yorke thereby set out an understanding of the Crown's role in printing that was to be adopted by the majority in Millar v. Taylor eleven years later.¹⁰⁶ Lord Mansfield for the Court upheld both the patent of the King's printer and that of Cambridge "within the university" as concurrent grants. In doing so, he said:

What power the Crown had assumed, in fact, at the time of the grant by H. 8 to the university, is very material as to the construction of those patents; whether to operate as to the general right of printing, or only with respect to the King's copyrights, because we must presume the Crown intended to grant what they had, or, in fact, assumed a right over (at 1230).

3. The Subsidiary Prerogative Cases: Property in Patent Grants

The reported cases referred to by counsel and courts in the nine prerogative cases, and those which they in turn cited as precedent, dealt almost entirely with letters patent from the Crown: their construction,¹⁰⁷ basis in prerogative,¹⁰⁸ validity in light of contradictory statutory language,¹⁰⁹ and remedies in instances of successive inconsistent grants.¹¹⁰ The concept of property right independent of prerogative and Crown grant was almost wholly absent from these cases.

(a) Patents For Office Holders

Several cases concerned disputes over patents for public or church office. In Wentworth v. Wright (1596) Cro. Eliz. 526, 78 ER 774, King's Bench decided the Queen had the prerogative right to name the replacement for a priest appointed a bishop, as against the patron. The Attorney-General argued in part:

And although it is said that this prerogative cannot be proved by reason, this is not material; nor ought there any reason to be given or enquired about the Queen's prerogative; for in regard she is the head of the weal publick, and defends her subjects and their possessions, the law attributes unto her many prerogatives, for which no reason can be yielded. (at 775).

The case of Lord Brook v. Lord Goring (1630) Cro. Car 197, 79 ER 773 involved successive patents for the office of clerk of the council "of the marches of Wales". In Bridgman et al v. Holt et al (1693) Shower P.C. 111, 1 ER 76, action was brought in the Assize of Novel Disseisin by claimants under a royal patent to the office of Chief Clerk to the Court of King's Bench, against an alleged usurper named to the post by the Chief Justice. Argument ensued over the historical basis for the respective claims¹¹¹, and the Court rejected the presentation of the patent as sufficient to prove the Crown claim. The office, according to defendant's counsel, "belonged" to the Chief Justice.

What is of interest about these cases is that title to public office by patent was repeatedly treated like tenure in realty. The patent holders claimed to be seised of the office; the grants were made in the terms of gifting estates in land. Opposing parties challenged the Crown's right to appoint office-holders by showing long-standing custom to the contrary (Wentworth, Bridgman), but did not directly question the prerogative power itself.

(b) Doctrines of Patent Construction

Cases cited for principles of patent construction reflect the strongest influence of concepts drawn from real property. Counsel in Parker (1685) and Baskett (1758) both referred to Le Case Del Royall Piscarie de la Banne (1611) Davis 55, 80 ER 540 in arguing that by wording in a patent or charter the Crown can grant less than it intended, but not more; just as the grant to the City of London of the River Thames did not pass rights to the subsoil ¹¹², so a printing patent passed no more of the prerogative than it expressly stated. Yorke likened the grant to Cambridge to the reversionary interest that was said to pass as an estate lesser than intended by the King in The Duke of Chandos' Case (1606) 6 Co. Rep 55, 77 ER 336. The scire facias cases and Re Alton Woods (1594) 1 Co Rep 26b, 76 ER 64 dealt with remedies where the King had been deceived (i.e. mistaken) in his grants of estates in land.

(c) Nature of Property Rights

The prerogative cases made passing references to two reported decisions involving printing not cited in Millar v. Taylor¹¹³. None of the cited cases discussed the nature and origins of rights in property, with two exceptions from the late Elizabethan period. Sir Henrie Constable's Case (1600) 5 Co. Rep. 105b, 77 Er 218 cited in Royall Piscarie (1611) at 542, concerned rights in flotsam, jetsam and wrecks washing up

on land. The report, with Coke's observations appended, describes how subjects can acquire property in the goods by prescription or grant, which otherwise belong to the King by prerogative:

the common law gave as well wreck, jetsam, flotsam, and lagan upon the sea, as estray... and the like to the King, because by rule of the common law, when no man can claim property in any goods, the King shall have them by his prerogative.
(at 223)

'Estrays' of a different sort are dealt with in The Case of Swans (1591) 7 Co. Rep. 15b, 77 ER 435, also cited in Royall Piscarie at 542. While the King has a prerogative property in wild swans found within land or water held by the Crown, the subject could also acquire property in swans and other ferae naturae by labour:

Property qualified and possessory a man may have in those which are ferae naturae; and to such property a man may attain by two ways, ... by industry as by taking them, or by making them mansueta (438)

Property in swans could never be absolute so long as they might stray. Wild swans on one's land passed with the land; domesticated swans could be willed as personal property. Justice Aston was to compare copyright with property in ferae naturae in Millar, a point discussed in Part V.¹¹⁴

4. The Scope and Nature of Crown Copyright

The prerogative cases established an exclusive right in the Crown to control the printing of certain works, whether by prerogative over the entire printing trade, a right originating in expenditure, or in the King's role as head of the executive government. What was the nature and extent of this 'copyright'? The cases provide only hints, but these deserve a brief exploration.

First, the cases deal only with the printing or copying of complete works (Bibles, law reports, almanacs etc.), as opposed to portions or abridgments of works. As a result, the courts gave no consideration to such issues as the degree of taking that would constitute a trespass on the Crown-derived right, nor of the taking of the idea for a work, as opposed to its expression. The only exception is found in Seymour (1677). There, the defendant had printed an almanac that

had all the essential parts of the almanack that is printed before "The Book of Common Prayer;" but that it has some other additions, such as are usual in common almanacks, etc. (at 865)

The Court held the almanac to be a work with a certain form, but no certain author. An individual could not acquire rights by supplying additions consistent with the form:

Those additions of prognostications and other things that are common in almanacks, do not alter the case; no more than if a man should claim a property in another

man's copy, by reason of some
inconsiderable additions of his own. (at
866)

Most of the works at issue in the prerogative cases could be said to be of authors unknown or uncertain. In Roll's Abridgment (1666) and Roper v. Streater (1670), where judges and reporters arguably had alienable rights as "authors" to the law reports, counsel for the successful patentees argued an employer copyright: since the King paid the salaries, copyright accrued to him.

In the university cases, the scope of the rights granted by patent constituted an important issue. The reports suggest that the complaints of the booksellers arose because the printers appointed by the universities had started to make inroads in the London market. In Parker (1685), the stationers argued that the patent gave Oxford the right to print books for its own use, not for competitive purposes. This was an early intimation of the distinction between 'intrinsic' and 'competitive' uses of a protected work that underlies much of the debate over fair dealing and fair use exceptions to copyright.¹¹⁵

The patentees consistently demonstrated their interest in having the prerogative put on the broadest, most political grounds. In addition to the argument that a press beyond the control of the Crown represented a threat to peace, order and public convenience¹¹⁶, patentees alleged that the possibility

of distortions creeping into English books justified a prerogative power over printing and importing books ¹¹⁷. Yorke in Baskett (1758) argued that allowing the University to compete with the King's printer would produce better editions of the statutes, while acknowledging that mistakes would occur if printing was open to all (at 1230). Concern for the integrity of works of state, the state's 'moral right' exercised on behalf of the public, has remained a cornerstone of the unique statutory treatment accorded Crown copyright to the present day ¹¹⁸.

C. DARCY V. ALLEN AND PATENTS FOR INVENTIONS

Cited in Parker (1685), Partridge (1709) and Baskett (1758) was the famous case of Darcy v. Allen, or The Case of Monopolies (1603) Moor 671, 72 ER 830; Noy 173, 74 ER 1131; and 11 Co. Rep. 84b, 77 ER 1260. As the formative decision in the history of patents for inventions, this is not surprising; perhaps more surprising is that Darcy received no attention from the judges in Millar. Mr. Justice Yates did raise the issue of inventions, just as he had raised Darcy when counsel in an earlier literary property case ¹¹⁹, but the majority barely referred to it. The relationship between the evolution of legal protection for inventors and legal protection for authors is one of the more revealing aspects of Millar.

Darcy stands generally for the proposition that monopolies are bad at common law ¹²⁰. The use made of Darcy by counsel in the three cases named varied somewhat. In Partridge (1709), the defendant challenged the stationers' patent as a monopoly, citing Darcy (at 647), a point repeated by Yorke in his attack on the idea of a prerogative over the printing trade (Baskett (1758), at 1255); in Parker (1685) the stationers referred to Darcy to point out that patent grants to companies had been exempted from the Statute of Monopolies (1624)¹²¹.

Darcy v. Allen involved a challenge to a patent granted by Elizabeth I for the sole manufacture and importing of playing cards. A growing controversy over the Queen's granting of monopolies led her to declare in 1601 that Crown patents were triable in the common law courts, which led to the Darcy litigation. The case did not involve a patent for invention, but in some fashion each of the other four categories of patent:¹²²

- (1) for inventions;
- (2) dispensing patents, relaxing a statutory prohibition in favour of the patentee;
- (3) those bestowing on the patentee the power to supervise a trade;
- (4) a patent handing over an established trade to patentee(s) for personal gain.

Darcy's significance for the inventor's patent rested in its approval of the practice as an exercise of Crown prerogative while ruling illegal all others as tending to monopoly against the public interest:

...that where any man by his own charge and industry, or by his own wit or invention doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that was never used before: and that for the good of the realm: that in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth: otherwise not. (Noy, 1139) ¹²³ (emphasis added)

This approval carried over to sections V and VI of the Statute of Monopolies which permitted a term of no more than 21 years for patents "heretofore made of the sole workinge or makinge of any manner of newe manufacture within this Realme, to the first and true inventor or inventors of such manufactures", and 14 years for those issuing thereafter.

The Statute therefore did not create a right to patents for invention, but recognized and declared as valid an existing practice of the Crown. E.W. Hulme has shown that the first such patents date from the early 1300's ¹²⁴. The practice of granting patents for invention did not acquire the characteristics of a systematic policy of government, however, until the early years of Elizabeth's reign. As Hulme points out, the word "invention" at the time of the Statute and

before did not mean 'original discovery or creation' in the modern sense; it meant the bringing of something new to English trade and industry ¹²⁵. Most patents through to the end of the seventeenth century were granted to persons importing a trade or manufacture from continental Europe that had not previously existed in England, including foreigners bringing skills and techniques with them. English monarchs and Parliaments since the fourteenth century had viewed this practice as an appropriate means of rescuing the country from its industrial backwardness.

The quarrel between Crown and Parliament reflected in Darcy and the Statute revolved around alleged abuses by the Crown of its prerogative power to grant monopoly patents, and the issue of whether the prerogative was subject to common law. Despite the Queen's declaration in her 1601 speech, Fuller in argument in Darcy expended considerable effort to demonstrate that the Court of King's Bench had jurisdiction to review and invalidate the express terms of a patent ¹²⁶. For the purposes of this paper, it is worth noting that the parties (to Darcy, and to the constitutional debate) did not at any point invoke a natural right in the inventor to a patent grant.

If a natural right was at stake in Darcy-- although the reports do not use that term-- it was the right of every Englishman to exercise his skills and tools in an acquired

trade. Fuller argued that the impugned monopoly violated this fundamental right:

Where before if any person by his industry had obtained excellent skill in his trade, he might have reaped the fruits thereof, and that hath been thought the surest thing a man could obtain, skill and knowledge, because theeves [sic] could not steal it.

But arts and skill of manual occupations rise not from the King, but from the labour and industry of men, and by the gifts of God to them, tending to the good of the commonwealth, and of the King, the head thereof... (at 1137, 1138)

As illustration he pointed to the rule at law that the tools of a man's trade could not be distrained for debt ¹²⁷. Coke's report makes it clear that the Court's principal stated objection to Darcy's patent lay in the threat to employment of honest tradesmen.¹²⁸ Nevertheless, the 'right' to exercise one's craft did not supersede the state's legitimate power to create monopolies in the public interest. The target in Darcy and the Statute was not monopoly patents per se, but the granting of such monopolies by royal prerogative. Neither Fuller in argument nor the Statute of Monopolies denied the right of Parliament to grant trade monopolies.¹²⁹

The right of craftsmen had been raised against monopolies; the patent for invention was made an exception to the monopoly rule, in the face of that right.¹³⁰ No one argued that the patent existed at common law as a property

right of the inventor, due to him in nature as the reward for ingenuity. First, the concept of invention encompassed a variety of activities, including the purely commercial function of bringing a manufacture from the continent to England. Second, the Crown had quite deliberately brought the patent into being as an instrument of mercantile policy. Third, Darcy effected the recognition of the public interest, the good of the commonweal, as the basis for the legitimacy of monopolies, including patents for invention:

A desire for industrial self-sufficiency, not an individualistic ethic, had justified copyright patents in the first place, and this remained Coke's criterion.¹³¹

The accepted view of the patent since that time has been of a statutory contract in the public interest between inventor and public whereby the former receives a time-limited monopoly over the exploitation of the invention in exchange for disclosing its design.¹³²

Darcy v. Allen (1601) and the debate surrounding it provided an example from history of the evolution of a right in the product of intellectual labour-- i.e., an exclusive right to control and reproduce a 'newe manufacture'. That example revealed a right permitted by the common law, but indisputably arising as public policy mandated under Crown prerogative. We turn now to examine the use made of this

example, and of the Crown prerogative printing cases, by the Court in Millar v. Taylor.

D. MILLAR v. TAYLOR AND THE CITIZEN KING

1. The Issue of Inventions

Mr. Justice Yates raised the issue of inventors' rights in his dissenting opinion. He had done so as counsel in the earlier copyright case Tonson v. Collins (1762):

Patents for new inventions are similar to the present case. They are allowed as temporary privileges, but the very grants are a proof, that, independant of them, the grantees could have had no monopoly.....Since then no permanent privilege is allowed to the inventor of an art, or a mechanical engine, what pretence have literary productions to a greater right ? Both are the productions of genius, both require labour and study, and both, by publication, become equally common to the world. (at 187)

Two related reasons led Yates J. to develop and draw on an analogy between patents and copyright: first, he, alone of the judges in Millar, viewed an exclusive right to produce copies of a published literary composition as a form of monopoly¹³³, and patents had always been understood to be monopolies; second, he believed that conceptually patents and copyright could not be distinguished on the basis of their genesis or theoretical justifications. He agreed that the common law recognized a right in both inventors and authors not to

publish their work. The common law had never, however, protected the inventor once he announced his discovery; for that he required a patent, contractual in nature and time-limited:

Both original inventions stand upon the same footing, in point of property; whether the case be mechanical, or literary;...But when the invention is once made known to the world, it is laid open; it is become a gift to the public: every purchaser has a right to make what use of it he pleases.

On what ground then can the author claim this right ? How comes his right to be superior to that of the ingenious inventor of a new and useful mechanical instrument? Especially, when we consider this island as the seat of commerce, and not much addicted to literature in ancient days; and therefore can hardly suppose that our laws give give a higher right or more permanent property to the author of a book, than to the inventor of a new and useful machine. (Millar, at 246)

The fact that the Statute of Anne had tracked the Statute of Monopolies in its limitation of old copyrights to 21 years, new copyrights to 14 years, and its incorporation of a provision forbidding the 'engrossing' of book prices by the copyright owner, did not escape his attention ¹³⁴. Patent holders had never dared come to the courts to claim a perpetual ownership of their inventions outside the Statute of Monopolies, and publishers should not have expected results from that recourse.

The only majority judge in Millar to respond directly to this argument was Justice Aston. He maintained a fundamental difference existed between inventions and literary works that rendered any analogy unhelpful:

And the difference consists in this, that the property of the maker of a mechanical engine is confined to that individual thing which he has made; that the machine made in imitation or resemblance of it, is a different work in substance, materials, labour and expence, in which the maker of the original machine can not claim any property; for it is not his, but only a resemblance of his: whereas the reprinted book is the very same substance; because its doctrine and sentiments are its essential and substantial part; and the printing of it is a mere mechanical act, and the method only of publishing and promulging [sic] the contents of the book.
(at 226)

This approach disclosed a pre-industrial concept of manufacturing, in which each object produced is unique and identifiable, as opposed to a fungible copy of an original design. With its treatment of inventions as 'material' and compositions as 'ideal', this distinction was unconvincing and went unrepeated by Willes J. or Lord Mansfield. In Donaldson, Aston J. took his position one step further, saying it "would be more liberal to conclude" that a common law property in inventions had existed prior to the Statute of Monopolies ¹³⁵.

The evolution of patent law did challenge the theory on which the literary property argument rested. Justice Yates grasped a unity underlying these forms of intellectual

property, of property in ideas;¹³⁶ for him, the common features included the necessity for legislative sanction of the property. The majority refused the parallel, and chose to look elsewhere for an analogy to literary property.

2. The Prerogative Cases in Millar v. Taylor

The preferred analogy was to the Crown right over printing of certain types of literary works, which the majority found to be persuasive evidence of copyright existing at common law.¹³⁷ Making this connection involved two steps:

- (a) identifying the Crown's control of those works as a property interest, rather than an exercise of executive authority;
- (b) equating the Crown's property interest in printing with the author's copyright.

Justice Yates took issue with the majority on both matters.

With respect to the first, Justices Willes and Aston differed from Lord Mansfield in their interpretations of the evolution of the prerogative cases. The former found in even the earliest cases judicial recognition of a Crown right based in property. While recognising that "These were times when prerogative ran high" (at 209),¹³⁸ Willes J. found in each of the pre-1688 cases a reason in property for the courts' holdings: in Roll's Abridgment (1666) and Roper v. Streater (1670), the Crown's paying judicial salaries,¹³⁹ and in

Seymour (1677), the Crown's property by default in anonymous works. Aston J. concurred in a brief reference to Seymour (at 225). Lord Mansfield found much less merit in the pre-Revolution cases. To him, abuse of the prerogative by the Crown in that period, and the willingness of the courts to countenance its abuse, rendered the judgments of little value. What intrigued him, however, was that counsel for the patentees took a similar approach in each case:

There were no questions in Westminster Hall, before the Restoration, as to Crown copies. The reason is very obvious: it will occur to every one that hears me. The fact, however, is so: there were none, before the Restoration.

Upon every patent which has been litigated since, the counsel for the patentee, (whatever else might be thrown out [ie, argued], or whatever encouragement they might have between the Restoration and Revolution, to throw out notions of power and prerogative,) have tortured their invention, to stand upon property. (at 254)

In other words, the legitimacy of prerogative was increasingly doubted, and good counsel knew they should try to justify patent rights on principles of property, not mere reasons of state or power. Lord Mansfield proceeded through an analysis of the pleadings in Partridge (1709) to argue that the prerogative basis for Crown copyright died after 1688; in Baskett (1758) no one harboured illusions on the subject:

We [the judges] had no idea of any prerogative in the Crown, over the press; or of any power to restrain it by exclusive privileges, or of any power to control the subject-matter on which a man might write, or the manner in which he might treat it. We rested upon property from the King's right of original publication. (Millar at 255)

The publishing of statutes, however, "belonged to the King...as the head and Sovereign." (at 255)

On the second point the majority judges agreed: if the King had property in certain works--and the cases indicated he did--then that proved a similar right existed in authors because the King could have no greater rights in property than his subjects. Justice Willes said:

I cannot distinguish between the King, and and an author. I disclaim any idea that the King has the least control over the press, but what arises from his property in his copy. (at 217)

To similar effect Justice Aston:

And if that alone [publication] was to prevail against a private author, why should not prerogative property, founded on the same ground of argument as the general property of authors in their works, be liable to the same free and universal communion? For I know no difference, in that respect, between the rights of the Crown and the property of the subject. (at 224)

For Lord Mansfield, a crucial issue was whether the common law deemed an author to abandon his rights in a literary

composition on publication; the cases dealing with Crown rights in the Bible and other state works proved the King maintained those rights following publication. Because his rights rested in property, not prerogative, this established the author's post-publication rights:

The King has no power or control over the subject-matter [of the Bible]: his power rests in property. His whole right rests upon the foundation of property in the copy by the common law....Whatever the common law says of property in the King's case, from analogy to the case of authors, must hold conclusively, in my apprehension, with regard to authors. (at 256)

Justice Yates argued with the majority over the uses of the historical record. Scathing in his attack on Justice Willes' implication that Star Chamber decrees represented a form of protection of property interests of which the common law could take cognizance,¹⁴⁰ Yates J. pointed out that early regulation of printing accompanied the Crown's abuse of its patent-granting power. Neither the decrees nor the printing patents ever had anything to do with the rights of authors.¹⁴¹ The courts had come to recognise since the 1680s, however, a legitimate and trimmed-down prerogative over certain works of state:

The books are Bibles, Common-Prayer Books, and all extracts from them, (such as primers, Psalters, Psalms,) and almanacs. Those have relation to the national religion, or Government, or the political

constitution. Other compositions to which the King's right of publication extends, are the statutes, Acts of Parliament, and State-papers. The King's right to all these is, as head of the Church, and of the political constitution. (at 242)

The King's rights over these works, simply put, did not derive from property and could not be analogised to the author's claim:

The King does not derive this right from labour, or composition, or any one circumstance attending the case of authors....it seems to me, that the King's property in these particular compositions called prerogative copies stands upon different principles than that of the author; and therefore will not apply to the case of an author. (at 244-245)

He pointed out how in Partridge (1709) the compiler of the almanac, i.e., its putative author, lost at the injunction stage to the patentee.

The majority judges and Yates J., in pursuit of the answer to the issue posed in Millar, differed in their interpretation of the Crown printing cases in two theoretical respects. First, the majority was unwilling to accord to the Crown any status or privileges not available to the private subject; in Lord Camden's blunt phrasing in Donaldson v. Beckett (1774), they wished to make of the King nothing more than "a Bookseller".¹⁴² Yates J., no less enamoured of the expansive prerogative with which the Crown's role in regulating printing had begun, nevertheless believed Crown

rights to have a unique source and purpose: the Crown's control over the printing of certain works, indefeasible by the act of publication, existed for reasons of state and did not prove a private right that could be justified only by reasons of property. 143

Second, the majority saw in the history of Crown printing rights the shadow of a nascent common law right. By the time of Baskett (1758) and Millar (1769), Crown rights had been stripped of mystery and the taint of press control, and the common law right had acceded to its rightful place at centre stage. Yates J., however, saw in the development of commercial rights in printing, as in the similar rights in inventions, inescapable evidence of the directive hand of sovereign authority. Those rights had originated and received recognition only through decrees, patents and statutory approbation. The long silence of the common law on this 'new property' signified to Justice Yates the incompatibility of common law principle with a property in ideas.

E. SUBSEQUENT DEVELOPMENTS IN CROWN COPYRIGHT

1. Crown Prerogative Copyright

Lord Camden in Donaldson had, as noted, disparaged the view that Crown ownership of copies in various works had a proprietary basis, whether from the King's expense or otherwise. Like Yates J. he acknowledged a prerogative Crown right over certain key works of state, such as the Bible and statutes. Neither Lord Camden nor Yates J. denied the legitimacy of a prerogative right, appropriately restricted, and as the majority opinion in Donaldson affirmed the existence of a common law copyright, little doubt surrounded the survival of a prerogative copyright. The right eventually received statutory approbation.¹⁴⁴

In the years following Millar and Donaldson, courts moved to restrict the scope of the prerogative. The Court of Common Pleas ruled in Stationers Company v. Carnan (1775)¹⁴⁵ that almanacs did not come within the prerogative, settling the issue left open since Partridge (1709), and that the Crown could not grant exclusive printing patents outside the confines of prerogative. An Irish court decided in 1794 that the Crown could grant patents for printing books for use by the established Church, but not for Bibles for all purposes.¹⁴⁶ Reflecting a priority of the age, narratives produced during voyages of discovery were ruled to be Crown copies.¹⁴⁷ The narrowing of prerogative copyright coincided

with locating its principal justification in the public interest in preventing distortions' appearing in works of state.¹⁴⁸ Such a justification loses its much of its force, as Yorke implied in Baskett (1758), with the realisation that market value of a privately published edition of a state work (e.g., a statute or judgment) depends on its accuracy. Given that, and also the growing role of the state in economic activity, it is not surprising that 20th century decisions on Crown prerogative have ruled it to be proprietary in nature, if not in origin. Two 1938 cases from the dominions-- R. v. Bellman¹⁴⁹ and Attorney-General of New South Wales v. Butterworth and Co. (Aust) Ltd.¹⁵⁰ --cite Lord Mansfield in Millar to stress the Crown's property interest in copyright.¹⁵¹

2. Public Domain and Government Publications

The contrast between Crown copyright and public domain is important to note: the latter applies to works for which no one holds copyright, and are therefore freely available to everyone for use and reproduction¹⁵²; the former applies to works owned by the Crown and subject to all the incidents of the exclusive rights of copyright.¹⁵³

American and Anglo-Canadian law diverged significantly on this issue. In Wheaton v. Peters¹⁵⁴, Supreme Court of the U.S. decided that its own judgments fell into the public domain:

It may be proper to remark that the court are unanimously of the opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right. (666, per McLean J.)

The Wheaton decision, based largely on the Court's belief that public access to law precluded private rights in judgments, was interpreted as extending to all publications produced by government employees, a principle embodied in the 1909 Copyright Act and subsequent copyright statutes.¹⁵⁵ Cases following Wheaton recognized the notes, additions and headings provided by law reporters to be copyrightable, and the issue of ownership rights in law reports has remained a live one in American law to this day. In West Publishing Co. v. Mead Data Central Inc.¹⁵⁶, an injunction was granted to prevent the defendant from using plaintiff's system of reporter pagination in defendant's LEXIS computer research data base. The result shows the extent of private rights protection in the reporting endeavour, despite the public domain in judgments themselves.¹⁵⁷

No Canadian or Commonwealth case has resolved the issue of the copyright status of judgments. The Australian decision in Attorney-General for New South Wales v. Butterworth & Co. (Aust.) Ltd. is the strongest modern authority for the proposition that statutes are subject to Crown copyright. Long Innes C.J. reviewed the prerogative cases, especially Roper v.

Streater (1670) and Baskett v. University of Cambridge (1758), and found them binding on the point. He identified Crown copyright in statutes as a prerogative right proprietary in nature, while not giving an opinion on the origin of the right in property concepts.¹⁵⁸ Concerning judgments, different views abound. Fox suggests that Roll's Abridgment (1666) is still good law to the effect that the Crown has copyright by virtue of paying the salaries of judges.¹⁵⁹ However, as pointed out above, that was only one of the arguments made by the patentee; the case appears more likely to stand for Crown prerogative over the printing trade, a proposition that did not survive Millar. More recent assessments question whether Crown prerogative would now ever be extended to judicial decisions.¹⁶⁰ That still leaves open the possibility of copyright belonging to the Crown by operation of the statutory provision ¹⁶¹, or to judges themselves as authors. These alternatives might cause a court, should the issue come to be litigated, to follow the U.S. public domain lead.¹⁶² To date, Commonwealth courts have never brought the issue to a head by restricting access to statutes or to judicial decisions.

By virtue both of the prerogative and the statutory recognition of Crown ownership of works produced under government direction or control, however, an extensive role for the Crown as owner of copyrighted works is guaranteed by Canadian law. This circumstance has obvious implications for generating public revenue. A further implication concerns the

issues of freedom of information, and freedom of expression. To the extent government has ownership rights in materials it produces it has an additional lever of control over the publication and dissemination of information. The British and Australian governments indeed have resorted to copyright in efforts to prevent the printing of information considered embarrassing or harmful, where breach of confidence and statutory provisions dealing with national security did not avail them.¹⁶³ Recently, the Canadian government obtained an injunction to prevent publication of an abridged version of a controversial combines investigation report.¹⁶⁴ The defence raised an argument based on s. 2(b) of the Charter of Rights and Freedoms (freedom of expression), which the Federal Court too easily dismissed. A more creative judicial response would have been to permit publication on payment of a reasonable 'licence' fee. The point is, copyright ought not to be available to governments to block publication of information, either arbitrarily or to avoid embarrassment. In Part IV we will see that one of the two interests which prompted the majority in Millar v. Taylor to find for a common law copyright was the personal interest of an author in his privacy and reputation, an interest most evident in an author's decision to withhold publication of his work. Retrieving the importance of personal interests in copyright might help to point out the inappropriateness of Crown copyright being used to withhold publication. Crown copyright

notionally originated in the Crown's public duty, not in "personal interests" that properly inhere only to individuals. Justice Yates' admonition that the Crown does not hold copyright like private authors is apposite: the right to withhold access to literary compositions that is central to private copyright deserves less respect when invoked by government authorities.

IV. PROPRIETARY AND PERSONAL INTERESTS IN EARLY COPYRIGHT: THE EQUITY INJUNCTION CASES

A. INTRODUCTION

Part I of this paper posed issues raised by printing press technology both for theories of property and for the nature and social conception of authorship. This Part approaches the second issue by examining the way in which the English courts understood the role and rights of an author in the literary property cases up to and including Millar v. Taylor.

Eisenstein has pointed out how the printing press created a division of labour in book production which ultimately made the author's profession possible.¹⁶⁵ Where previously copyists had played the crucial role in making texts available, and most texts had a Biblical or classical heritage, print allowed the production of new texts on a large scale and for a mass readership limited only by the literacy and interests. Eisenstein notes that in the 13th Century, St. Bonaventura described four ways of 'making books', none of which included wholly original composition.¹⁶⁶ She speculates that the modern tradition that sees the artist/author as a heroic and lonely figure, following the Muses in bursts of originality, and in defiance of established order in society and the arts, may owe its genesis to the new technology.

As part of this reconceptualising of literary labour, copyright arrived as the law's mechanism for distributing the rewards of a new market. In doing so, however, copyright not only structured the way in which commercial exploitation of the book trade would occur, it also responded to and confirmed the new definitions of authorship. The property right in copyright would come to turn on originality, on rewarding those producers who did not copy or plagiarise their predecessors but who created expression. The value in originality had more than economic significance; the image of the author as intellectual labourer contributed to an understanding that the relationship between the creator and the objects of his labour was integral to the creator's personhood, and deserved protection aside from his economic interests. This Part looks at the early copyright cases to understand how these two interests entered into the common law tradition.

B. REVIEW OF THE CASES: VICISSITUDES OF AUTHORS AND PRINTERS

This section provides a brief overview of the cases leading to Millar v. Taylor which dealt in some fashion with the respective interests of publishers and authors. The particular concern for participants in the literary property debate was to distinguish those cases involving books subject to the statutory term for copyright and those which did not;

injunctions granted for the latter, argued the London booksellers, implied judicial recognition of common law copyright. For purposes of this paper, a more important distinction to draw is between cases involving published and unpublished works.

1. Injunctions for Published Works

In Gyles v. Wilcox and others (1740) 2 Atk 141, 26 ER 489 the plaintiff bookseller sought an injunction against defendant booksellers for publishing the book Modern Crown Law, alleging it to be "borrowed verbatim", save for deletion of several statutes and the English translation of Latin and French quotations, from Sir Matthew Hale's Pleas of the Crown, published in 1657 and over which the plaintiff claimed copyright under the Statute of Anne. The principal issue was whether abridging the original work constituted an infringement of the Statute or an innocent use of the original. The Lord Chancellor inclined toward the plaintiff, saying the right conferred by the Statute was not of the nature of monopoly and deserved a "liberal construction" because its intent was to

secure the property of books in the authors themselves, or the purchasers thereof, as some recompence for their pains and labour in such works as may be of use to the learned world. (at 490)

Nevertheless, he referred the case to a 'learned panel' to determine whether the defendants' book was the "same" as plaintiff's, or constituted a genuine abridgment, in which event it would not infringe. Following the panel's report, the Court dismissed the application.¹⁶⁷

In Tonson v. Merchant and Walker (1752), the plaintiff sued over an edition of Milton's Poems which incorporated commentaries by various scholars and writers. Since the original edition of the poems had appeared long before the Statute, the defendants raised the literary property issue, arguing that the 21-year statutory copyright for pre-1709 works had expired. The plaintiff responded by arguing for common law copyright. Lord Chancellor Hardwicke declined to rule on the point, saying the dispute should be sent to the common law judges for resolution; however, he did enjoin the defendants from publishing or selling their edition because it included the commentary of Dr. Newton, which had been written for plaintiff's edition in the 1730s and still had statutory protection. The issue was whether by adding his own original notes to Newton's commentary the defendant Merchant had made a new work which did not infringe plaintiff's copyright in the commentary.

In Tonson v. Walker (1752), Lord Hardwicke cited Burnett v. Chetwood (1722) 2 Mer 441, 35 ER 1008, as an instance of the unique factors involved in unpublished manuscript cases. The case dealt with both published and unpublished works of

the same writer. The plaintiff was executor of the estate of Dr. Burnett, author of the theological work Archaeologia Sacra. The defendant had produced an English translation from Burnett's Latin original. During his lifetime Dr. Burnett had prevented the book's being translated because he felt it contained controversial ideas not suitable for the "vulgar" reader. Lord Chancellor Macclesfield, after considering the status of translations under the Statute, granted an injunction to stop the defendant from printing that book and a second unpublished work of Burnett surreptitiously obtained. He did so more because he felt the Court had a responsibility to supervise publication of difficult religious ideas and because the defendant had respected neither the author's wishes nor his style, than from concern that the translation violated plaintiff's property interests.¹⁶⁸

The judges in Millar cited six unreported cases where printers sought injunctions to prevent defendants' publishing works for which the printers claimed the copy: Ponder v. Bradyl (1679),¹⁶⁹ Knaplock v. Curl (1722), Eyre v. Walker (1735),¹⁷⁰ Motte v. Falkner (1735),¹⁷¹ Walthoe v. Walker (1736),¹⁷² Tonson v. Walker (1739),¹⁷³ and Reily v. Fowler (1768). A summary of Knaplock (1722) appears in a short collection of injunction cases.¹⁷⁴ The case dealt with ownership of statutory copyright for Directions to Church-Wardens by Dr. Prideaux; the defendants claimed as assignees from the printer to whom the author had "first delivered the

Copy to be printed" (at 441). Lord Macclesfield, distinguishing between "copy" as a material object and the "right of copy" as a legal right, decided in favour of the plaintiff, who had subsequently purchased the "right" from the author:

...the bare Delivery of the Copy by the Author to be printed, doth not devest the Right of the Copy out of the Author, but is only an Authority to the Printer to print that Edition, and the Author may afterwards grant the Right of the Copy to another Person. (441)

The same chapter on injunctions also summarises Austin v. Cave (1740). There, Lord Hardwicke granted an injunction against a defendant who attempted to print Dr Trapp's Book Against Being Righteous Overmuch in extracts and under a different title. To the argument that extracts did not come under the Statute, Lord Hardwicke said "It is not material what Title you give the Book, nor whether you print all at once or not" (at 441). No report exists for Read v. Hodges (1740), but the case is briefly referred to both in Gyles v. Walker (1740) and Tonson v. Walker and Merchant (1752). In Read, the defendant claimed that his republication of a work of history, the Czar of Muscovy, was an abridgment of the original and not an infringement. Lord Hardwicke ruled it to be an "evasive abridgment"¹⁷⁵ as being a word-for-word copy of the original with just a few pages missing, and granted the injunction. No other cases prior to Millar exploring the

proprietary rights of printers and authors in published books appear to be reported.¹⁷⁶

2. The First Publication Cases

Four cases cited in Millar dealt with alleged piracy of works that had not been published by their authors. Only two of these cases, Pope v Curl (1741) 2 Atk 342, 26 ER 608, and Duke of Queensberry v. Shebbeare (1758) 2 Eden 328, 28 ER 924, are reported. In Pope, the publisher Edward Curl printed a volume titled Letters from Swift, Pope, and Others. Alexander Pope sought and obtained an injunction to prevent the publication of letters he had written.¹⁷⁷ Defendant raised, inter alia, the objection that by sending a letter the writer makes a gift of it to the receiver, which permitted the receiver to make any use of it he wished, including publication. The Court replied:

But I am of opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer. (at 608)

In the Duke of Queensberry case, the plaintiff was the administrator of the estate of an heir of Lord Clarendon who had written, but not published, a history of Charles II. The defendant Gwynn claimed that his late father, whose estate he

administered, had received an original manuscript from Lord Clarendon, who told him "he might take a copy thereof, and make use of the same as he should think fit." The Lord Keeper ruled that those words, if spoken, did not convey a right to profit from multiplying the book in print; the father "might make every use of it, except that." (at 925) Two unreported cases, Webb v. Rose (May 24, 1732) and Forrester v. Waller (June 13, 1741), also dealt with injunctions granted to prevent the publication of previously unpublished manuscripts.

C. PROPRIETARY INTERESTS: THE SCOPE OF THE RIGHT OF COPY

1. Scope of the Right in the Injunction Cases

In speaking of the scope of the property right in copyright, a number of things might be included: for instance, the temporal duration of the right (the driving issue of Millar v. Taylor), the geographic limits of its application,¹⁷⁸ or the categories of works of expression (literature, painting, music etc.) subject to copyright.¹⁷⁹ This Part of the paper seeks to explore through the English cases up to and including Millar the development of a concept of property in authorship. To do so, it focuses on issues which reveal the breadth of property in the author's work recognised by the courts and parties to the literary property debate. Two related issues provide this focus: (a) the type of work understood to qualify for copyright; (b) the uses by

third parties found to infringe copyright. The second point largely corresponds with whether the author was seen to own ideas, or only the particular expression he gave them-- in current parlance, the idea/ expression dichotomy. In other words, what did the author own ?

To ask these questions is in some degree to impose the preoccupations of a later, much expanded copyright regime on its earliest emanations. One must not draw too much significance from perceived 'gaps' in early copyright. Nevertheless, the legal status of the author as creator can be measured in part in relation to these factors.

(a) Type of Work

The Statute of Anne used only the words "printed books" to describe the type of work that qualified for protection. The definition of "book" rarely arose as an issue in the cases. In Pope v. Curl (1741), the defendant argued unsuccessfully that an edition of letters did not constitute a book for purposes of the Statute;¹⁸⁰ the Lord Chancellor stated it would be mischievous to distinguish this from "any other learned work." (at 608) The parties avoided the interesting question of whether a single letter had copyright as a "book". In Tonson v. Walker and Merchant (1752), the Court viewed the commentary of Dr. Newton as a work separate from Paradise Lost, despite its being incorporated into the same printed volume. In Baskett v. University of Cambridge

(1758), King's Bench implicitly rejected the argument that statutes were not books and so did not fall within the University's Charter to print "libros". Therefore, despite the Statute's use of the word "books", due as some commentators have suggested ¹⁸¹ to the influence of printers and booksellers in the drafting of the legislation, English courts were prepared to adopt a flexible approach to defining the class of works qualifying for the property right.¹⁸²

Few works of fiction appear in the early prerogative and copyright cases. Indeed, a clear preponderance of the cases deal with books written for professional or religious purposes-- works such as law reports, medical treatises, and theological writings. This no doubt reflects historical reality with respect to the development of prose fiction as a major literary endeavour; more than that, however, courts placed stress on 'usefulness' as an attribute of the protected work. The Lord Chancellor in Pope v. Curl (1741) found letters to be as worthy as "other learned works". He elaborated:

It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable; for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading. (at 608)

In Tonson v. Collins (1762), Blackstone maintained that 'value' was an attribute of property, but emphasized he did not thereby equate value with usefulness.⁽¹⁸¹⁾ He anticipated a point made by Aston J. in Millar about which more is said in Part V. Despite repeated references to "use" and "value" and "learned works", no early claim for protection failed on the basis of a judicial assessment that the work in question lacked merit, or provided no benefit to society.¹⁸³ In the nineteenth century obscenity came to be seen as a reason to deny copyright, a rule that only recently has been set aside in Canada.¹⁸⁴

(b) Uses by Third Parties

The second point, concerning third party uses¹⁸⁵, calls for a brief explanation. The "uses" made of protected works refers to the activities over which the law of copyright gives control to authors. On one level, this means the material activities covered by copyright: the Statute of Anne gave the author and assigns the "sole right of printing or reprinting" (Art. I); Willes J. defined the "copy of a book" as "the sole right of printing, publishing and selling" (Millar, at 206). Present-day statutes have added a number of activities to this list.¹⁸⁶ On a different, if related level, "uses" means the manner and purpose for which the work is taken or reproduced by a third party; for example, the third party may reproduce all or part of the original for the purposes of competing with

it, making a new work based on or inspired by the original, or merely enhancing or facilitating his enjoyment of the original. These types of use can be termed, respectively, competing, derivative and intrinsic uses. Contemporary copyright regimes extend protection to many derivative uses, while providing general statutory exceptions under "fair dealing" or "fair use" ¹⁸⁷ provisions that allow others to be freely engaged in. Intrinsic uses, which have gained importance through the increased ease and availability of reprographic technology like photocopiers and videocassette recording devices, remain in a figurative no man's land between warring camps.¹⁸⁸ Although these terms and issues were not identified as such in the early stages of copyright development, they assist in understanding the theoretical underpinnings of early copyright.

The most interesting issue raised by the cases in this regard concerned the status of abridgments. A doctrine emerged that "genuine abridgments" of protected works did not constitute infringements, but were themselves original products of labour deserving of copyright. Lord Hardwicke said in Gyles v. Wilcox (1740):

But this [finding of infringement] must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning and judgment of the author is shewn in them, and in many cases

are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author. (at 490)

Citing Gyles, the Court in Tonson v. Walker and Merchant (1752) stated the issue to be whether alterations in an existing work effectively created a new work. Judges denied the status of 'new work' to abridgments which involved only minor (Company of Stationers v. Seymour (1677)) or 'evasive' (Read v. Hodges) amendments. Burnett v. Chetwood (1722) raised the similar case of translations: the Lord Chancellor agreed that translations, in general, represented original work resulting from the "care and pains" of the translator, of the kind which the Statute intended to encourage. He nevertheless granted an injunction, in part because the translation was somewhat too original:

...the plaintiff finds that the said translation is erroneous, and the sense and words of the author mistaken, and represented in an absurd and ridiculous manner. (at 1009)

Thus, despite the courts' tendency to protect the interests of authors and their assigns in the early cases, they did not understand the property right to encompass 'derivative rights', i.e., rights in the author to control the creation of new works brought about by a substantial taking of his work. Translations and abridgments represent forms of derivative use most closely related to pure copying, certainly

when compared to other uses--such as dramatisation, filming, and performing in public-- which constitute the lifeblood of many contemporary copyright industries. The author had, in this respect, a narrow legal right restricted to the publishing and reprinting of the original work virtually in its entirety.¹⁸⁹

The absence of protection for derivative uses suggests that authors were not viewed as owning more than the particular expression which their work embodied. Although the distinction in copyright between ideas (not protected) and expression (protected) received explicit judicial recognition considerably later ¹⁹⁰, the early cases implicitly accept the limit.

2. Scope of the Right in Millar v. Taylor

The early copyright cases addressed particular issues raised in factual disputes between authors, printers and alleged infringers or pirates. As such, they reveal glimpses of the way in which courts conceived the rights and relationships existing between these parties, usually (after 1709) under the terms set out by the Statute of Anne. The cases making up the literary property debate which culminated in Millar and Donaldson, however, directed their discussion at the bases in law and philosophy for those rights and relationships.

The Millar Court was required by virtue of the issue before it to consider the scope of the author's rights under a common law copyright. The majority judges, in recognising a common law right which had as its main feature perpetuity-- the principal litigation goal of the London booksellers-- also adopted the restricted concept of the author's right that had emerged, if only in fleeting references, in the early cases. This may well have appeared to the judges, and the plaintiff, a reasonable and appropriate trade-off for a perpetual right to prevent piracy of printed works. In dissent, Mr. Justice Yates rooted his difficulties with the common law right in the possibility that copyright had unbounded scope, that it constituted an expansive right over ideas and knowledge as well as original expression.

(a) The Majority-- Justices Willes and Aston 191

Willes J. commenced his opinion by listing a series of qualifications limiting the impact of his judgment. Included in the qualifications were these comments:

It is found too [in the jury's verdict] "that the defendant sold several copies of the said book." And therefore this case is not embarrassed with any question, "wherein consists the identity of a book."

Certainly bona fide imitations, translations, and abridgments are different; and, in respect of the property, may be considered as new works: but colourable and fraudulent variations will not do. (at 205)

In so saying, he accepted the narrow copyright, which excluded an author's having control over 'new works' derived from his own, for the common law right. He later stated the essence of the idea/ expression distinction which has formed the basis of subsequent copyright law:

...the literary composition is as the material; which always is property. The book conveys knowledge, instruction or entertainment: but multiplying copies in print is a quite distinct thing from all the book communicates. And there is no incongruity, to reserve that right; and yet convey the free use of all the book teaches. (at 216)

Justice Aston, approaching the issues more from principle than precedent, addressed the argument that the object of copyright was "quite ideal and imaginary" (at 216) and as such could not be known to the common law. The right, though incorporeal, had a physical manifestation in the printed book:

The present claim is founded upon the original right to this work, as being the mental labour of the author; and that the effect and produce of the labour is his. It is a personal, incorporeal property, saleable and profitable; it has indicia certa: for, though the sentiments and doctrine may be called ideal, yet when the same are communicated to the sight and understanding of every man, by the medium of printing, the work becomes a distinguishable subject of property, and not totally destitute of corporeal properties. (at 221-222)

Nevertheless, ownership of the physical manifestation of the author's labour, the book, and ownership of copyright were two different things. The former permitted every use to be made of the book and its contents, save one:

He [the purchaser of a book] may improve upon it, imitate it, translate it; oppose its sentiments: but he buys no right to publish the identical book. (at 226)

This represented copyright in its narrowest sense. Aston J.'s willingness to allow imitations is particularly striking; it suggests he had in mind the classical notion of art, which envisaged imitation of the form of previous great writers as the hallmark of literary endeavour. This approach would find intrinsic uses, e.g., copying the work not to publish it but to facilitate studying it, or lending it to friends, outside the ambit of copyright protection.

Echoing the holding in Knaplock v. Curl, Aston J. stated that only the most explicit acts by the author would establish a "manifest intent" to give up his particular property in the book, the copyright.¹⁹² Lord Mansfield followed the lead of Willes and Aston JJ. in describing the narrow scope of copyright when, in showing how the King's rights in the English version of the Bible tracked those of common authors, he said that the King had no right to restrain others' versifying Bible passages, or making other translations (at 253).

Still, as narrowly as the common law right was described, Aston J. implied that it might not be restricted solely to the "book". In Tonson v. Collins (1762), Blackstone had described the object of value in the author's work in this fashion:

The next way of publication [after oral performance] is by writing, or describing in characters, those words in which an author has clothed his ideas. Here the value which is stamped upon the writing arises merely from the matter it conveys. Characters are but the signs of words, and words are the vehicle of sentiments. The sentiment therefore is the thing of value, from which the profit must arise. (at 181)

Justice Aston's distinction between an invention and a book ¹⁹³ similarly turned on finding the identity of a book in its ideas, "because its doctrine and sentiments are its essential and substantial part." (Millar v. Taylor at 226) If this opened the door to the essential problematic of the idea/expression distinction, in Justice Willes' words the 'embarrassing question wherein lies the identity of the book', Aston J. was prepared to leave to the jury in each case the issue "of the substantial work or composition, and of its original or derivate ownership." (at 224)

One other point from Justice Aston's opinion deserves mention. The theory of property he applied to copyright turned on finding present in an 'object' a "distinguishable existence" and "an actual value". He argued that both conditions were met in a literary composition. However, he

took pains to show that 'actual value' did not mean the object must meet some test of usefulness, or-- a point he credited to Locke and Grotius -- constitute a 'necessary'. He meant that the merit of a book, be it measured in literary worth or informational value, could not be argued as a factor determining its property status.

To summarise the position of the majority in Millar, the author's proprietary interest in his work, while perpetual in duration, was confined narrowly to an exclusive right over the copying for sale (the 'multiplying of copies for profit') of his "book", i.e., the precise manifestation of his expression. Excluded from the property was any right over 'new works' based on his book, including abridgments and translations. Aside from these derivative uses, the majority also implicitly excluded what might be termed an 'intrinsic use'--that is, copying the book not for purposes of sale and profit, but for enhanced personal use. The ruling in Duke of Queensberry v. Shebbeare (1758) that the defendant could do anything with the manuscript including copy it for personal reasons, so long as he did not publish it for the market, is entirely consistent with the majority's judgment. Similarly, Blackstone in Tonson v. Collins easily conceded that a circulating library did not infringe copyright by lending its books.¹⁹⁴

The majority thereby protected what it perceived to be the crucial, or only, means of commercially exploiting a work of authorship: publishing whole copies for sale. The

corresponding mischief to which the judgment addressed itself was 'piracy' between competing printers. Such a perception, as sensible as it appeared in terms of the state of bookselling and the technology of printing, followed from the preoccupation of the plaintiffs in the literary property cases: not authors, but printers claiming as assignees of a perpetual right to produce for the market. The Millar majority also recognised a form of the distinction between ideas and expression which left the former unprotected and freely available to all. Justice Yates failed to make this subtle but crucial distinction; however, he pointed out a serious flaw in the majority's theoretical justification of the common law right.

(b) Justice Yates on the Scope of Copyright

Justice Yates viewed the position for common law copyright as the staking of a claim to nothing less than ideas. The author's manuscript was a physical object, the "object only of his own labour" (at 230), but the 'copy' was "all ideal" (at 232), an intangible composite of ideas and sentiments. As such, the copy could not be subject of a property right because common law principles had never and could never countenance property in the absence of a physical object:

...but the objects of them all [rights in the nature of property], the principal

subject to which they relate, or in which they enjoy, must be corporeal. And this [is] a position which arises from the necessary nature of all property. For, property has some certain, distinct and separate possession: the object of it, therefore, must be something visible....which has bounds to define it, and some marks to distinguish it. (at 232)

Property arose from occupancy and possession, and granted to the owner a right of exclusion to prevent trespass. These attributes lost their meaning and purpose if made merely notional, not corresponding to objects in the material world. Justice Yates distinguished between property meaning 'property right', which he agreed was incorporeal, and property meaning 'object of property right', which he believed must necessarily be corporeal.¹⁹⁵ Without physical demarcation, third parties could not know the boundaries they must respect, and it would not be possible even to identify the moment when property commenced.

Justice Yates insisted that the object of copyright was the idea, not its particular expression. He understood the manuscript only as a singular object, to which the usual rules of personal property applied (as well as rules of trust and confidentiality owing to its communicative nature) and not as an embodiment of expression capable of being distinguished and made exclusive at common law. Yates J. did not grasp the mediating role of the text, which gave a fixed form to the author's invention. His understanding better describes

present-day copyright, with its protection of the substance of a fictional work and of various derivative rights, than the right to make copies of entire books, which the Millar majority recognised as copyright.

Yates J.'s concern was that a property right to an incorporeal had no principled limits, whether of duration or scope. He found the majority's position that common law copyright extended only to duplications of a text, and not to abridgments or translations, logically unconvincing. The majority located the justification for copyright in the dual facets of the labour theory: a person is entitled to the fruits of his labour, and no one is entitled to reap where he has not sown. With an incorporeal derived from intellectual labour, however, the "fruits" have no natural definition. If the author's reward for his labour meant profits flowing from third party uses of his composition, then almost no activity fell outside the property right:

If the buyer of a book may not make what use of it he pleases, what line can be drawn that will not tend to supersede all his dominion over it ? he may not lend it, if he is not to print it; because it will intrench upon the author's profits. So that an objection might be made even to his lending the book to his friends; for he may prevent those friends from buying the book; and so the profits of such sale of it will not accrue to the author. (at 234)

In other words, the value of a composition depended precisely on what uses of the book the law made the exclusive preserve of the author-- law determined value, so value could not serve as a justification for law:

From [publication], the value, with respect to the author, depends upon his right to the sole and perpetual publication of them: and the great point in question is, 'whether he is intitled to that right, or not.' But laying this observation aside, mere value, (all may see), will not describe the property in this. The air, the light, the sun, are of value inestimable: but who can claim a property in them ? mere value does not constitute property. (at 230)

The latter phrase reveals Justice Yates' underlying view of the author as an intellectual labourer, taking up those ideas which, like the air and sunlight, are all about him, and by intermixing his labour enriching the common culture for use by others. Yates J. did not share the majority's impression of the author as originator of value, and of works of unique expression. He did believe that authors deserved reward in the form of an exclusive right to copy for a limited time, a reward only legislation, and not common law, could design.

D. PERSONAL INTERESTS OF THE AUTHOR: LORD MANSFIELD AND THE LITERARY PROPERTY QUESTION

1. The First Publication Cases

The four cases cited in Millar as recognising a common law right in an author to publish, or authorise the publication of, his work played a central role in the literary property debate. Since the Statute of Anne protected only printed books, these cases-- Pope v. Curl (1741), Duke of Queensberry v. Shebbeare (1758), Webb v. Rose (1732), and Forrester v. Waller (1741)--could not be distinguished on the basis they merely enforced the statutory right.

If a right to publish existed at common law, the proponents of literary property argued, then how could the act of publication, unaccompanied by any renunciation of rights by the author or his assignee, effectively extinguish it ? Certainly for Lord Mansfield this was the key point:

If the copy belongs to an author, after publication; it certainly belonged to him before. But if it does not belong to him after; where is the common law to be found, which says "there is such a property before?" all the metaphysical subtilties from the nature of the thing may be equally objected to the property before. It is incorporeal; it relates to ideas detached from any physical existence. (Millar v. Taylor at 252)

In Duke of Queensberry (1758) Chancery, in Lord Mansfield's view, had no trouble distinguishing between the manuscript in the defendant Gwynn's hands and the property interest:

Mr. Gwynn might have thrown it into the fire, had he pleased. But at the distance of near a hundred years, the copy was adjudged the property of Lord Clarendon's representatives; and Mr. Gwynn's printing and publishing it, without their consent, was adjudged an injury to that property... (at 252)

The Lords Chancellor in both Duke of Queensberry (1758) and Pope v. Curl (1741) had also spoken of the defendants' acts as usurping a profit to which the authors (and their representatives) were entitled should they decide to publish. But other equally important interests were at play in those cases. Justice Yates used them as the basis for distinguishing the first publication cases from Millar:

...in all these cases the publications were surreptitious, against the will of the owner [of the manuscripts], before he had consented to the publication of them; and, as such, they will have no effect upon the present question.

It is certain every man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state, the manuscript is, in every sense, his peculiar property; and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property.... But this does not apply to the present question (at 242)

In other words, the author had legitimate interests of a personal rather than commercial nature in deciding whether or not to publish a manuscript, interests the common law recognised as a form of property right; the violator of that right was guilty of a breach of trust or confidence, not merely or necessarily an appropriation of profits.

Lord Mansfield also identified the personal interests implicated in the first publication cases as an important aspect of the property right of common law copyright; indeed, copyright's capacity to protect those interests through a grant to the author of exclusive control over the whole course of publication was fundamental to his ruling. This cannot be said of any other judicial opinion given during the literary property debate up to and including Donaldson v. Beckett (1774).

The nature and function of the copyright Lord Mansfield derived from natural law was a copyright that responded both to proprietary and personal interests. To Lord Mansfield it was significant that Pope had "a very imperfect memory of [his letters'] contents: which made him the more anxious to stop their publication." (at 252) The letters may have had commercial value, but more important, Pope had a right to prevent their public disclosure. The very essence of the asserted common law copyright was that it provided the author control over the uses made of the products of his intellectual and artistic labour, a control that had economic value and

preserved the relationship between the author and his work, and indeed his public persona. Should this right not survive publication the relationship between author and work would be ruptured:

He is no more master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any one may print, pirate and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published. (at 252)

2. Personal Interests After Donaldson V. Beckett (1774)

The common view which followed the holding in Jefferys v. Boosey in 1854 was that in Donaldson the House of Lords agreed with the Court of King's Bench in Millar that a common law copyright existed, but further found this right had been extinguished for all published books by the Statute of Anne in 1709.¹⁹⁶ As a consequence, copyright became for all intents and purposes a statutory right, whose terms and scope henceforth were to be determined by the legislature. The exception was the right to first publication which, not affected by the Statute of Anne, retained its roots in the common law.

Lyman Patterson's point that the rejection of a common law development for an author's copyright effected by Donaldson stifled recognition of personal interests peculiar to the author is largely borne out by history.¹⁹⁷ British and U.S. copyright statutes concerned themselves only with commercial rights. Le droit moral, or moral rights of the author, a concept familiar to continental Europe's copyright laws from an early stage, has only recently started to appear in Anglo-American statutory law.¹⁹⁸ A striking exception occurred in Canada. The Copyright Act of 1921, modeled closely in almost every other respect on the Imperial Copyright Act of 1911, included a moral rights provision in s. 12(7):

Independently of the author's copyright, and even after the assignment, either wholly or partially, of the said copyright, the author has the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the work that would be prejudicial to his honour or reputation.

In the 1988 Amendments to the Copyright Act the moral rights were expanded and elaborated.¹⁹⁹

3. Personal Interests and Copyright Law

The personal interests which former s. 12(7) and the new ss. 12.1, 12.2, 18.1 and 18.2 protect concern the author's reputation: the interests of paternity (the right to claim authorship or use a pseudonym)²⁰⁰ and of the work's

integrity.²⁰¹ The rights enumerated are separate and distinct from the property right, although certain of the 1988 amendments-- making the moral rights of equal duration to copyright, and making them waivable ²⁰² -- effectively bring them closer together.

These interests are not solely nor, in all circumstances, best protected by the moral rights provision of the Act. Copyright itself permits the author through contractual arrangements to exercise a degree of control over the uses which can and cannot be made of his work.²⁰³ Common law actions such as defamation and passing off are also available to protect the author's reputational interests.²⁰⁴

Section 12(7) of the Act did not protect what is perhaps the most fundamental personal interest of authors: privacy.²⁰⁵ That interest had since Pope v. Curl (1741) been the preserve of the right of first publication. After Donaldson , this right remained the only part of copyright recognised at common law. The British Copyright Act of 1911 and the Canadian Copyright Act of 1921 incorporated the right of first publication into statutory copyright.²⁰⁶ Nevertheless, the right to decide whether or not to publish continued to obtain special protection under the statutes and as a matter of judicial interpretation. For example:

- (i) an unpublished work has copyright for an indefinite duration;²⁰⁷

- (ii) unauthorised publication of an unpublished work constitutes unfair dealing; ²⁰⁸
- (iii) the Act provides compulsory licences only for published works. ²⁰⁹

The special treatment accorded the right of publication suggests it may have a different status than other rights granted in the Act. In Canada, the Supreme Court has flirted with recognising a "right of privacy" in s. 8 of the Canadian Charter of Rights and Freedoms, the "search and seizure" provision.²¹⁰ Several provincial legislatures have adopted privacy statutes which protect a variety of privacy interests.²¹¹ The Copyright Act remains, however, a significant instrument for protecting the privacy of the author's written, and other, works of expression.

The unique nature of the right of first publication is evidenced, albeit in mirror fashion, in the early Canadian case Morang & Co. v. LeSueur ²¹². The author had sold his manuscript biography of William Lyon Mackenzie to a publisher. The contract did not specify the publisher to be under a duty to publish, and for political reasons it decided neither to do so nor to return the manuscript to the author.²¹³ In the Supreme Court of Canada, Fitzpatrick C.J., ruled that a book could not be treated like other merchandise, and that while the author could alienate his right not to publish, this could be effected only by express terms. The Court in essence

distinguished between the publisher's undisputed right to the commercial copyright should he publish, and the author's right to first publication.²¹⁴

In the United State, the early English copyright cases formed the foundation for the argument of Brandeis and Warren in their seminal 1890 article "The Right to Privacy".²¹⁵ They argued that the injunctions granted to prevent publication of letters and other private writings did not rest on property in what they saw as its previous narrow sense:

The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form is in reality not the principle of private property, but that of an inviolate personality.²¹⁶

Judge Jon O. Newman recently expanded on this insight. In commenting on the English cases he said:

There is strong indication in the early cases that while the right being articulated was one of property, the interest being protected was one of privacy. Why then did the courts not protect privacy as such ? The answer lies in the law of remedies. Protection against copying required an injunction. The equity courts doubted their power to issue injunctions to protect 'personal' rights, but confidently commanded restraint of publication to protect property rights. And so the law of literary property was enlisted in the service of privacy.²¹⁷

4. Lord Mansfield: Authors and Property Rights

In returning to the analysis of Lord Mansfield's judgment in Millar v. Taylor, the last phrase from Newman, turned on its head, provides a useful focus: privacy was enlisted in the service of literary property. After all, the issue presented to King's Bench was whether literary property existed at common law. Lord Mansfield found in the first publication cases precedent for the property right. Justices Willes and Aston did so as well, but unlike them, Lord Mansfield was fully aware and prepared to acknowledge that those cases dealt with interests beyond the author's opportunity to reap the profits of his labour:

It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he will ever publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions... (at 252)

In this passage he identified the interests later comprised by moral right: the right to claim authorship, the right to maintain the work's integrity and the right to reputation. To Lord Mansfield, the control which copyright at common law would give an author to preserve his connection to the object of his creation was itself a justification of the property right.

The other judges who considered the literary property question did not advert to this issue. In accord with his physicalist concept of the objects of property ²¹⁸ Justice Yates viewed the right of first publication essentially as a right to the manuscript as an object over which the author had ownership rights that gave rise to actions in trespass or trover for a taking without consent, in addition to a claim of breach of trust against a party who published the manuscript after receiving it under a duty, express or implied, of confidentiality. He did not otherwise identify any non-commercial interest of the author in the object of his creation. Justices Aston and Willes concerned themselves solely with the author's interest in reaping the material benefits of his creative labour, and the advisory opinions of the judges in Donaldson followed Yates, Willes and Aston JJ. in their respective approaches.

Lord Mansfield envisaged common law copyright as perpetual and alienable. Personal rights, in contrast to property rights, are characterized as being non-alienable and limited to the lifetime of the individual, and indeed moral rights in Canadian copyright law had those characteristics until the 1988 amendments.²¹⁹ Lord Mansfield did not, apart from using the personal interests of the author as a justification for the property right, deal with them in detail and so the absence from his opinion of any consideration of how the author could preserve those interests outside the

contractual relationship with his publisher is not surprising. Nor did Lord Mansfield explain whether heirs or assignees of the author could assert the right to maintain the integrity of the work, although his reasons implied this to be the case. The significance of Lord Mansfield's opinion, however, lies in the centrality which he gave personal interests in the author's endeavour. Where others saw the reward of the author for his original efforts in the profit he could make from the exclusive right to multiply copies of his work for sale, whether in perpetuity or for a term limited by statute, Lord Mansfield saw a fuller reward which responded as well to the author as a creator, as the maker of something which remained in some fashion integral to his personality.

In sum, the use of the first publication cases in Millar by the majority reveals a dichotomy in the theoretical relationship accorded proprietary and personal interests which still exists at the core of copyright in the common law jurisdictions. On one hand, Lord Mansfield's view represented the recognition of something important about property rights: their value incorporates a protection of personhood as well as of material reward. On the other, the majority judgment embodied a form of possessive individualism,²²⁰ in the sense of using personal interests like privacy to justify constituting the creative individual as possessor of property for purely commercial purposes; i.e., finding in the author's particular private concerns a reason for establishing a

commercial right of limitless duration. David Lange has identified the conversion of judicial concern with personal interests into property rights as a hallmark of the development of intellectual property and related rights. A prime example of his thesis is the "right of publicity" now well-established in American law.

E. A CONTEMPORARY COUNTERPART: MISAPPROPRIATION OF PERSONALITY AND PUBLICITY RIGHTS

The evolution from legal protection of interests of a personal nature to a system of property rights, which is the internal logic of Millar in the majority's treatment of the first publication cases, has at least one modern counterpart: actions for misappropriation of personality and the right of publicity. This section will concern itself more with the extensive U.S. development in this area than with the Canadian and Commonwealth experiences.

Early American cases recognising the right of individuals to be free from unwanted uses of photographs of themselves, associations with commercial endeavours, or public disclosure of personal information were inspired by the work of Brandeis and Warren.²²¹ Because of this basis in a right of privacy, courts denied protection to individuals who had opened much of their lives to public view (ie, most celebrities), on a theory of waiver.²²² And indeed, in terms of a privacy right

narrowly conceived this made sense because in many cases the issue was not disclosure or breach of privacy per se , but rather whether the well-known public figure had control over commercial exploitation of his fame. The doctrine which eventually emerged in response to the latter problem was the right of publicity, a property right in one's own name and likeness. The celebrity now had a further commodity to sell, in addition to his professional talents and the rights in any products for which he was responsible: his persona. On this right is founded the enormous merchandising industry through which stars of stage, screen, sports and other celebrated activities market their fame directly, or to enhance sales of otherwise unrelated commodities.²²³ The roots of publicity rights in privacy law continue to cause theoretical and practical confusion (for instance, a debate has raged over whether publicity rights are inheritable as property)²²⁴ and states such as California have tried to untangle the web by granting to individuals a right of privacy to prevent appropriation of name or likeness up to the point at which they authorise their commercial use, and thenceforth a property right in further exploitation.²²⁵

This development strongly resembles the evolution of copyright law. From Millar until the Imperial Copyright Act of 1911, copyright was conceived as a commercial right that arose only after an author had published his work, thereby waiving a right born in privacy to withhold publication.

In Canada, a right of publicity as such has not yet received recognition, although causes of action closely approximating the publicity right are now established in both statute and common law. Several provinces have enacted privacy statutes which include amongst their protections the right to prevent unauthorised commercial use of name or likeness.²²⁶ Further, in Krouse v. Chrysler Canada Ltd., Estey, J.A. as he then was, acknowledged that "the common law does contemplate a concept in the law of torts which may be broadly classified as an appropriation of one's personality".²²⁷ Developments in other Commonwealth jurisdictions roughly follow the Canadian pattern of offering some protection, but less than that found in most American states.²²⁸

Several commentators²²⁹ have suggested that the action for misappropriation of personality, or the right of publicity, represents not two rights joined but a single right to control the use others make of one's personality. The point is that a personal interest in protecting one's identity and privacy extends beyond the moment at which one engages in disclosure of private facts or images, and deserves respect in addition to any rights of commercial exploitation.²³⁰ One should have the right, for instance, to prevent others from associating features identified with one's personality with their products, not simply because this denies a commercial opportunity, but because the association offends a sense of personal integrity.²³¹ Such a theoretical approach tracks the

line of argument developed by Lord Mansfield, who envisaged copyright as property performing the function of protecting both personal and commercial interests of authors.

The analogy between copyright and rights of publicity, while strong, should not be overdrawn. The analogy breaks down when looking at the justification for the two rights in economic theory. The justification for copyright that it encourages the production of original expression is not so easily available to rights of publicity, because "celebrity" generally follows as a fortuitous by-product of activities undertaken for other purposes and rewards. The stronger justification for a "right of publicity" is a theory of unjust enrichment. With a continuing 'commodification' of personality effected by publicity rights, however, this may change, and manufacturing celebrity for the sheer purpose of its commercial exploitation may become the norm.

V. THEORIES OF PROPERTY IN MILLAR V. TAYLOR

A. LIMITS OF PRECEDENT AND THE RESORT TO REASON

This paper has examined the legal authority argued and considered in Millar, dividing it roughly into three categories: (1) cases preceding Millar in England and Scotland during the course of the London booksellers' efforts to establish a perpetual common law copyright; (2) cases involving exclusive rights to publish books exercised by or at the grant of the Crown; (3) a series of injunctive actions brought by authors and booksellers in Chancery to vindicate various personal and commercial interests in publication. At that point, the chain of precedent stopped and Millar v. Taylor (1769) began.

In litigation directed at fixing the place of the right to copy in relation to the common law of property, it might have seemed likely either or both parties would cite authority drawn from the fields of personal or real property to illustrate the principles at stake. With a single exception, this did not happen. Justice Aston cited an Elizabethan decision, Ireland v. Higgins (1587) Cro. Eliz 125, 78 ER 383, in which a plaintiff claiming ownership of a greyhound succeeded over the defendant's objection that the dog, as ferae naturae, when out of possession was not subject of

property. He did so precisely to make the point that the common law recognised property rights in novel objects on the basis of principle (object's distinguishability, determinacy of owner) without precedent.²³²

One can speculate on the reasons why counsel and judges did not go to real or personal property for precedent. Real property, with its basis in feudal law and doctrine of seisin may have seemed of little relevance to the issue at bar.²³³ The emerging principles of personal property, centred as they were on possession, may have only underlined the problem which the right to copy represented: the separation of possession and ownership. More important, as James Evans shows,²³⁴ the doctrine of stare decisis had not yet reached its privileged position by the time of Millar. While cases drawn from real and personal property would in any event have had exemplary value, rather than serving as authority for copyright, the point is helpful in suggesting that pre-1800 courts were comfortable looking to sources outside decided law for guidance.²³⁵

B. NATURAL LAW THEORY OF PROPERTY RIGHTS AND COPYRIGHT

The issue of whether copyright should be recognised in the common law demanded that judges look to the grounds on which property rights in general could be justified. The issue of justification of property is one that preoccupies political as well as legal theory; this Part will concentrate on the

justificatory theories of the Millar judges, with a view to the manner in which they presaged later developments in legal theory. The majority judgment in Millar is an expression of natural law theory, and it is to that school of thought this section turns.

1. The Political Theory of Natural Rights

The late eighteenth century witnessed the greatest influence of the secular natural law political theory which first emerged during the Reformation. Leaders of the American Revolution, and the revolutionaries in France twenty years later, drew inspiration and ideology from natural law theories, a fact reflected in the constitutional documents produced in each country. Prior to 1600, "natural law" was the preserve of Christian philosophy, particularly that of Thomas Aquinas and other theologians of the Church. Aquinas distinguished natural law, as divinely ordained law ordering the world, from positive law decreed by sovereign political authorities to govern the affairs of men. Natural law informed positive law but stood above and beyond it, placing a higher call on men's allegiances.

The first secular theory of natural law has been generally ascribed to Hugo Grotius. Following Grotius, such natural rights theorists as Hobbes, Locke and Rousseau put in place of divine will the nature of man as autonomous moral agent. The starting point in natural rights theory was a state

of nature anterior to the creation of human society in which individuals acted on their own interests and desires. Society arose as a contract between autonomous individuals, designed to meet their needs for security and mutual prosperity, the role played by a government of laws. In this fashion, state and society existed to serve the interests of individuals, interests which assumed the character of legal rights in and, if necessary, against the political order. Those rights inhered to the individual by virtue of his nature as a human being.

The status and justification of private property became key issues in natural rights theories. Conceiving property as being brought into society by individuals, and its protection as constituting a principal reason for individuals to enter into political compact with each other, theorists were required to explain why and how individual rights in property could arise in the statute of nature. The most influential theory of property in the natural rights school was developed by John Locke.²³⁶

2. Locke and the Natural Law Theory of Property

The meaning and implications of Locke's theory of property continue to be the subject of intense scholarly debate. C.B. Macpherson's analysis of Locke's thought as the archetypal moment in the development of possessive individualism²³⁷ identified the source for modern liberal

theory in a justification of capitalism as the natural and moral outcome for man conceived as an acquirer. This in turn prompted extensive response, some arguing against his thesis on the basis of a historical reading of Locke as engaged in the theological wars of his time ²³⁸, others that Locke made private property secondary to society, in which men realised their fundamental purposes.²³⁹ Almost irrespective of these subtleties, Locke's theory has had extensive influence in liberal jurisprudence regarding property rights.

The Lockeian justification of property has been termed the labour theory of property rights. Locke argued that it was morally right that an individual have exclusive rights in physical objects which he has produced by mixing his labour with nature's resources. Lawrence Becker points out that Locke's justification of property had two conceptually distinct bases:²⁴⁰

- (1) the individual has a property right in his own body and its labour;
- (2) the benefit of property is the appropriate reward for the pain of labour.

The second basis represents the claim that labour deserved reward, and that property was that appropriate reward, not because it was good in and of itself, but because it was painful and created value. Alan Ryan, in dividing political theories between those that view labour as a means to material

ends and those that view it as self-expression, and thus an end in itself, places Locke's theory in the first camp.²⁴¹ The value created by labour should accrue to its producer. Locke described how by mixing one's labour with nature, the lot of all improved; but only the producer was entitled to the fruits of that labour. To deny reward in these circumstances was akin to permitting unjust enrichment, the reaping by strangers where they have not sown.²⁴² These dual agricultural images of owning the 'fruits of one's labour' and others 'reaping where they have not sown' were the hallmarks of Lockeian labour theory as it has continued to operate in jurisprudence.

Of course, the reward for labour did not in logic have to be ownership of the object produced. That it was so, for Locke, derived from the second aspect of his theory identified by Becker: a more metaphysical entitlement to the object following from the individual's property in his own body and labour. In this respect, the body (but only one's own) was treated as an object in nature, capable of being owned in as exclusive a manner as any other object:

Though the Earth, and all inferior creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any right to but himself. The Labour of his Body, and of the Work of his hands, we may say, are properly his. ²⁴³

Denial of property in the objects of one's labour was therefore like an invasion of one's own person. So, while an individual laboured to provide himself with the necessities and comforts of life, his ownership of the things he produced also bore on his personal integrity. Becker writes of this psychological facet of the labour theory in this way:

I am what I have made. I am what I was,
what I want to do, and what I produce.²⁴⁴

This paralleled the analysis found in Hegel's thought, and its later emendation in Marx's concept of alienation.²⁴⁵ Locke did not go so far as to offer a critique of making labour and its objects alienable. He looked upon creation of money as a fall from grace, but an inevitable and irrevocable fall. Money's great attribute was that it could not waste, and waste was the only limit Locke believed existed with respect to accumulation of property initiated in one's own labour. The right to sell one's labour time and produce was assumed by Locke to be part of the natural right of property, requiring no justification apart from that of the right itself.²⁴⁶

3. Blackstone On Property Rights and Copyright

William Blackstone's Commentaries on the Laws of England appeared in 1765, three years after he argued for a common law copyright in Tonson v. Collins, four years before his argument for the plaintiff in Millar, and nine years before he rendered

an advisory opinion in favour of literary property in Donaldson v. Beckett. The argument he made in Tonson and his outline of property theory in the Commentaries closely resembled the analysis of Justice Aston in Millar; it seems reasonable to speculate that Blackstone played an important role in setting the terms of the debate on the booksellers' side.

The Commentaries revealed Blackstone's tempered natural law position. He identified the rights to life, liberty and property as the three absolute rights inherent to Englishmen--that is, rights grounded in nature and protected from time immemorial by the common law. Property rights had their origin as usufructuary rights in a state of nature where all objects were otherwise held in common. At a point when population growth produced scarcity of land and food, a more evolved right, a permanent property in the substance as well as the use of things, developed. The basis for property both in the use (consumption) and the substance of things was first occupancy, although Blackstone acknowledged a moral difference between mere occupancy and labour:

[Movables were appropriated before land] principally because few of them could be fit for use, till improved and ameliorated by the bodily labour of the occupant, which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein. ²⁴⁷

Blackstone noted a "nicety" distinguishing Grotius and Pufendorf from Locke, in that the former argued for an implied assent by men that first occupancy should yield ownership, while Locke believed occupancy as labour justified property on its own.²⁴⁸ Property subsisted in the first taker until he demonstrated an intention to abandon the object as publici juris; alienation, which followed property as a matter of convenience for owners, involved an abandonment coupled with an intention of the purchaser to 'occupy' the object.

Blackstone described property in an absolute manner:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.²⁴⁹

This despotic dominion over the external world was God's gift to mankind.²⁵⁰ K.J. Vandavelde (1980) ²⁵¹ argues that Blackstone's treatment of property was 'physicalist' and 'absolutist'. By the former he means conceiving property as a right relating to things. While Blackstone recognised that not all property had corporeal form, Vandavelde argues that he reified the concepts of incorporeal hereditaments and choses in action by calling them 'things in contemplation.' Vandavelde contrasts this to the later Hohfeldian scheme which described property not as a right over things, but as a jural

relation between persons. The 'absolutism' of Blackstone's thought made it difficult for legal theory to comprehend degrees of or limits on ownership: property meant nothing less than despotic dominion. Hohfeld's analysis involved separating rights, powers, privileges, and liberties, and showing how they could exist in various combinations in a single legal relationship; law could limit various of these factors without destroying the right of property. While Vandeveld's point is generally well-taken, and corresponds to our discussion of the challenge which copyright presented to natural law property theories, he is wrong to say that Blackstone maintained property could not be subject to limitation in the public interest.²⁵² Indeed, Blackstone wrote that property

consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. ²⁵³

The absolute right of property, founded in natural law and preserved by common law, was not for Blackstone immune to expropriation by the state, only expropriation without compensation. The compact between the individual and civil society involved the former making some sacrifice of his rights in exchange for peace and security. In return, society must respect the individual's residual rights; as well, it must endeavour to rest security on private property itself:

And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.²⁵⁴

Blackstone brought many of these themes to his arguments for a common law copyright. In Tonson v. Collins (1762) he argued that copyright was founded in reason, citing three factors. First, literary property met the requirements of the labour theory:

The natural foundation and commencement of property; viz. by invention and labour. Both exerted in a literary production; the present work is found to be an original composition. Original (*ex vi termini*) implies invention; as composition does industry and labour. Property may with equal reason be acquired by mental, as by bodily labour. (at 180)

An idea could be occupied like a field, but both required cultivation and improvement on the part of the right-holder in order to be useful. Second, "common utility" demanded that property be recognised in the fruits of industry, in order to encourage further production:

Science equally encouraged by protecting the produce of genius and application. Without some advantage proposed, few would read, study, compose or publish. (at 180)

Because only the profits of publication could provide this reward, the appropriate property was "an exclusive right of

publication." In this way, Blackstone glided over the subtle yet significant difference between property as dominion over things produced by labour and property as a right over an activity. Third, literary compositions shared the "essential requisite of every subject of property": exchange value. However, the "subject" he described here was the composition itself, or more precisely its "sentiment", not the right of multiplying copies of the composition.²⁵⁵

4. The Majority Opinions in Millar v. Taylor

The three majority judges in Millar approached the literary property issue in different ways. Justice Willes looked to history and precedent for answers and eschewed metaphysical reasoning.²⁵⁶ Nevertheless, he concluded his judgment by saying it violated natural justice for a stranger to "reap the beneficial pecuniary produce of another man's work" (at 218). Lord Mansfield adopted the views of his two colleagues, and in briefer reasons developed the approach from natural law identified in Part IV, and to which this discussion shortly returns. Justice Aston commenced from metaphysics and drew on natural rights theory and Blackstone.

Aston J. thought that defendant's arguments that literary property was "quite ideal and imaginary...not an object of law, nor capable of protection" demanded an answer founded in "certain great truths and sound propositions." (at 219) His answer began with a statement by Pufendorf, the "learned

author of the religion of nature", that moral good coincides with legal right. He then reviewed several propositions from Pufendorf intended to prove as a moral truth that the products of the labour of one man can no more be the property of another than his labour itself can be.

Like Willes J. and Blackstone, Justice Aston showed lawyerly impatience with certain 'niceties' of the philosophers' works, especially those tending to cast doubt on copyright as an appropriate subject for property at common law. His criticisms revealed the perspective of an empirical modernism, rejecting limitations on private property implied by state of nature theories. He said that several "written definitions of property" cited by lawyers in argument

are, in my opinion, very inadequate to the objects of property at this day. They are adapted, by the writers, to things in a primitive (not to say imaginary) state; when all things were in common....

Thus great men, ruminating back to the origin of things, lose sight of the present state of the world; and end their inquiries at that point where they should begin our improvements. (at 220-221)

The great men, including Locke, limited property by viewing it only as objects wrested by occupancy from the commons, and as "necessaries" required for survival. Aston J. specifically rejected as irrelevant to the modern age the limiting principle of spoilage, which he attributed to Locke and Grotius. He preferred Pufendorf's view that "distinct

properties" increased over time as circumstances and human genius required. In particular, theory and common law no longer demanded that objects be useful in order to be property:

Things of fancy, pleasure or convenience are as much objects of property; and so considered by the common law; monkeys, parrots or the like; in short, anything merchandizable and valuable. (at 221)

If such objections to the expansion of objects of property no longer held, Aston J. argued, it was only necessary to know the attributes which qualified something to be the subject of property rights. He cited two: (1) "a capacity to be distinguished"; (2) "an actual value in that thing to the true owner." (221) It was shown in Part IV that Justice Aston believed fixing the composition in printed form provided it with sufficient corporeality to be distinguishable. The "value" of a composition to its author lay in its publication, and it was that which Justice Aston made the subject of the property right. If publication in itself represented the value and property of the author in his work, then it would be illogical to find in the very act of publication a renunciation of property, as the defendant argued. Having established literary property as possessing the two attributes of property, Aston J. then cited the maxim noted by Blackstone: "The best rule, both of reason and

justice, seems to be, 'to assign to every thing capable of ownership, a legal and determinate owner.'" (at 221)

To Justice Aston, the author's ownership of the literary composition was not only justified on the labour theory of entitlement, it could claim superiority over property in land or tangible objects:

And there is a material difference in favour of this sort of property, from that gained by occupancy; which before was common, and not yours; but was to be rendered so by some act of your own. For, this is originally the author's: and, therefore, unless clearly rendered common by his own act and full consent, it ought still to remain his. (at 221)

In other words, literary composition did not emanate from common resources, let alone natural resources, but sprang forth as an original product of the author's imagination and mental labour.

C. JUSTICE YATES' CRITIQUE OF THE NATURAL LAW POSITION

1. Public Domain: Natural Rights of the Public

Justice Yates did not share this view of the author's creative activity. In maintaining that "[p]roperty is founded upon occupancy", he implied authors also were engaged in appropriating from the commons; the problem, however, lay in the impossibility of occupying or appropriating ideas in the same way one occupied land:

Some act of appropriation must be exerted, to take the thing out of the state of being common, to denote the accession of a proprietor: for, otherwise, how should other persons be apprized they are not to use it ? these are acts that must be exercised upon something. The occupancy of a thought would be a new kind of property indeed. (at 230)

For Yates J., the compositions of authors had an interdependency with the culture in which they arose, arising from a "commons" of ideas and style, and returning to that commons. In short, Justice Yates had in mind a public domain in literary composition. In making the point that the fruits of the author's labour should be circumscribed he said:

He [the author] must not expect that these fruits shall be eternal; that he is to monopolize them to infinity; that every vegetation and increase shall be confined to himself alone, and never revert to the common mass. In that case, the injustice would lie on the side of the monopolist, who would thus exclude all the rest of mankind from enjoying their natural and social rights. (at 231-232)

(emphasis added)

The 'fruits' might be material reward, but the 'vegetation and increase' referred to the uses of the author's ideas and inventions themselves. Justice Yates had a particular concern that common law ownership of ideas would bar independent appropriation by subsequent authors--that is, authors arriving at the same place without any reference to or notice of the 'original', and without copying.²⁵⁷ To the argument that the

custom of the stationers of buying and selling copyrights amongst each other could sustain a right at common law, Yates J. said that private parties could not "affect the real right of the public, who are no parties to such contracts: they can't create law." (at 237) One danger of a perpetual property right in the publishing of compositions was that it gave booksellers, and authors, "a right to suppress" (at 249) works for entirely arbitrary reasons, should they so choose.²⁵⁸ This sense that copyright represented a balancing of interests between the "natural rights" of a public audience composed of succeeding generations of writers, readers, and booksellers, and the rights of the creator of an original manuscript and his assignees, was unique to Yates J. amongst the judges in Millar. He did not dispute that the author had natural right on his side in terms of deserving reward for his intellectual labour ²⁵⁹; he did object, however, to the contention that this right gave rise to common law property over an incorporeal, something he argued English law had never countenanced.

2. The Argument Over Incorporeal Property

The two sides in Millar v. Taylor and in the literary property debate differed vehemently over whether the common law could recognise property in incorporeals. Justice Yates argued that only physical things could be the object of property rights, that incorporeals lacked the finite, fixed

boundaries that property required in order to perform its function of preserving social peace; his opponents replied that literary property had a corporeal quality in the form of the composition,²⁶⁰ and that the right to first publication was no less an incorporeal than copyright.²⁶¹ Yates J.'s position appeared at first glance to be wholly physicalist and for that reason archaic. Importantly, however, he wished to deny a common law property to incorporeals-- a natural law property unlimited in scope and duration-- not a limited statutory property.

To understand the significance of this point it is first necessary to address a confusion in Justice Yates' opinion over two types of incorporeals he felt were implicated in copyright: (1) ideas; (2) the activities of copying or publishing.

As pointed out in Part IV, Yates J. believed the right to copy gave protection to ideas, not merely to the particular expression embodied in a fixed literary work. With respect to Thompson's Seasons, he said that the defendant could not have violated any property of the author or his assignees "unless the very style and sentiments in the work were his [the author's]." (at 230) His main concern on this score was that ideas could not be demarcated-- in derivation, extent or abandonment--in a manner sufficient to separate one person's 'property' from another's, causing endless dispute and

litigation. Such a result frustrated the purpose of property law in a Hobbesian world:

The principal end for which the first institution of property was established, was to preserve the peace of mankind; which could not exist in a promiscuous scramble. Therefore a moral obligation arose upon all, "that none should intrude upon the possession of another." But this obligation could only take place where the property was distinguishable; and every body knew that it was not open to another. (at 234)

However if, as Justice Aston maintained, the law conceived copyright solely as the exclusive right to copy the precise expression (verbatim copying, as it were) of an author, this argument of uncertainty and insecurity largely failed.²⁶² Justice Yates may have failed to appreciate the significance of using expression as an observable boundary for literary property. It was also possible, however, that he was influenced by a concept of authorship. As shown in Part IV, many of the books which had come before the courts up to the time of Tonson v. Collins (1762) and Millar were informational or instructive in nature. In such works, compared to works of fiction, the expression and ideas of the author were closely wedded. Protecting the expression of an informational work could be tantamount to protecting the ideas it contained. Having a non-fiction model of composition in mind might account for Justice Yates' strongly voiced concerns for the

issues of independent creation, a commons of knowledge, and the public domain in ideas.

Justice Yates' understanding of the second incorporeal implicated in copyright as property-- the activity of copying--was stated more clearly. He perceived that what the owner of copyright owned was not a physical object, a book or a poem on paper, but a right to prevent all the world from engaging in the activity of making a copy of the object. All property correctly understood, he said, involved rights to prevent actions by others, but the proscribed actions related to interference with material objects:

In answer to these objections, it was alledged for the plaintiff, "that there are many other instances of incorporeal rights; such as all the various kinds of prescriptive rights and partial claims."

But the fallacy lies in the equivocal use of the word "property;" which sometimes denotes the right of the person; (as when we say, "such a one has this estate, or that piece of goods:") sometimes, the object itself.

Here, the question is upon the object itself, not the person. I readily admit that the rights of persons may be incorporeal.

But the question is now, "whether any thing can be the object of proprietary right, which is not the object of corporeal substance." And, for my own part, I know not of any one instance of any one right which has not respect to corporeal substance. Every prescriptive inheritance, every title whatever has respect to the lands in which they are exercised. No right can exist, without a

substance to retain it, and to which it is confined: it would, otherwise, be a right without any existence. (at 233)

Here, the substance, the literary work, could be replicated without being physically interfered with in any way; the unitary character of spatial objects which made them capable of being owned absolutely (including in perpetuity, in the sense of being owned by 'some person') broke down for an incorporeal like 'copying'. To Justice Yates, the property claimed by the plaintiff represented nothing more than a form of chose in action, a right to sue a party who printed a copy of his composition without consent. (at 245)

Justice Yates' repeated references to copyright as monopoly followed logically from this understanding. As a right to exclude others from engaging in certain activities with a presumed economic benefit, copyright conferred a type of partial trade monopoly on the author and assignee. The analogy he drew to patents for inventions focused precisely on this issue. The object which the plaintiff in actuality claimed as his property was the profit that issued from an exclusive right to manufacture.

3. Value as Property or Creation of Law

Justice Aston and the other majority judges argued that value yielded property rights, in that he who creates value by his labour was entitled to the reward of exclusive

ownership of the object of value. To permit non-producers to reap part of that value would be tantamount to unjust enrichment. Yates J. challenged this logic. Responding to the unjust enrichment point he said:

For, the injustice it suggests, depends upon the extent and duration of the author's property; as it is the violation of that property that must alone constitute the injury. (at 231)

As discussed briefly in Part IV, he rejected the idea that value produced property:

...mere value, (all may see), will not describe the property in this. The air, the light, the sun, are of value inestimable; but who can claim a property in them? mere value does not constitute property. Property must be somewhat exclusive of the claim of another. (at 230) (emphasis added)

Thus, property preceded value. It provided the exclusivity which created value. The Court, Yates J. implied, could not escape its responsibility for creating the value in a perpetual right of publication by pretending the value existed in nature, before the law granted it protection.

What did Yates J. mean by 'property' in this argument? Blackstone, too, had cited the examples of air, light and water as things which "must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had."²⁶³ These things could only

be subjects of property as to their use because they were not scarce; a substantive property arose with scarcity. Yates' argument made the point that scarcity in literary compositions was essentially brought into being by the law, not by nature. Property in publication meant the creation by law of exchange value, an alienable property that had, in Aston J.'s words, "merchandizable value." Indeed, it is difficult to conceive of property in incorporeal activities like copying and publishing as having any "use value" distinct from exchangeability.

Justice Yates argument on property and value found echoes in another, more famous intellectual property case a century and a half later. In International News Service v. Associated Press ²⁶⁴, the Supreme Court of the U.S. considered whether a wire service company had a right akin to property in the news stories it produced. Associated Press, the plaintiff, posted dispatches from its reporters covering the First World War on a board outside its New York offices for the use of local newspapers and other interested parties. Its competitor, the defendant I.N.S. copied the dispatches and put them over the wire to its subscribing newspapers across North America. Associated Press sued. The dispatches did not comply with the formalities required by the U.S. Copyright Act (1909), and because of their public distribution no action lay in breach of confidence. Associated Press succeeded, however, in convincing a Court majority to find in its favour on the basis of a new tort, "unfair competition". The majority spoke the

language of natural law, finding a quasi-property in the plaintiff's news stories on the grounds of its investment and labour, and the unjust enrichment of the defendant should it be allowed to continue the practice. Justices Holmes²⁶⁵ and Brandeis strongly disagreed, adopting a perspective similar to that taken by Yates J. in Millar:

Brandeis J.:

Upon these incorporeal productions the attribute of property is continued after such communication only in certain cases where public policy has seemed to demand it. (at 215)

Holmes J.:

Property, a creation of law, does not arise from value, although exchangeable--a matter of fact....Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference. (at 246)

The point made by these dissenting voices was clear: the recognition or creation of exclusive property in activities was a political question in the broad sense; and courts were not the appropriate bodies to decide the question.

4. Statutory Property

As stated above, Justice Yates did not entirely discount an author's 'natural' entitlement to reward for his labour. In fact, he adhered to the belief that property at common law

derived from natural rights in the products of labour. The products, however, had to be corporeal. The author therefore owned his manuscript at common law. The sale of the manuscript alone (and thus, for Yates, the sale of the right to publish it for the first time) might yield some reward, although significantly less than if the author also owned copyright. Justice Yates was vague on whether the author's right to reward extended beyond property in the manuscript, although he implied that it did not.

He acknowledged that society benefited from the work of authors and that a system of reward was needed to provide encouragement or incentive. As with the inventor, this represented the real claim of the author on English laws:

The whole claim that an author can really make, is on the public benevolence, by way of encouragement; but not as an absolute coercive right. (at 246)

The reason no absolute right lay was, as has been shown, that the right to copy in his view had to be balanced with competing rights in other producers (authors and booksellers) and in the public. The mistake in resting copyright on a labour theory that held the author entitled to the entire value his labour created was that value so understood had no inherent limits. The owner of a book in physical form presumably also had rights (or at least interests in certain uses of the book); but all of those rights could be conceived

on a pure labour theory as belonging to the author as 'values' he had created, and all could then be transferred to him in law:

If the buyer of a book may not make what use of it he pleases, what line can be drawn that will not tend to supersede all his dominion over it ? he may not lend it, if he is not to print it; because it will intrench upon the author's profits. So that an objection might be made even to his lending the book to his friends; for he may prevent those friends from buying the book... (at 234)

A perpetual copyright, he argued, would also have the effect of locking up the most valuable literary works in the hands of a few printers and booksellers forever, giving them a huge and unfair advantage over all newcomers to this "lawful trade." (250) Lord Camden, who disparaged the "Tonsons and Lintots" of every age, made much of this concern in his polemic in Donaldson v. Beckett.

If, then, the consideration of copyright necessarily involved the balancing of legitimate interests, who should do it ? Justice Yates had no hesitation: "Nothing less than legislative power can restrain the use of anything" (at 234), such as the use made of a single copy of a book. It fell to the legislature to sort out the interests at play and Yates J. pointed to the Statute of Anne as just such an exercise. The Statute gave authors an exclusive, assignable right to make copies of their compositions for sale for up to 28 years

following registration in Stationers Hall. Justice Yates did not want to be considered unsympathetic to writers or uninterested in their welfare; he could not accept, however, that 28 years provided so little protection that it would cause harm or fail to give material encouragement.²⁶⁶

If copyright existed only by statute, that did not make it any less property. The "Legislature indeed may make a new right" (at 245), a new property right, albeit one limited in duration. Justice Yates cited the case of Ewer v. Jones (1703) 2 Salk 415, 6 Mod 26, 87 ER 790,²⁶⁷ for the proposition that exclusive rights of property created by statutes could be sued for at common law. Statutory property had the power and status of common law property; it differed in that it was not absolute in terms of uses reserved for the owner or in duration, decisions of policy that should be made by a legislature in the public interest.

Part II of the paper examined the arguments surrounding the cases dealing with Crown prerogative and patent grants cited in Millar. It showed that the majority had tried to draw an analogy from those cases to a property at common law. Justice Yates had resisted the analogy. His view of those early expressions of copyright-type protections could be linked to his theory of the nature and justification of copyright as property. The Crown had developed patents for invention, and for printing, as an exercise of state power, both to serve its financial interests in patronage and

political ends in censorship, and more legitimately, to develop national industry. The basis of 'copyright' in its early forms had always been political. The Statute of Anne had generalised this property by taking the power of distributing it away from the Crown, but continued the recognition of copyright as responding to policy considerations. The effort to place copyright on the footing of common law property justified on natural law principles obscured the role it played in society. The politicisation of copyright in Justice Yates' thought and in the outcome of the literary property debate itself has infused the law of copyright ever since; it also contributed to a complete rethinking of the nature and purposes of legal rights that commenced shortly thereafter.

D. COPYRIGHT AND THE BREAKDOWN OF ABSOLUTE PROPERTY RIGHTS

1. Intangible Property and The Transformation of Legal Theory

The insight credited in this paper to Justice Yates is that copyright could not be made analogous to property rights at common law, conceived as absolute and perpetual rights founded in natural law. He envisaged instead two types of property: a common law property applicable to tangibles, and a political or statutory property applicable to intangible commercial rights of exclusive activity. The dominant schools

in contemporary 20th century liberal legal theory, as well as their radical critics, have come to view all property as sharing the attributes Yates J. had ascribed to copyright. Before returning to consider more closely the understanding of copyright as property in contemporary theory, this transformation of the jurisprudence of property rights in general deserves attention.

Patrick Atiyah says of the outcome of the literary property debate and the reversal of Millar by the Lords in Donaldson:

The truth was laid bare for all who wanted to see it, though few probably did: property rights were not 'natural' but artificial creations of law, and it was the law, based on values and policies, which determined the extent of those rights. Property had suffered its first major defeat.²⁶⁸

He makes this observation in the course of discussing the transformation in common law from viewing property as "possessions", things with use value, to interests, including promissory interests, with exchange value. These interests or expectations, not dissimilar to the future interests that had become so prevalent in the law of real property, could be secured, indeed created, only by law. Copyright was one of the new types of property in expectations which embodied the transformation. Atiyah's point is that law and legal theory were propelled by the new property of copyright and other

commercial rights to a position beyond Yates' bifurcated vision of natural and statutory property, to a recognition of the political nature of all property rights.

Several legal historians have connected this evolution to the beginnings to the increasing treatment of real property as a commodity of exchange.²⁶⁹ Both Daniel McClure²⁷⁰ and K. J. Vandeveld²⁷¹ trace the evolution of American trademark law to demonstrate its contribution to a breakdown in the natural law understanding of property rights. The debate in Anglo-American trademark law corresponding to the literary property debate, occurred over the issue of the extent to which trademarks might create monopolies that reduced competition in the marketplace. Trademark law in the common law jurisdictions has been characterised by a duality: the law protects 'non-distinctive' marks (i.e., descriptive marks or those based on a personal name or geographic location) on a misrepresentation basis, and distinctive marks on a property basis. That is, the former cannot be used in a way that involves a 'passing-off' of the defendant's products as the plaintiff mark-owner's products. On the property theory, however, distinctive marks receive protection from misappropriation in which the defendant user allegedly seeks to take advantage of goodwill existing for the plaintiff's mark even when the impugned use involves no confusion in the public's mind over the source of the product. Distinctiveness can be seen playing a similar role in trademark law to that of originality in copyright.

McClure and Vandevælde argue that the high-water moment for the property theory in U.S. trademark law occurred in a period from its first judicial recognition in the mid-19th century to the early 20th century, culminating around the time of the I.N.S. decision on unfair competition. Even during this period, however, courts showed discomfort with the sweeping power of trademarks as property, good against anyone in any business or geographic location, and started to place limits on the right. One limit analogous to the time limitation in copyright statutes was the principle that a trademark which lost its distinctiveness and became a generic term for an entire industry ²⁷² (often because of the marketing skill of the mark's owner) fell into the public domain. Vandevælde states the implications for property theory:

Designating a trademark or trade name property no longer stated a premise from which the rights of the parties could be automatically deduced.

Cases would be decided, not by deducing legal rights from concepts, but only by the policy of protecting investors from injury.²⁷³

Interestingly, James Oldham notes in a recent study that Lord Mansfield showed himself to be supportive of plaintiffs in early trademark, or passing off actions.²⁷⁴ In most of these cases Lord Mansfield presided over jury trials, and few reasons for judgment are extant; however, Oldham remarks that jury awards were generous in the context of the times, and

argues this would be consistent with Lord Mansfield's concern to protect reputations over and above the commercial interests at play.

The developments noted by Atiyah, Vandewelde and others²⁷⁵, influenced and were reflected in legal philosophy, particularly in the rise of utilitarian and legal realist theories. This paper does not seek to show a direct influence between the literary property debate and subsequent legal philosophy, nor to give an exhaustive review of philosophical positions that have been subject to scrutiny for decades. The discussion which follows has the modest purpose of demonstrating how mainstream and critical modern jurisprudence have adopted much of Justice Yates' theoretical position in Millar concerning the relationship between property rights and value.²⁷⁶

2. The Politicisation of Property in Modern Legal Theory

Late in the eighteenth century Jeremy Bentham launched his critique of natural rights theory and Blackstone's construction of English common law from the perspective of utilitarian philosophy.²⁷⁷ He disparaged efforts to locate the sources of common law rights in metaphysics or morality, arguing instead that law was a social institution, justified in its general and specific rules only to the extent to which it had social utility, reflected in the measure of utility as

"the greatest happiness for the greatest number." Bentham's strong preference for statute law over judge-made common law reflected his belief that jurisprudence could be treated as science, with legal concepts capable of being tested and refined on the utility measure. That law preceded rights rather than the reverse was fundamental to Bentham's credo.

The contemporary heir of utilitarian and positivist theory is the "law and economics school".²⁷⁸ The utility measure, or social 'end' of law, conceived by this theoretical approach is the efficient production of goods and services. Richard Posner, leading exponent of economic analysis of law and now a U.S. federal judge, writes:

This example suggests that the legal protection of property rights has an important function: to create incentives to use resources efficiently....The proper incentives are created by the parceling out among the members of society of mutually exclusive rights to the use of particular resources...The creation of exclusive rights is a necessary rather than sufficient condition for the efficient use of resources. The rights must be transferable.²⁷⁹

The example to which he refers is a revisiting of the farmer who works a piece of land but has no property in it, and so has no exclusive right in the produce; after experiencing the lawful harvesting of 'his' crop by others, he will soon decide to let the land lie fallow. This type of analysis was not, of course, foreign to natural rights theorists like

Blackstone²⁸⁰, but unlike them economic theorists like Posner find it irrelevant and misleading to posit a moral grounding for property in labour or occupancy; the creation of incentive to use resources efficiently, to maximise economic utility, is the sole justification for property rights. The function of law is precisely to create and protect those rights, and thereby provide a secure expectation of reward and a secure basis for contractual promises. As Lawrence Becker points out, however, the logic of the utilitarian/ economics approach runs counter to a concept of property as an absolute and incontrovertible right.²⁸¹ Wealth maximisation may sometime demand the limiting or curtailing of ownership rights, as economic theorists believe to be the case with copyright. This is acceptable to the theory because it does not perceive value as existing prior to its creation in law. Nevertheless, utilitarian/ economic theory often seems to have adopted its own 'naturalist' defence of property. By conceiving human nature in terms of economic man, a naturally acquisitive and utility maximising creature, the theory moves easily to a position advocating ubiquitous property rights virtually unassailable by the state.²⁸²

The Legal Realist school in American jurisprudence adopted the utilitarian skepticism of natural law, but added a critique of the analytical framework of positivism.²⁸³ Its attack involved a challenge to the idea that law could be understood as a process of deducing rules from broadly stated

legal principles. Law was not a discrete universe of applied logic, but a realm of social discourse. Judicial decisions, like statute law, represented the making of social policy choices. As Singer points out²⁸⁴, the Realists believed the supposedly neutral free market principles which then held sway in legal doctrine obscured the political nature of private law and a conservative agenda resistant to state intervention in the economy. Holmes' opinion in the I.N.S. v. Associated Press case was a significant moment in Realist jurisprudence. Like Holmes, scholars such as Felix Cohen²⁸⁵ sought to establish property as an ineluctably political category. Property rights did not merely depend on the state for their existence, however, they carried with them social and political power. Incursions on property rights had political legitimacy as attacks on the concentration of power in American society.

The Critical Legal Studies movement, contemporary heir to the Realists, has further radicalised these insights. Singer points out that many liberal legal scholars operating in the post-Realist era have sought objectivity in a process-based approach to rights; like Dworkin²⁸⁶, they distinguish between a political discourse which is appropriately the preserve of legislators and the judicial discourse of the courts. Legal issues can then be divided on the basis of which discourse is more suited to their resolution. Judicial discourse is a form of politics, but one that is subject to the demands of a particular style of argument, reasoning and issue-specific

resolution. The Critical school denies even this degree of objectivity in the legal system, and any meaningful separation between public and private law.²⁸⁷ If the law creates value (and directs its distribution in society) then the Critics refuse to permit anyone in the country of law to eschew political responsibility for the consequences.²⁸⁸

Justice Yates was not a Realist, let alone an early adherent of CLS. His particular insight, however, that copyright required a political structuring in order to ensure that, as an institution of property, it would serve a social purpose without tipping the balance of competing interests which arose with the technology for reproducing books. This held the kernel of an idea that swept away earlier understandings of property and private law.

E. THE CONTINUING DEBATE OVER THE NATURE OF COPYRIGHT

Part II of this paper reviewed the development of copyright after Millar, showing that the majority position was rejected in Donaldson v. Beckett by the House of Lords. The common interpretation of Donaldson holds that a copyright at common law was recognised but ruled by the judges to have been pre-empted, save for the first publication right, by the Statute of Anne. Such a result constituted only a partial vindication of Justice Yates' theoretical position, since he had rejected the concept of common law copyright altogether.

It did effectively make copyright a wholly statutory entity, as he had deemed necessarily to be the case.

Over the years and through the ongoing process of statutory amendment and international agreement²⁸⁹, the rights of authors of literary and other expressive works have been extended, for the most part, and on occasion narrowed or made subject to a form of expropriation by compulsory licensing provisions.²⁹⁰ The standard international period for most copyright works²⁹¹ is life of the author plus fifty years. While debates over particular copyright issues remain lively, often heated, the nature of copyright as a statutory right, subject to all the limits of definition and duration established by the responsible legislature, goes generally unquestioned and is frequently cited by courts.²⁹²

Despite this consensus on the statutory basis of copyright, the underlying nature and justification of copyright continue to be the subject of intense analysis. In a sense, the literary property debate of the eighteenth century has never ended, and the two sides in Millar remain roughly representative of the two dominant approaches to copyright today. In Canada the debate surfaced in a 1979 exchange between A.A. Keyes and Claude Brunet, authors of a government-sponsored study of copyright directed at laying the groundwork for a comprehensive overhaul of the Copyright Act²⁹³, and R.J. Roberts.²⁹⁴ Roberts argued that Keyes and Brunet had adopted a 'copyright as natural property of

creators' stance, and consequently had favoured copyright owners in a series of recommendations on controversial issues. Through a brief historical review of the literary property debate he endeavoured to show that the law had in fact resolved copyright to be a monopoly right granted by statute in the public interest and as such, it must be construed narrowly by the courts and expanded with caution by legislators.²⁹⁵

Roberts' position echoes that of writers from the law and economics school, who generally view copyright with a suspicion similar to that of Yates J. in Millar. Stephen Breyer caused a minor sensation in 1970 with his article "The Uneasy Case for Copyright"²⁹⁶ which argued from economic theory that copyright overcompensates creators, and that alternatives such as compulsory licences and government subsidies could adequately encourage production of creative works at lower cost to society. Posner is also uneasy; while believing copyright, restricted as it presently is to expression and to a fixed term, is justified on efficiency grounds, he still has doubts:

One is not sure that any copyright protection is necessary to generate the socially optimal amount of book production, given the advantages that accrue to the first publisher (it takes a while to copy) and the fact that royalties are usually only a small fraction of the overall cost of producing and selling a book.²⁹⁷

The 'encouragement theory' of copyright holds that the goal of copyright law is to provide a reward to creators sufficient to yield the "socially optimal amount of...production", but no more, because the reward comes at the cost of monopoly.²⁹⁸

Those writing from the competing perspective take the side of creators against the public, or at least the consuming public, arguing that creators deserve and are entitled to reap the benefit of valuable uses of their protected works. David Ladd, for instance, argues that attempts like that suggested by Breyer to develop a legal/social policy regime aimed at paying the minimum necessary to encourage an 'optimal amount' of creative works are doomed to distort the market and impose an arbitrary standard of worth on creative endeavour.²⁹⁹

After 200 years, it is ironic that the debate continues using many of the same arguments and terms identified by the Court of King's Bench in Millar v. Taylor. While the debate does reflect an essential dilemma at the heart of copyright which has given it much of its theoretical vitality, there may now be more interesting ways to frame it.³⁰⁰ The discussion of 'monopoly vs. property' often seems like an overdramatisation, a drawing of categorical lines that obscures more than it reveals.

For one thing, it forgets the point which Justice Yates made that informs much of modern jurisprudence: copyright is monopoly and property. As the foregoing review has tried to show, changing conceptions of the appropriate definition of

property led to a recognition that this statutory right was no less property than rights preserved at common law, and no more contingent than a common law right. Roberts sees copyright as a state-granted monopoly in the public interest, and opposes this to a common law property; the implication is that "natural property" exists regardless of the public interest and politics. It is this understanding which the new theory of property attacked. Any type of property, providing as it does for exclusivity over activities in owners, requires justification, and its extent and scope in law should correspond to the justifications on which it rests at any one time.

Second, the 'property vs. monopoly' debate takes place almost exclusively on the terrain of economic reward and benefit, one side intent on seeing copyright owners receive the fullest possible return on the author's labour, the other concerned to limit the economic rent on protected works and maintain a high level of competitive activity. This dichotomy tends to remove from consideration a crucial aspect of copyright revealed in the examination of the historical and theoretical sources of Millar v. Taylor: as understood by Lord Mansfield, the role of property in the copy in protecting the author's personal, as well as material interests. Whether this factor serves as a separate, third justification for copyright, or rather an explanation for certain features of its historic development is discussed in Part VI.

VI. COPYRIGHT AND THE JUSTIFICATION
OF PROPERTY FROM PERSONHOOD

A. LORD MANSFIELD AND THE LABOUR THEORY

The labour theory of property, often described as Lockean, and the utilitarian or economic theory represent the two dominant analyses of copyright and related rights to this day. Both are located within the tradition of liberal individualism, and both speak essentially to a material or pecuniary purpose in property rights: the former to the just reward for the pain of labour or the just entitlement to value created by labour, the latter to a legal means to ensure the maximising of material goods and benefits in society.

In Part IV, however, it was argued that Lord Mansfield had discussed the right of copy in a fashion unique to Millar v. Taylor and the literary property debate, one that moved beyond the pecuniary consideration of dividing economic benefits derived from a literary composition and to a consideration of the author's claim to having invested part of himself, of his personality, in the composition. Lord Mansfield justified the granting of an exclusive copyright to the author at least in part on the basis that such a right afforded control over the integrity of the composition and, as a consequence, over the author's creative reputation. As pointed out, this concern for the personal implications in

ownership of the text had appeared in a number of the cases preceding Millar v. Taylor.³⁰¹

Lord Mansfield's approach could be described as an elucidation of the psychological dimension underlying a labour theory of property entitlement, to which earlier reference was made. In Locke's theory, the property in one's own person extended through the body's labour to the object produced. Another way to approach the labour theory is to ask: when is an exclusive property in the object produced the appropriate reward for the producer's labour? Becker attempts a general statement of the limiting conditions of the labour theory:

Well, it means that when people deserve a benefit for their labour, and when (in terms of the purposes of their efforts) nothing but property in the things produced will do, and when the value of such rights meets the test of proportionality, then they deserve property in those things. When, on the other hand, substitutes will do every bit as well, they then deserve either the things produced or an equally satisfactory substitute. And finally, where property in the things produced is not what is sought at all, and cannot be an adequate substitute for what is sought, the laborers deserve something else (perhaps recognition, gratitude).³⁰²

Property therefore seems appropriate where it corresponds to the purposes of the labour and to the value the labour produces. This clearly denotes both a psychological and a commercial component. If the purpose of the labour expended deserves something akin to property, and not a substitute (for

instance, a derived income) although of equal value, one must assume it relates to the importance of the specific object produced to the specific labourer. This importance might relate to possession and use of the object, but that cannot be all if one were to assume the right in question to be alienable. Therefore, property is the appropriate reward where control over the object-- including its exchange-- relates to the purpose in producing it. "Control" is therefore the psychological or personal interest which the labour theory in part addresses, just as "proportional reward" is the economic interest.

Lord Mansfield's concern in Millar was for very particular kind of labour: the labour of an author. He found that the appropriate reward for the author's exercise of intellect was indeed the control which inhered to property rights, a right to extract a material reward for authorial labour and to set terms for exploitation of the work by a purchaser of the right to copy.³⁰³

B. PROPERTY AND PERSONALITY: TWO THEORIES

Just as Justice Yates' opinion in Millar v. Taylor presaged developments in nineteenth century legal theory, Lord Mansfield's opinion might anticipated developments in the philosophy of individualism, and of the significance of the relationship between objects of property and the individual

owner to the latter's self-development. This begs a question: did Lord Mansfield's perspective truly represent a distinctive understanding of the basis for property-- in other words, does the recognition of a property right in the author over the objects of his labour have meaning beyond its evident material implications ? Answering this question first requires considering the nature of the relationship between property and personhood on a general theoretical level.

Alan Ryan provides a helpful focus for what might otherwise prove a difficult inquiry due to the silence of much property theorising on the issue of personhood. He opposes two traditions in political theory concerning property rights³⁰⁴ : the first, which he terms "instrumental", views property as a reward for the pain and inconvenience of labour and as a means for converting resources into consumables; the second, the "self-developmental" tradition, asserts both that labour should be intrinsically satisfying and that the relationship between the individual and the objects he owns is as much or more important for the development of personality as for economic purposes.³⁰⁵ Ryan identifies the instrumental tradition with Locke and Bentham, amongst others, and the self-developmental with Rousseau and the German philosopher Hegel.³⁰⁶ The "instrumental" tradition might, by the very name Ryan gives it, imply a tradition that denies any constitutive role for property in the development of individual personality. The statement that it does have such a

function appears, not surprisingly therefore, in a leading critique of the tradition: C.B. Macpherson's theory of possessive individualism.³⁰⁷

1. Property and Possessive Individualism

Macpherson's seminal work explicated and criticised the ontological assumptions underlying the political theories of Hobbe, Locke and other seventeenth century English philosophers. He attacked these theories for reading back into human nature in a state of nature what he argued was the seventeenth century's image of the individual in a society dominated by market relations. He characterised the individualism of the market as "possessive individualism", one of whose seven defining propositions was that:

- (iii) The individual is essentially the proprietor of his own person and capacities, for which he owes nothing to society.³⁰⁸

Freedom and humanity were in turn defined by the concept of the individual as owner of himself in a cold world:

The individual in market society is human as proprietor of his own person. However much he may wish it to be otherwise, his humanity does depend on his freedom from any but self-interested contractual relations with others.³⁰⁹

The possessive nature of this concept of individualism reduced society to the sum of acquisitive actors pursuing their own

interests: "Society consists of relations of exchange between proprietors."³¹⁰ While Macpherson's theory, like that of the subjects of his study, was not psychological per se, it pointed to a dynamic relationship between property and personality: private property, as an institution reified as the natural and all-encompassing measure of man, reduced the individual to a self-contained atom bereft of communal possibilities. The recognition of property in the products of one's own imagination might well seem the acme of possessive individualism, of viewing the individual as the owner of capacities for which he owes nothing to society.

2. Hegel's Theory of Property and Personal Will

Ryan's second tradition, the self-developmental, offered something more. Here it will be examined in terms of Hegel's theory of property. That theory received its fullest elaboration in The Philosophy of Right (1828)³¹¹. To say Hegel developed a justification of property somewhat misses the point of his work. In Hegel's philosophic method human life and history provided the starting point, the 'stuff', for speculation about ideal forms. Hegel did not endeavour to construct a normative theory of society and its institutions from first principles, as natural law philosophers did, but rather to identify the reason in existing institutions. History represented the working out of Idea or Spirit in human affairs, a continual progress (albeit through contradiction

and conflict) of man and society towards an ideal. While this imbued his thought with the trappings of historical determinism and political conservatism³¹², it also permitted him to discuss society as a dynamic phenomenon that changes over time as humans worked out their relationships to the natural world, to each other and to themselves. Locke, Rousseau and other natural law theorists used the fictions of a state of nature and a social contract to explain the purposes for social institutions; their views of society consequently remained abstract and static, apart from the initial description of the 'fall' from nature to society. Hegel chose instead to adopt the course of human history as the basis for philosophy, to assume that it had meaning and rational purpose. In approaching an institution like property, then, Hegel saw his task not as one of justification, but of understanding.

To Hegel, history represented the working out of the problem, or Idea, of individual will, the struggle through time and stages of social development of humans seeking to form themselves as fully differentiated, willing individuals. As much as a historical progression, Hegel envisaged this development as a psychological and ethical process in the self-constituting of every individual. In this scheme, property played a crucial role. It represented the means by which the individual externalised his will in nature, imposed his will over objects³¹³ (but not other persons)³¹⁴ in the

external world. The fully-formed individual established property relations with objects, and the higher stages of society were the ones which recognised the institution of private property. Property served more an ethical purpose than an economic one.

Property, Hegel wrote, "is the embodiment of personality". To invest oneself in an object it was not good enough merely to will, or want, ownership; "to secure this end occupancy is requisite."³¹⁵ Here, too, then the basis for property was labour in the form of occupation. The view of Hegel as extolling 'self-expression' in labour and property has mistakenly led some, Ryan argues, to assume that Hegel believed in a hierarchy of labour, with intellectual activity superior to all others. According to Ryan, Hegel made no such distinction, finding all labour to have ethical significance.³¹⁶ That was because, for Hegel, knowledge or consciousness was grounded in experience. Labour provided the labourer with a fuller experience and awareness of himself. The relationship of labourer to object produced (or author to object created) was one of self-construction, not mere ownership.

Hegel concluded his examination of property in The Philosophy of Right with a discussion of copyright. This was not insignificant, because Hegel's expository style involved moving in every phenomenon studied from the simple to the complex, the primitive to the sophisticated, showing at each

point the inner conflicts and dynamics, the dialectics, that urged development forward. What concerned Hegel about copyright was precisely the dilemma faced by the judges in Millar: how to conceive of the difference between ownership of the 'thing', the book, and all its use and value on the one hand, and the author's ownership of the "universal ways and means of multiplying such books"³¹⁷ on the other. This presented a particular challenge to Hegel because he had argued that property required "complete and free ownership."³¹⁸ He sidestepped the problem by finding the reproducible 'thing' to have a unique nature entailing the divisibility of its external uses between the owner and the author, whereby "the thing is not merely a possession but a capital asset."³¹⁹ He proceeded to discuss the ease of making modifications to an author's work, and the appropriateness of allowing this to occur in the sciences and in law, which depended on building on the work of predecessors. Copyright legislation therefore secured the property of authors "only to a very restricted extent" and frequently "the profit promised to the author...becomes negligible."³²⁰

Hegel's brief discussion of copyright did not go much beyond the opinions of the majority in Millar with respect to a narrow property right in the author over copying. His overall theory of property has, however, received recent attention which exploits its particular relevance to copyright and intellectual property. These studies help to show how Lord

Mansfield's insight into the purposes of property in the objects of intellectual labour remain crucial to a full understanding of these rights.

3. Contemporary Scholarship on the Personhood Basis of Property

Margaret Radin develops from Hegel's thought a concept of property as serving a function of self-realisation, or "personhood."³²¹ She defines her approach this way:

The premise underlying the personhood perspective is that to achieve proper self-development-- to be a person-- an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.³²²

This represents a "third strand of liberal property theory"³²³ in addition to the Lockean labour-desert and utilitarian welfare maximising strands, and like them posits both a general justification for and delineation of property rights. Radin seeks to show that legal theory has largely neglected that dimension of property that is important to the constituting of personhood, as distinct from its purely economic consequences. Like Hegel, she does not use this perspective to offer a critique of institutions of private property so much as to better understand them and reveal the unspoken assumptions which underlie the protections of property granted by courts and legislatures.

Radin distinguishes between "personal" and "fungible" property. The former is property "bound up with a person", the latter "property that is held purely instrumentally"³²⁴. The owner of an object of personal property, understood in this sense, cannot be adequately compensated for its loss by receiving an identical object or its monetary equivalent. She uses the example of a wedding ring, which has the character of personal property to its wearer, but fungible property to the ring's manufacturer. Her purpose in using this distinction is both descriptive and normative. Normatively, she argues that personal property deserves a higher measure of legal protection than fungible property. On the descriptive side, she argues that the legal system does in fact grant this higher measure of protection, although without explicit recognition and often subsumed under other rules.³²⁵ She argues further that many theorists have posited bifurcated conceptions of property rights which resemble her scheme in form, and implicitly in substance.³²⁶

Radin recognises that without a well-grounded theory of personhood, for which she turns to Hegel and other philosophers, her approach risks being wholly subjective and without significance for law. In fact, her attempt to explain how a line can be drawn between 'healthy' personal property and unhealthy object-fetishism appears arbitrary and unconvincing.³²⁷

4. The Appeal of a Theory of Personhood

The last point perhaps indicates what a fine line separated a Hegelian theory of property as embodying personhood from the critique of possessive individualism. Was Hegel (and are his contemporary interpreters) doing anything more than celebrating the individual as possessor of himself and of worldly objects ? In one sense, no. Hegel's philosophy, at the political level, represented a panegyric to liberal society and its institution of private property. In a deeper sense, however, Hegel provided something new to the property debate. Property as a way for the individual to express his will and be recognised in society was to be different than property as an exchangeable good in the market. As Ryan points out, Hegel rejected a contract model for legal relations; work and property served the purposes of ethical development, not wealth maximisation.³²⁸ The individual was conceived as more than a trader in his own capacities. Just as Lord Mansfield had more than the author's ability to profit from his own creativity in mind, so Hegel suggested a further dimension for the phenomenon of property rights.³²⁹ That dimension may be most evident where labour most closely resembles self-expression.

C. COPYRIGHT AND PERSONHOOD

1. The Justification From Personhood

The endeavour to highlight the role personal interests play in property rights, more specifically to examine how property can be seen to constitute personhood in the individual, has value for interpreting the unique property of copyright.³³⁰ Justin Hughes exploits this potential in his article "The Philosophy of Intellectual Property."³³¹ Hughes argues that the Hegelian concept of property as fulfilling the need for personal will to externalise itself constitutes a second justification of property which supplements the Lockean labour theory justification. He believes this to be particularly the case for intellectual property³³² compared to other forms of property.

Like Alan Ryan, Hughes views utilitarian justifications to be a subset of the 'instrumental' labour theory. He maintains that the labour theory derived from Locke has three conditions for justifying a property right: (1) producing the 'object' (read idea) requires labour; (2) the commons from which the object is taken is not significantly devalued; (3) the appropriator of the object does not waste it. Intellectual property meets these conditions, especially the second because the commons of ideas is not finite and intellectual property regimes respect a public domain through their statutory 'sunset' provisions. However, intellectual property does

encounter certain problems from the Lockean perspective: little labour may be involved in the appropriating of certain ideas, especially those more associated with creativity and inspiration, and the withholding of intellectual products by their author may violate the waste principle. The justification from personhood can overcome those difficulties:

Such a justification posits that property provides a unique or especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person.... According to this personality theory, the kind of control needed is best fulfilled by the set of rights we call property rights.³³³

The concept of copyright as a right of property giving control to the creator (author) over the extension of his person, represented by the object of his intellectual labour, is close to the approach Lord Mansfield adopted in Millar. He too believed that the interest of the author in preserving his reputation through protection of the work's integrity, being able to prevent unauthorised 'takings' which would have the effect of altering his relationship to the composition, justified copyright at common law.

2. Problems with a Personhood Justification of Property

Hughes identifies two problems with the personhood justification: the difficulty in establishing limits, and the issue of alienation of property. To that, two related problems

could be added: the subjectivity seemingly inherent in the concept, and the material consequences of all property rights.

(1) Subjectivity-- as noted above, the personhood theory can easily founder on the issue of the subjectivity of individual willing. Without a developed theory of personality which provides a guide to healthy and unhealthy object-relations, it is difficult to imagine how a legal system could employ rules that would recognise property rights where an individual's will or personal integrity was implicated, but deny property where it was not. According to Hegel, labour is the means by which the will becomes embodied in the external object. The labour which gives rise to intellectual property is expression.³³⁴ By expressing his labour and talents, the individual invests the object with his personality. This gives rise to the claim for property, and it is through property's character as a social institution that the individual has his personality recognised by others. Nevertheless, the effort to identify an objective basis for defining legitimate expressions of individual will incurs risks of directing human personality by legal sanction.

(2) Potentially Limitless-- This relates closely to the first issue; the argument from personhood, as suggested by Lord Mansfield's use of authorial control over literary compositions to justify a property right at common law, can be seen as a variation of the labour theory. Like it, the personhood justification experiences difficulty in

comprehending limits on property. If the creator of an object, or literary work, should have property in it because he has invested his will in the object, it becomes problematic to define where his control should end and unhindered uses of the object by others begin.

(3) Alienability -- Hegel maintained that the institution of property in its highest stage had the characteristic of full and free alienability. He theorised that the individual will was withdrawn from the object owned in the process of alienation. However, if the personal interest in an object is coterminous with its exchange value, then it does not seem that personhood offers any unique or additional justification of property. Hughes puts the dilemma this way:

This is the paradox of alienation under the personality model of property. The present owner maintains ownership because he identifies the property as an expression of self. Alienation is the denial of this personal link to an object. But if the personal link does not exist--if the object does not express or manifest part of the individual's personality--there is no foundation for property rights over the object by which the 'owner' may determine the object's future. An owner's present desire to alienate a piece of property is connected to the recognition that the property either is not or soon will not be an expression of himself. Thus the justification for property is missing.³³⁵

Ultimately, Lord Mansfield's approach would founder on this point as well. That is, a fully alienable copyright provides

only a tenuous control for an author over his personal interests in the work; once sold, the control passes to other hands. An author in a strong bargaining position may be able to parcel his rights and hold onto those which give a degree of ongoing control, or perhaps extract a higher material reward for his withdrawal.

The question is whether, if the interest of personality is to count, it can be subject to complete alienability. Hegel in fact analogised the alienation of the "universal" aspect of intellectual property, the creator's full abandonment of his idea, to slavery, the sale of one's self.³³⁶ Several jurisdictions, including Canada, addressed this issue by separating the property of copyright from an inalienable moral right directed at preserving personal interests in the work. It is for this reason that moves to make moral rights alienable, or even waivable as they now are in the Copyright Act as amended in 1988, seem inconsistent with their purpose. The point for the present discussion, however, is that the justification from personhood does not necessarily, or even primarily, support a property right, if such is conceived as an alienable right.

(4) Material Consequences-- Finally, however much this theory as justification might be concerned with basing property on its constitutive role in the development of individual will and personality, the fact of property as an economic institution that determines distribution of rewards

and areas of exclusive activity continues. A personhood justification that could have the effect of expanding, or making more absolute, rights of economic power should be subject to close scrutiny.

3. A Preferred Use of the Theory

Rather than viewing the Hegelian theory of property as a justification in and of itself for particular rights of property, Jeremy Waldron takes the tack of using Hegel's theory of personal development as a general justification of property; that is, if, as Hegel maintains, property relations are necessary for self-development, then a moral claim can be implied to the effect that every person should hold property.³³⁷ Waldron thereby draws an egalitarian imperative from Hegel's work which he finds absent in theorists who follow Ryan's "instrumentalist" tradition. However, seeing Hegel's theory as justificatory in any sense is fraught with difficulty, not least because it cannot be derived from his own method or purpose, as noted above. It may be more appropriate to see in the theory an explanation of the nature of property rights. As such it can offer insights which are not readily available from other perspectives.

The significance of the theory of personhood for copyright as an explanatory tool is a recognition that more than mere economic interests are at stake in 'ownership' of the right to reproduce creative works. This has value simply

as an interpretive tool which allows us to better understand this legal institution. When we look at particular manifestations of copyright, it may be useful to keep in mind that copyright is responding to some deeper interests in respecting the personal integrity of the person who has created the object in question. Second, beyond this interpretive function, there may be circumstances in which the balancing of interests within copyright, and especially between copyright and other competing interests such as freedom of expression, may be more appropriately resolved by knowing when interests of personality as opposed to fungible economic interests are implicated.

In the remainder of Part VI an attempt is made to move forward from the right of copy as it was envisaged during the literary property debate to its contemporary configuration. In particular, the roles of 'creativity' and 'originality' as the bases of property in copies (and other rights incorporated into modern copyright) will be addressed. The discussion focuses on both the material and the personal interests which copyright serves in its function as property. The acknowledgment that personal interests of authors receive recognition and protection through means other than copyright--including non-alienable moral rights--should not obscure the insight available from a Hegelian approach; property rights in themselves serve personal interests and constitute the expression and reception of personal will in the world.

Copyright in particular is more than a distribution of economic entitlements: it establishes value in a range of personal accomplishments, from a labour expressed in reproducible, fixed forms of literary or other compositions (which is not qualitatively distinguishable from the labour that Radin might call 'fungible') to creative labour imbued with authorial personality. In doing so, however, it deals with these forms in ways that defy the nominal generalisation which statutes and courts alike prefer.

D. LABOUR AND CREATIVITY IN COPYRIGHT

1. Originality in Modern Copyright Law

Copyright pertains in Canada to "every original literary, dramatic, musical and artistic work."³³⁸ The Copyright Act provides further definitions of each of these classes of works--for example, "literary work...includes maps, charts, plans, tables and compilations."³³⁹ Most of the rights afforded by the Act pertain to every class, but some rights are unique to one class. For example, the statute grants derivative rights to convert a dramatic work into another form, and vice versa ³⁴⁰, but no such rights for the other classes inter se.

Protected works can be differentiated between those which are expressive of creative imagination and others which are informational or involve an arrangement of factual material, a

distinction which does not receive express recognition in the statute. Despite the creative connotations in common parlance of "literary, artistic, musical and dramatic," copyright extends to a vast range of wholly practical, mundane works not readily associated with creativity. In Canada, copyright has been recognised in business directories³⁴¹, insurance plans and schedules³⁴², debt collection letters³⁴³, the text on tombstones³⁴⁴, and schedules of horse races produced by track officials³⁴⁵, to name just a few. The intention to protect some of these works can be found in express references in the statute--e.g., "compilations" and "tables"--but it is more fundamentally grounded in basic principles of copyright that developed in the decades following Millar v. Taylor.

The key principle arose from judicial interpretations of the word "original" which appeared in copyright statutes subsequent to the Statute of Anne (1709). The Statute did not contain an express qualification of originality; it spoke only of "authors" and of "books". In the cases examined in Part IV and in Millar, English courts centred their attention on whether defendants had copied the particular book in question; originality (as in, 'first occupancy') became a theoretical justification for copyright, but not a test which a plaintiff had to meet in order to succeed. Minor modifications to an existing work might be sufficient to support a defence to an infringement action, as in Gyles v. Walker (1740).

The test for "originality" under current statutes is minimal; in a classic statement of the law, Peterson J. said:

Copyright Acts are not concerned with the originality of ideas but with the expression of thought, and in the case of 'literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work--that it should originate from the author.³⁴⁶

The case in question ruled that exam questions attracted copyright. In such cases, where the subject matter are facts and formulations drawn from a common stock of knowledge, originality sufficient for copyright is found in the selection and arrangement of facts, so long as that involves the modest exercise of skill and judgment.³⁴⁷ The argument on originality proving almost always unavailing, defendants have tried to make use of statutory wording which might suggest a degree of creative merit or quality is required for copyright. Such adjectives as "literary" and "artistic" have been pointed to for an aesthetic standard, but again with little success. In Hay & Hay v. Sloan³⁴⁸ defendant asked the court to deny copyright to architectural plans for a standard suburban home as not being "artistic". Stewart J. replied:

It is gratifying to think that those who drafted this Act were content to leave such aesthetic responsibility to the

judiciary, but it is, I think, dangerous to assume such intention.³⁴⁹

This rationale, that courts should not engage in qualitative assessments of expressive works, has supported the judicial reliance on the thin measure of originality. The word "literary" has been understood to mean the work must be written in printed form, not that it have the quality of literature. A rare exception to this approach occurred in Exxon Corporation v. Exxon Insurance³⁵⁰ in which the Court of Appeal concluded, in deciding that the name "Exxon" did not qualify for copyright protection, that a literary work must convey "either information and instruction...or pleasure".³⁵¹ This principle has not to date been extended to other cases. In the recent Canadian litigation over machine readable operating programs, the argument that a work that does not involve communication with human beings is unprotected was rejected.³⁵²

2. The Protection Afforded 'Informational' Works

The accepted view of copyright law is that the rights afforded every protected work in the same category are the same, although the scope of protection may vary with the nature of the work. Since copyright protects the expression of ideas, not ideas themselves, a work involving a limited degree of expression is less protected.³⁵³

The argument here, however, will be that a difference in the quality of protection exists between a 'creative' work, a work of artistic imagination, and an 'informational' work consisting of the arrangement of facts, a difference relating both to the nature of the labour involved, and to the constellation of material and personal interests implicated in both types of work.

The relationship of idea and expression differ in these two types of work. In a novel, for instance, the author certainly draws on a common body of knowledge, ideas and language to construct his work; in an important sense, however, the work fuses form and substance, or idea and expression. More than a choice of efficient word order, expression is intimately linked to the elements of the story, its events, characters and themes. In a work of fact compilation, idea and expression are usually quite distinct. The 'expression' may be a simple ordering of the material to make it readily accessible to the reader. The ordering may have little intrinsic value and be easily avoidable by second-comers; while copyright might be expected to provide little protection in this circumstance, Canadian courts have actually considerable protection-- on a labour theory of copyright.

A recent example occurred in B.C. Jockey Club v. Standen.³⁵⁴ There, the plaintiff corporation operated a race track; it claimed infringement of its copyright in "Overnight", a sheet published daily during the racing season

and listing the order of the next day's races, horses entered, weights, jockeys and post positions. The defendant reproduced³⁵⁵ this information from "Overnight" in his own daily handicapping publication, adding other statistical material from his own research, a commentary on each race, and betting odds. The B.C. Court of Appeal affirmed the trial judge's ruling in favour of plaintiff. He had said:

But in my opinion the defendant in the case at bar has done more than copy information from "Overnight". He has appropriated the results of the labour and the skills of the Club which has gone into the compilation of the information which the Club has developed and published.³⁵⁶

Even altering the presentation of the basic racing information in "Overnight" would likely not have helped defendant:

The copyright of the Club does not reside solely in the order of the information which it has compiled.³⁵⁷

It is difficult to avoid the conclusion that in Standen copyright resided more in the information that labour produced than in its particular form of expression.³⁵⁸ Similar rulings have been made by other Canadian courts throughout the history of copyright in this country.³⁵⁹ The strongest statement of the principle comes from Cartwright v. Wharton³⁶⁰, a pre-1921 case, which concerned a law list that used a previous list as the basis for its additional research, correction and comment. The Court said that by sending out names from plaintiff's list

for correction, defendant had "appropriated to himself the results of the plaintiff's diligence and labour"³⁶¹, and cited with favour English decisions restricting the legitimate use of copyrighted informational works to after-the-fact verification of one's own independent research. In Standen, of course, "Overnight" constituted the sole and sufficient source of the basic information which defendant required for his betting sheet.

The protection of time, labour and resources which Canadian courts have seen fit to provide under copyright might best be described as a form of limited protection for research.³⁶² In almost every instance the protection has been granted in situations where a competitor was seeking to make use of the original to capture part of the copyright owner's market. In this respect, these cases resemble the tort of unfair competition recognised in the Associated Press v. I.N.S. case³⁶³, and a branch of the breach of confidentiality action.³⁶⁴ A legitimate question arises as to how far copyright law should be stretched in order to achieve the same goal. That question is especially pertinent in the circumstances of a case like Standen, where the defendant was not actually competing with the plaintiff, but making a derivative use of printed information produced as a byproduct of plaintiff's business activity.³⁶⁵ In any event, copyright in these cases serves exclusively a material interest of the copyright owner: the interest of commercial exploitation of

the work. Its justification lies both in the theory of utility and incentive (ensuring the plaintiff recovers the cost of his investment) and in the aspect of the labour theory that seeks to prevent unjust enrichment.

3. The Protection Afforded 'Creative' Works

Creative works encounter a different treatment. Copyright law affords them protection not solely on the grounds of labour expended, but also on that of the imaginative act. As with informational works the concern is not with outright copying of a work, which has always been found to constitute infringement, but with what Kaplan terms "horizontal rights"³⁶⁶, the scope of copyright over uses of the original work in an altered form. It will be recalled that in Millar v. Taylor, virtually every such use was considered by the majority to lie outside the scope of a perpetual, common law copyright. It was in part his fear that this would not be so that led Justice Yates to the conclusion that copyright must be a statutorily regulated property right.

The most revealing issue here is the question of derivative rights. Braithwaite offers this brief definition:

A derivative work ... involves a second tier of creative effort superimposed upon that of the underlying author.³⁶⁷

He points to the subsections to section 3 of the Copyright Act as one of two sources of exclusive rights over derivative uses

in Canadian law. There, the right is given to translate (ss.(a)), adapt dramatic works (ss.(b)), dramatise other works (ss.(c)), and to mechanically reproduce and film copyrighted works. While these rights are ostensibly available for all works, in practice they refer to creative works. Certainly, an informational work may often be translated; translation, however, is of the listed derivative rights the one most clearly related to simple copying.³⁶⁸ The others either apply expressly (a dramatisation) or impliedly (note the reference to "a novel" in ss. (b) and (c)) to creative works. By specifying these rights, the statute implies they would not otherwise have fallen within rights to "reproduce... any substantial part" of the work (s. 3(1)).

What is a right to dramatise a novel ? It constitutes the right to take the elements of the novel and express them in a quite distinct form, with its unique demands of dialogue, three-dimensionality and visualisation, to name but three. An analysis of similar derivative rights in the U.S. Copyright Act of 1976 led one commentator to conclude that copyright does protect ideas, creative ideas:

Thus, copyright is no longer a publisher's right concerned only with form, but rather is an author's right concerned with content.³⁶⁹

This follows logically from the aforementioned fusion of idea and expression, form and substance, in creative works. An

exclusive right merely to reproduce in substantial part the expression (understood as word order) of a creative work would be a narrow right, in both a material and personal sense.

The express derivative rights in the Act are the clearest demonstration that copyright protects artistic ideas. The same thing occurs, however, with the judicial tests devised for identifying 'substantial reproduction,' Braithwaite's second source of derivative works.³⁷⁰ Whether a part of a work has been reproduced depends on an objective finding of similarity, and whether the part reproduced is substantial can turn on its quality as much as its quantity.³⁷¹ With a creative work, these standards require identifying core ideas or patterns in the work. In Hanfstaengl v. Empire Palace³⁷², newspaper sketches of tableaux vivants taken from paintings were found not to infringe copyright in the paintings, mostly because they were found inferior in quality and not to convey the "idea" of the originals. In Glyn v. Weston Feature Film³⁷³, the court assessed similarity between a novel and an allegedly infringing film by comparing plot and character development, finding these elements in the novel too ordinary to deserve protection. A classic American statement of how similarity between creative works is determined comes from Justice Learned Hand in Nichols v. Universal Pictures Corp.:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The

last may perhaps be no more than a general statement of what the play is about, and at times may consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended.³⁷⁴

Justice Hand continued further to describe how characters in a creative work can be protected if sufficiently distinct. As might have been expected, the borderline between ideas and expression in creative works is extraordinarily difficult to discern.

One category which falls between informational and creative works, and has engendered considerable confusion, is that of history and biography. In one respect, a historical study can be viewed as a compilation of evidence which must remain in the public domain; in another, such a work may contain as much expression and interpretation as a fictional work. Goff J. wrestled with the the appropriate test for infringement to apply in Harman Pictures, N.V. v. Osborne et al, a contest between the plaintiff owner of film rights to a book about the charge of the Light Brigade, and defendant producers of a screenplay on the same subject.³⁷⁵ The case therefore concerned derivative rights to a work of history. Not surprisingly, the screenplay shared many principal events with the book while differing from it in many details.³⁷⁶ In

granting an injunction, Justice Goff quoted from Wilson J. in Macmillan v. Suresh Chunder Deb:³⁷⁷

...the true principle in all these cases is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work; that is, in fact, merely to take away the result of another man's labour, or, in other words, his property.³⁷⁸

Goff J. framed the issue in terms of whether the defendant used the book as a

basis, taking his selection of incidents and quotations therefrom, albeit...making some alterations and additions by reference to the common sources and by reference to other sources.³⁷⁹

This appears again to be a not so limited protection of research. In a recent B.C. case, an academic historian's research was protected vis-a-vis the writer of more popular historical works intended for schools.³⁸⁰

In Harper & Row, Publishers Inc. et al v. Nation Enterprises³⁸¹, the Supreme Court of the U.S. considered the copyright status of the autobiography of former President Gerald Ford. The majority and minority opinions both recognised the central issue as the complex fusion of fact and expression in historical and biographical works. For the majority, Justice O'Connor stated the dilemma:

Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression.³⁸²

The Court granted the injunction, but noted that the more closely fact and expression are linked, the less protection expression will receive.³⁸³

E. RETRIEVING A PERSONAL INTERESTS PERSPECTIVE

In sum, copyright law in its nearly 300 year history in the common law world has become the source of substantial commercial expectations and rights. Many of those reside in spheres of activity which have little or nothing to do with a vision of the lonely author or poet toiling away in a garret.³⁸⁴ Copyright protects a vast range of original expression, from the most banal business form or scribbled memorandum to the prize-winning novel. That variety betrays the unitary principles on which copyright rests. The idea/expression dichotomy in particular disguises the complex interplay of factors which determine the scope of copyright protection at the margins: with informational works and works of compilation Canadian and other courts have extended protection under what is in effect a misappropriation doctrine to facts, especially in circumstances which involve market competitors; with creative works, copyright has been found to

protect literary and artistic ideas, particularly in terms of transferring works from their original form into other forms.

As stated, these established rights have a material or commercial significance of the first order. Film rights presently constitute the financial jackpot for fiction writers. Still, the personal interests which animated Lord Mansfield's thinking in Millar v. Taylor can also be seen at play in the copyright scheme as it has developed on these points. The exercise of derivative rights (including when those arise through judicial interpretation of 'substantial reproduction') constitute a form of control in the author over the progress of his work in the world. They recognise through a property concept the right of a creator to have a say over whether and how his original work will be remoulded into the new expression of a different medium.

A recasting of this discussion in terms of the two concepts of property and personality, earlier discussed, leads in the following directions. As a result of the literary property debate and of its culmination in Millar v. Taylor and Donaldson v. Beckett, Anglo-American law 'propertised' the relationship between the author and his work. His rights in the work could be characterised as alienable property rights, albeit statute-based. Those rights comprised all of the author's material and personal interests in the work. In Canada, through the French influence and an early adherence to an international convention which itself incorporated the

European tradition, an inalienable moral right was included in the Copyright Act to preserve certain personal interests of the author. The recent amendment to the Act both expanded the moral right, but also and perhaps more importantly made it waivable; the ultimate effect of the latter is likely to increase authors' reliance on property rights as the source of protection for personal interests and, indeed, for their status as author. The author is thereby constituted in our law as an owner. Copyright thus exemplifies 'possessive individualism' at work; the individual conceived as possessor of himself and his capacities, recognised in rights he holds against society.

If for the moment this position is accepted without criticism, and we turn to Radin's interpretation of property law in terms of Hegel 's theory, interesting insights come to light. Her position is both descriptive, in saying that property law is in fact often driven by ethical concepts of personhood, and normative, in arguing that a duality in property rights should be recognised on the basis of "fungible" and "personal" property. In copyright law such a division is readily apparent. In connection with the discussion above, a "fungible" copyright might include:

(a) nature of works

- informational works, and compilations
- works produced in the ordinary course of commercial activity

(b) nature of 'taking' or 'use'

--competitive uses in the owner's market

By contrast a "personal" copyright might encompass

(a) nature of work

--creative works, works of imagination

(b) nature of 'taking' or 'use'

--derivative uses

The point of such a classification, as Radin points out, is not so much to create a first and second class property, as to be clear when personal interests in addition to material interests are implicated in a policy issue or a fact situation. Appeals to personal interests would only be made when they are implicated. It was suggested earlier that it is inappropriate for governments to assert Crown copyright for the purpose of preventing publication of information in the public interest. That represents one instance in which the personal interests which motivated the original copyright decision in Millar v. Taylor (1769) would not be present, and ought not to support the full exercise of an exclusive right of property.

ENDNOTES

1. Including Jean Bodin, Hugo Grotius, Montesquieu, Burke, and Jefferson. Other theorists like Thomas Hobbes, John Locke and David Hume had no formal legal training, but in the course of their careers advised governments on legislation and otherwise demonstrated considerable familiarity with law and the legal process.

2. See his "Reinterpretation of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes" (1988) 76 Georgetown Law Journal 1949; "Eighteenth-Century Judges' Notes: How They Explain, Correct and Enhance the Reports" (1987) 31 American Journal of Legal History 9; and articles cited at notes 65 and 274.

3. A brief note on citation: due to the reliance placed on cases in the literary property debate leading to, and including, Millar v. Taylor, the first mention of each such case will be highlighted in the text; thereafter, the date of the case will be included in the text.

4. 8 Anne. c. 19.

5. See, for example, and for general discussions of the legal status of "information", Grant Hammond, "Property rights to information" (1981) 27 McGill Law Journal 47; A. Weinrib, "Information and property" (1988) 38 University of Toronto Law Journal 117; R.J. Roberts, "Is information property?" (1987) 3 Intellectual Property Journal 209.

6. McLuhan, Marshall. The Gutenberg Galaxy: The Making of Typographical Man (Toronto: University of Toronto Press, 1962)

7. See for one important example Elizabeth Eisenstein, The Printing Press as Agent of Change. (London: Cambridge University Press, 1979). Eisenstein credits McLuhan with whetting her appetite for the study of printing's impact on society and culture, but describes in the Preface her frustration with his refusal to approach the topic in a linear, historical fashion. See further discussion of her work at text accompanying notes 32ff, below.

Robert Darnton's work linking the history of publishing and book dissemination with political and intellectual history presents a striking example of what sophisticated media studies can achieve. See his descriptions of methods and results in The Kiss of Lamourette: Reflections in Cultural History (New York: W.W. Norton & Co., Inc., 1990), Parts 3-5.

8. R. v. Stewart. [1988] 1 SCR 963. To be precise, the Court reached this conclusion through an interpretation of "takes...anything" (emphasis added) in the theft provision of the Criminal Code. "Anything", it ruled, must be capable of being the subject of property rights. Neither copyright nor confidential information, as intangibles, satisfied this test. See judgment of Lamer J., as he then was, at 972 ff.
9. See generally James Baker, An Introduction to English Legal History (London: Butterworths, 1979) 2d ed., Ch. 13, pp. 193-262; Holdsworth, W.H. A History of English Law, (London: Sweet & Maxwell, 1948) vol. III.
10. Blackstone, William. Commentaries, (Chicago: Callaghan & Co., 1884, 3rd ed.), Book II, at 473.
11. The issue for the courts, in a certain sense, was whether "property" had a further attribute to those mentioned here: its recognition in common law as an absolute right, as opposed to a 'merely' statutory recognition. See discussion in Part V.
12. Hohfeld's most influential articles were: "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale Law Journal 16; and "Fundamental Legal Conceptions" (1917) 26 Yale Law Journal 710. See generally the discussion in Part V, below.
13. (Oxford: Clarendon Press, 1988)
14. C.B. Macpherson, Property: Mainstream and Critical Positions (Toronto: University of Toronto Press, 1982), p. 7.
15. "Dialogue on Private Property" (1954) 9 Rutgers Law Review 357 at 379.
16. Supra note 14, at 6.
17. Ibid. at 202. Charles Reich in a similar vein wrote of welfare entitlements and other social program benefits as having become the "new property" of the modern world. See his "The New Property" (1964) 73 Yale Law Journal 733.
18. Baker, supra note 9, ch. 14 "Estates and Settlements", 222-250.
19. Becker, Lawrence C. Property Rights: Philosophic Foundations (London: Routledge and Kegan Paul, 1977), p. 24.
20. Hohfeld (1917), supra note 12. The 'moral interests' included actions for libel and privacy. Indeed, Hohfeld's categories 2 (intangible objects--e.g., patents) and 5

correspond closely to the distinction between "commercial" and "personal" interests in copyright developed through the course of this paper.

21. David Lange, "Recognizing the Public Domain", (1981) 44 Law and Contemporary Problems 147.

22. Blackstone wrote that scarcity made it

"necessary to entertain conceptions of more permanent dominions; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used." (Book II, 4-5)

Supra note 10, at 473.

23. See discussion of the early history of patents for inventions in Part III.

24. Works which discuss the history of the Stationers Company and its internal operations, including members' claimed rights, include: Patterson, L. Ray, Copyright in Historical Perspective (Nashville: Vanderbilt University Press, 1968); Fox, Harold, The Canadian Law of Copyright and Industrial Designs (Toronto: Carswell, 1967), pp. 1-40; Thomas, Donald, A Long Time Burning: The History of Literary Censorship (New York: Frederick A. Praeger, 1969); and Gray, W. Forbes, "Alexander Donaldson and the Fight for Cheap Books" (1926) 38 Juridical Review 180.

25. See comments of Lord Macclesfield in Knaplock v. Curl (1922), cited at note 178, below; Justice Willes in Millar v. Taylor (1769), saying the name "copy of a book"

"which has been used for ages, as a term to signify the sole right of printing, publishing and selling, shews this species of property to have been long known." (at 206)

26. On the history of "plagiarism" and the decline in its acceptability as a method of literary endeavour see Thomas Mallon, Stolen Words: Forays into the Origins and Ravages of Plagiarism (New York: Ticknor & Fields, 1989), and Joel Wersheimer, Imitation (London: Routledge & Kegan Paul, 1984). Wersheimer draws on the work of Samuel Johnson to show how the classical concept of art as imitation was on the defensive in the mid-seventeenth century.

27. Partridge's Origins gives a derivation for "author" which suggests it may once have had to do with 'augmenting' as opposed to 'creating':

"Augere has pp auctus, on which arose both auctio, (lit) an increasing, (but always) a public sale, with o/s auktion, whence E auktion, and auctor, lit an increaser, hence a founder, an auctioneer, an author..."

Partridge, Eric. Origins: A Short Etymological Dictionary of Modern English. (London: Routledge & Kegan Paul, 1958), p.32.

28. Richard Wincor, From Ritual To Royalties (Toronto: George J. McLeod, Limited, 1962), p. 16.

29. From "What is an Author ?" in Language, Counter-Memory, Practice: Selected Essays and Interviews, ed. Donald F. Bouchard, (Ithaca: Cornell University Press, 1977), p.124.

30. The distinction is, of course, crucial. Foucault believes that the individual author is less significant to the constructing of texts than the 'author-function', a socially received idea that authorship is important to understanding texts. He contrasts the modern period when "works are totally dominated by the sovereignty of the author" with earlier periods, and other societies, in which attribution of authorship plays almost no role in the 'authenticating' of texts--i.e., the process of giving them value as truth. Ibid. at 126.

31. Ibid. at 124.

32. Supra note 7.

33. Ibid., see her outline of purposes in the Preface.

34. An example of the different, modern view of the copyist as a "mere journeyman" is found in G.W.F. Hegel, The Philosophy of Right, trans. T.M. Knox. (Oxford: Clarendon Press, 1942). First published in 1828, it shows Hegel differentiating between the copyist of a work of art (e.g., a painting or sculpture), in which the "copy of a work of art is essentially a product of the copyist's own mental and technical ability", whereas the copyist of a literary work or an invention is performing a purely mechanical act. Section 68, at 54.

35. "Partly because copyists had, after all, never paid those whose works they copied, partly because new books were a small portion of the early book-trade, and partly because divisions of labor remained

blurred, the author retained a quasi-amateur status until the eighteenth century."

Ibid., at 153-154.

Victor Bonham-Carter notes that the possibility of having a career as an author only appeared in the 18th century. For a long time after the printing press was invented, the dominant force in English literature was the royal court:

"The influence of the Court was paramount- in refining and stabilising the language, in finding outlets for the new literature by the presentation of masques, plays and addresses for ceremonial occasions, and generally in stimulating the writing of poetry, drama and belles lettres. Publication in this field was incidental."

Authors by Profession, (London: Society of Authors, 1978), p. 12.

36. Ibid. at 84.

37. Ibid. at 121-122.

38. Ibid. at 230-231.

39. Ibid. at 234 ff. Bonham-Carter notes that until the 18th century it was the rule rather than the exception for published authors to be known by a pseudonym. Even Milton at first concealed his identity. Of course, one reason for not coming forward in public was royal censorship and the harsh punishments it carried. Supra note 35, at 15-18.

40. Ibid. at 156.

41. Of course, libel law became one of the principal means for defending literary reputations as well as limiting the author's literary licence. See for an early example of a writer's use of the libel action ***

42. Libel law in the seventeenth and eighteenth centuries was primarily used as a means of censorship to protect governments and political reputations: see Donald Thomas, supra note 24, (Britain), and Norman L. Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel (Chapel Hill: University of North Carolina Press, 1986) (the U.S.). Thomas describes Lord Mansfield's important role as a judicial

enforcer of seditious libel law, resisting when possible the wish of obstreperous juries to acquit the accused in political cases. Ibid. at 100-110.

43. Henceforward, the male possessive "his", "himself", etc. is used, an arbitrary decision of style not intended to exclude half of the world's authors from the purview of this study.

Copyright as an author's right, as opposed to a publisher's right, is generally traced back to the Statute of Anne (1709).

44. "Speeches and books were assigned real authors, other than mythical or important religious figures, only when the author became subject to punishment and to the extent that his discourse was considered transgressive."

That Foucault intends this to mean a phenomenon of the modern age, connected to the arrival of copyright laws, seems clearer when he adds that at the moment writing achieved its status as property its "transgressive properties...became the forceful imperative of literature. [The danger of books returned] "at the moment [the author] was accepted into the social order of property which governs our culture." Supra, note 29, at 124-125.

Foucault does not connect these events, in particular the danger which the state perceived in writing, with the printing press, but the historical record in England speaks for itself. See Part II.

45. Richard Posner, for example, writes:

"The dominant theory of literary creativity, as it had been in classical and medieval times, was creative imitation: the imitator was free to borrow as long as he added to what he borrowed. The modern equation of creativity to originality is a legacy of the Romantic era, with its cult of individual expression."

Law and Literature: A Misunderstood Relation (Cambridge: Harvard University Press, 1988) at 346.

Eisenstein notes:

"That the concept of 'the artist as a genius' is related to the new notion of 'intellectual property rights' is underlined by Arnold Hauser, Social History of Art, II, 70."

Supra note 7, at 229.

46. Supra note [26].

A considerable literature deals with the 'literary property' status of Shakespeare's works, including his borrowings from earlier writers, the battles he waged with printers of his plays, and the changes made to his work in the decades following his death. See, for example, L. Rosenthal, "Literary Property and the Adaptation of Shakespeare" (1990 draft, not for publication, presented at a colloquium on "Conceptions of Property in the Eighteenth Century" at the UCLA Center for 17th and 18th Century Studies, 1990), and Leo Kirschbaum, Shakespeare and the Stationers (Columbus: Ohio State University Press, 1955).

47. Barthes, Roland. "The Death of the Author" in Images, Music, Text: Essays Selected and Translated by Stephen Heath (New York: Hill and Wong, 1977).

Barthes, like Foucault, associates the author's 'arrival' as a known and important figure for criticism with the beginning of private property rights in literature. He recognises the tenacity of the view that the author matters:

"It is thus logical that in literature it should be this position, the epitome and culmination of capitalist ideology, which has attached the greatest importance to the 'person' of the author... The image of literature to be found in ordinary culture is tyrannically centred on the author, his person, his life, his tastes, his passions...." (at 143)

Indeed the tenacity of property rights, and the industries based on them, may explain why the strength of deconstructionist and other schools in the academy critical of the "author-function" have had little or no influence on the regime of legal protection for literary productions.

48. See further discussion in Part II.

49. The other case in which Justice Yates dissented was Perrin v. Blake 4 Burr 2579, 98 ER 355, 1 Wm Black 672, 96 ER 392, in which a similar issue of principle divided him from

Lord Mansfield. In Perrin, King's Bench was called on to interpret a trust by devise. The facts fell squarely within the ruling in Shelley's Case, which required that the testator's clear intention be frustrated. Lord Mansfield led the Court majority nevertheless to reject the clear precedent. Justice Yates defended the rule of precedent, and his view prevailed before the House of Lords.

William Odgers cited Perrin as the only case in which Yates J. dissented during his six years on the Court, failing to note Millar v. Taylor: "Sir William Blackstone" (1919) 28 Yale Law Journal 542. Odgers' piece provides intriguing background to the relations between the King's Bench judges during this period. In early 1770 Justice Yates resigned King's Bench to serve on the Court of Common Pleas. Before he commenced his new duties, and just after Blackstone was sworn in to replace him at King's Bench, Justice Yates died in June 1770. Blackstone went to Common Pleas instead.

The anonymous journalist Junius wrote Lord Mansfield a scathing letter, attacking his ego and tendency to stray from precedent, in which he said:

"The name of Mr. Justice Yates will naturally revive in your mind some of those emotions of fear and detestation with which you always beheld him. That great lawyer, that honest man, saw your whole conduct in the light that I do."
Ibid. at 548.

Odgers cited other references to Lord Mansfield's having scorned Yates J. with sarcasm, but dismissed them as exaggerations. Still, it appears that dissenting in Perrin and Millar may have taken a toll on Justice Yates and caused him to want to leave Lord Mansfield's Court.

50. See James Evans, "Change in the Doctrine of Precedent During the Nineteenth Century" in Precedent in Law (Oxford: Clarendon Press, 1987), ed. L. Goldstein.

51. William Murray, Lord Mansfield, played a major role in the debate for twenty years as counsel and judge. Blackstone similarly acted as counsel for the London booksellers, and as an advising judge in Donaldson v. Beckett. Lord Hardwicke LJC, heard a number of the injunction cases in the mid-eighteenth century. His son, Charles Yorke, was Solicitor-General in Baskett v. University of Cambridge (1758) (see Part III, below). James Boswell, a literary if not necessarily a legal notable, acted as counsel for Alexander Donaldson before the Scottish Court of Sessions in Hinton v. Donaldson (1770).

Further reference is made to the roles of each of these figures, below.

52. Although Donaldson v. Beckett (1774) is frequently cited to 4 Burr 2408, 98 ER 257, that is only a summary report. The most complete reports of the judges' opinions and several of the Lords' speeches are found at 17 Parl. Hist. Eng. 953, and "A Gentleman's Report" in The Literary Property Debate: Six Tracts 1764-1774 (London: Garland Publishing Co., 1975), Part F. It is the latter to which reference is made throughout this paper.

53. The ambiguity of the Donaldson decision, its possible misinterpretation by subsequent courts and commentators, and its effect on copyright are discussed more fully in Part II.

The report in the Literary Property Debate: Seven Tracts 1747-1773 reports the speeches of Lords Camden, Effingham Howard and Lyttleton, and of Lord Chancellor Apsley and the Bishop of Carlisle.

54. Ireland v. Higgins (1586) Cro. Eliz. 125, 78 ER 383, discussed below in Part V. The case concerned the ownership of greyhounds.

55. In this paper the terms 'printer', 'publisher' and 'bookseller' are used interchangeably (unless otherwise indicated), as they appeared largely to have been used through to the end of the eighteenth century. A division of labour in the book trade developed very slowly, and most members of the Stationers' Company performed all three of these functions. See Eisenstein, *supra* note 7 at 136 ff., and Patterson, *supra* note 24, at 44-47.

56. See also Patterson, *ibid.*, Gray, *supra* note 24, and Abrams, Howard, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright" (1983) 29 Wayne Law Review 1119.

57. Patterson discusses the booksellers' legislative efforts in the 1730s, *ibid.* at 154-157.

58. Lord Mansfield referred to his role in the booksellers' litigation in his closing remarks in Millar:

"The subject at large is exhausted: and therefore I have not gone into it. I have had frequent opportunities to consider of it. I have travelled in it for many years. I was counsel in most of the cases which have been cited from Chancery: I have

copies of all, from the register-book. The first case of Milton's Paradise Lost [Tonson v. Walker (1739), *infra*, Part IV] was upon my motion. I argued the second [Tonson v. Walker & Merchant (1752)]: which was solemnly argued, by one on each side. I argued the case of Millar against Kincaid, in the House of Lords [1750, see discussion below]. Many of the precedents were tried by my advice."

Millar v. Taylor, at 257.

59. Justice Willes (Millar v. Taylor, at 210) and Lord Mansfield (at 257) referred to the case under this name, both in referring to the appeal by the plaintiffs to the House of Lords in 1750, which was dismissed.

The only available record of this case appears in The Literary Property Debate: Seven Tracts 1747-1773, Parts A and B, the pleadings of the parties.

60. Justice Yates, Millar v. Taylor, at 257. His reference appears to be to the case before the Court of Sessions; Millar and Midwinter were two of twenty English booksellers who took the action.

61. Millar v. Taylor, at 210-212. Counsel for the respondent in Millar had presented to the Court notes of a solicitor's correspondence which cited Lord Hardwicke as saying in the House of Lords that the Statute of Anne constituted a "patent for authors", a view which confirmed the respondent's position (see discussion of patents and copyright in Part III). Justice Yates repeated this reference, but Willes J. dismissed it as being unreliable.

62. The Literary Property Debate: Six Tracts 1764-1774, Part C (Court of Session).

63. See further discussion of the case in Part IV.

64. Justice Willes cited the denouement to Tonson v. Collins (1762) and added both an appeal to nameless authority, and a note of courtesy to his brother on the Bench:

"I have been informed from the best authority, so far as the Court had formed an opinion, they all inclined to the plaintiff. On discovering collusion, however, they refused to proceed in the cause; though it had been argued bona

fide, and very ably, by the counsel [Joseph Yates], who appeared for the defendant."

Millar v. Taylor, at 214.

65. James Oldham, "Law Reporting in the London Newspapers: 1756-1786" (1987) 31 American Journal of Legal History 177.

66. Amongst others, Tonson claimed to hold copyright for the works of Milton, Dryden and Shakespeare. See Bonham-Carter, *supra* note 35, at 19.

67. Letter from John Whiston to John Merrill, dated April 23, 1759, included in Alexander Donaldson, "Some Thoughts on the State of Literary Property" (undated), in The Literary Property Debate: Six Tracts 1764-1774, Part E.

Donaldson wrote:

"It is a notorious fact, that the booksellers of London have hitherto ingrossed, and, in a great measure, monopolized the printing and vending many books, both ancient and modern, which are mostly in request, under the specious pretence of their having purchased from the authors immediately, or by progress, the sole and exclusive property of said books..." (3)

68. A lively description of these and other events related in this Part is given by W. Forbes Gray, *supra* note 24.

69. Four judges sat in each of King's Bench, Common Pleas, and the Court of the Exchequer. They were as follows:

King's Bench -- Ashurst J., Aston J., Willes J., Lord Mansfield (Justice Yates had died in 1770)

Common Pleas -- De Grey LCJ, Blackstone J., Gould J., Nares J.

Exchequer -- Smythe CB, Barons Adams, Eyre, Perrott

70. 4 Burrow 2408, 98 ER at 257-258.

71. That is, save for some perhaps understandable confusion. Questions 2 and 4 appear to call for opposite responses from each judge. Nevertheless, one or two judges (it is not entirely clear) who opposed the idea of common law copyright

answered 'no' to both questions, likely because they did not wish to concur in the assumption which Question 2 asked them to make. See opinions of De Grey CJ and Smythe CB.

72. Abrams, *supra* note 56.

73. *Ibid.*, Appendix A at pp.1188 ff.

74. Justice Yates, dissenting from the majority on all other issues in Millar, was willing to acknowledge that the common law recognised an author's right to first publication of his literary composition, as a form of right of confidentiality. See discussion, Part IV.

75. Wheaton v. Peters (1834) 33 U.S. (8 Peters) 591. This case is discussed further in Part III, below.

76. (1854) IV HLC 815, 10 ER 681.

77. Copyright Act 5 & 6 Vict., c. 45 (1842).

78. The confusion in the reporting of Donaldson seems responsible, at least in part, for the Jefferys' Court own confused interpretation.

A further point should be made: in speaking of "copyright" the judges meant a post-publication right. They acknowledged that a pre-publication, or first publication, right existed at common law, but did not envisage that as "copyright." Indeed, viewing a right of first publication as copyright dates from the incorporation of this right into "copyright" in the Imperial Copyright Act of 1911: 1&2 Geo. V, c. 46.

79. In Prince Albert v. Strange (1849) 2 DeGex & Sm. 652, 64 ER 293, the Royal Family had handed over several of the Prince Consort's etchings to a printer for the preparation of a private, Family edition. They came into the hands of a publisher who readied a volume for mass sale and circulation. Prince Albert sought and obtained an injunction. The Vice-Chancellor, disturbed at the publisher's bad manners, confirmed a property right in first publication which is not lost "by partial or limited communications not made with a view to general publication." (at 310).

Also, Millar was later used as authority in cases dealing with Crown copyright, for the proposition that Crown rights were proprietary in origin, and not wholly the result of the exercise of prerogative powers. See discussion in Part III.

80. *Supra*, note 75.

81. See brief discussion in Stevens, Robert. Politics and the Law: The House of Lords as a Judicial Body, 1800-1976 (London: Weidenfeld and Nicolson, 1979), and in W. Holdsworth, A History of English Law (London: Sweet and Maxwell, 1966, 6th ed.) Vol. 10, p. 610 ff.

82. See on this point James Evans, *supra* note 50, who cites their positions in Millar and Donaldson as a prefiguring of the 19th Century triumph of the doctrine of stare decisis.

83. Donaldson v. Beckett, *supra* note 52, at 52.

84. *Ibid.* at 54.

A rejoinder to Lord Camden's casual dismissal of the material needs of writers, of his assumption that the great writers sought only honour and glory, was given by Catherine Macaulay in "A Modest Plea for Copyright" (1775), found in Literary Property Debate: Eight Tracts 1774-1775, Part C.

Milton's fate had symbolic value in the debate. He had sold "Paradise Lost" for 5 pounds, and died in penury several years later. The poem had, of course, become an extremely valuable composition, and the subject of repeated litigation by Tonson, who maintained a dubious claim to its ownership up to the time of Donaldson.

85. There is a suggestion in the material that the booksellers had seen the Donaldson litigation not as a threat, but an opportunity to extend the ruling in Millar to other circumstances that by the cautious language of Justices Willes and Aston had been excluded from its consideration. See "The Case for the Appellant" in The Literary Property Debate: Six Tracts 1764-1774 (London: Garland Publishing Inc., 1974) Part F.

86. Gray, *supra* note 24.

87. *Supra* note 24.

88. See his articles on copyright in television news and case reports in, respectively: "Free Speech, Copyright and Fair Use", (1987) 40 Vanderbilt Law Review 1, and, with Craig Joyce, "Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations", (1989) 36 U.C.L.A. Law Review 719.

89. For discussion of issues in what has been and continues to be a heated debate in Canada, see: Cameron, Donald, "Copyright and Copying Machines" (1986) 4 Canadian Computer Law Review 186; Fontaine, P.L., D. A. Smith and P. Grant,

Developing a Reprography Collective in Canada: Final Report (Toronto: Stevenson, Kellogg, Ernst & Whinney, 1986); Nabhan, Victor, "The New Copying Methods: Reprography, Sound and Audio-Visual Recording" (1987) 3 Intellectual Property Journal 49. In short, the position in Canada is that there is no exemption from copyright liability for library photocopying of other than 'insubstantial' parts of a protected work; the problem is with respect to enforcement and collection of fees. The 1988 amendments introduced provisions to facilitate the formation of copyright collectives to engage in this process on behalf of large groups of copyright owners. Copyright Amendment Act S.C. 1988, c. 15, s. 14.

90. See passages from Boswell's Life of Johnson referred to by W. Forbes Gray, *supra* note 24.

91. For reference to Burke's support of the London booksellers, see Gray, *supra* note 24. Burrows' notes appended to the report of Millar v. Taylor found in Part F of Seven Tracts: 1747-1774 list several books opposing the idea of common law copyright, and also refer to the role of Swift and Addison in the drafting of the Statute of Anne (1709). Pieces by William Kenrick, Part B, and Catherine Macaulay, *supra* note 84, in Eight Tracts: 1774-1775, assume the authors' position in arguing for common law copyright.

92. Wincor, *supra* note 28, at 35.

93. See further account of the interdependence of the Stationers' Company and book censorship and licensing in Part III.

94. See in particular the discussion in Part V.

95. It has been echoed in some quarters, however: Stephen Breyer's controversial 1970 analysis of the economic justifications for copyright -- "The Uneasy Case for Copyright in Books, Photocopies, and Computer Programs" (1970) 84 Harvard Law Review 21-- suggested that honours and financial subsidies might be an adequate and less expensive way than an exclusive property right to reward authors and artists.

96. An issue discussed in detail Parts IV and VI.

97. "On the principle of setting a thief to catch a thief, the Stationers' Company (to which almost everyone engaged in the book trade was compelled to belong) was invested by the Crown with the power and the obligation of operating a censorship by examining and licensing books before

publication."

Thomas, *supra* note 24, at 9.

98. The preceding is a very brief summary of a lengthy and complex history of trade regulation, and interaction between government authorities and publishing interests. An excellent and detailed survey of these events is given in Chapters 2-6 of L. Ray Patterson's Copyright in Historical Perspective *supra* note 24. Amongst other things, Patterson explores the struggles within the Stationers' Company that broke out at various times between the wealthy 'monopolist' printers and the poorer members, and the ebbs and flows between regulation directed at censorship, and that (of Elizabeth I in 1586, and the Long Parliament in 1647) concerned more with 'good order' in the printing trade.

99. Patterson describes the "stationers' copyright" at some length, arguing that it represented the limited publisher's copyright that was confused with author's rights, and subsequently consumed in statutory copyright after Donaldson:

"The stationers' copyright can be analogized to a perpetual lease of personal property, a manuscript or copy, as it was called, for one specific purpose, that of publishing....It implies a continuing inchoate property, a type of property upon which the common law did not look with favour."

Ibid., at 10-11.

100. "I have a note of one and fifty patents granted for the imprinting of divers books. Since Ed. 6 time the printers and stationers are incorporated; they complain against their own charters ? they have patents themselves.....So for civil law-books, school books, almanacks, that is a privilege to themselves as a corporation; if the one is a monopolie, so certainly is the other."

Roll's Abridgment (1666) 124 ER 843 at 844.

101. "In monopolies, the inventions are preserved to them that invented it. Now if I can prove the King at his own price brought it into England first, then he was the first owner of it. "

Ibid., at 843. This argument, then, draws on the established experience of patents for inventions, and on the understanding of 'inventions' as including mechanical devices imported into England. See discussion of patents in section D, below.

102. Lord Mansfield noted in Millar that the prerogative argument in Roper was premised on the King's paying the Judges' salaries, adding drily that the Judges disagreed, thinking the reports should belong to the 'author' (at 254). The interests at play might explain why the King's Bench judges found for Roper, and why the Lords reversed.

The fact that contests over publishing law books appear as the first copyright cases reflects a long-standing propensity of the legal profession to get to the front of the litigation line. The first U.S. copyright case, which re-interpreted Millar and Donaldson in light of the U.S. Constitutional provision for copyright, involved a dispute over the ownership of reports of Supreme Court cases: Wheaton v. Peters, supra note 75. In more recent Canadian experience, the first equality rights Charter case to come before the Supreme Court concerned the right of non-citizens to practice law-- Andrews v. Law Society of B.C. [1989] 1 SCR 124; and the first mobility rights case, the right of law firms to operate across provincial boundaries-- Black v. Law Society of Alberta (1989) 58 DLR 4th 317 (S.C.C.).

103. The defining of 'law books' was apparently seen as a difficult issue in Roper v. Streater (1670)-- see reference in Partridge, 88 ER 647 at 649. Clearly, however, the term extended beyond compilations of statutes to case reports, and in Roll's Abridgment, to edited collections of cases organized on thematic lines.

For later developments in the ownership of case reports see brief discussion in section E, below.

104. Parker had previously come before Chancery in [Hills et al v. Oxford (1684) 1 Vern 275, 23 ER 467]. The Lord Keeper refused to grant an injunction against the university printers, and although clearly sympathetic to the stationers, sent the case to law:

"...it was never meant by the patent to the University that they should print more than for their own use...but as they now manage it, they would engross the whole profit of printing to themselves, and prevent the King's farmers of the benefit of their patent." (at 468).

The case concerned the printing of bibles.

105. Counsel for the stationers said that in Seymour the defendant held a patent from the King, showing how strong a decision in favour of the Company's charter the case represents. (at 108) The reports of Seymour do not indicate this to be the case; indeed, Pemberton for the stationers explicitly argued that the defendant claimed no independent right to print, but sought only to challenge the Company's right to do so. Seymour 86 ER 865, at 865.

106. Lord Mansfield said in Millar (at 255) that the Court in Baskett had largely followed Yorke's argument.

107. Le Case Del Royall Piscarie De La Banne (1611) Davis 55, 80 ER 540; Duke of Chandos' Case (1606) 6 Co. Rep 55, 77 ER 336; Re Alton Woods (1594) 1 Co Rep 26b, 76 ER 64.

108. Bridgman et al v. Holt et al (Master of the King's Bench Office) (1693) Shower P.C. 111, 1 ER 76; Wentworth v. Wright (1596) Cro. Eliz. 526, 78 ER 774; The Case of Swans (1591) 7 Co Rep 15b, 77 ER 435; Sir Henrie Constable's Case (1600) 5 Co Rep 105b, 77 ER 218.

109. Armiger v. Holland (1596) Cro Eliz 543, 78 ER 789.

110. Hunt v. Coffin (1519) 2 Dyer 197, 73 ER 435; Crouch v. Hain (1624) Latch 57, 82 ER 273; Dixe v. Browne Palmer 422, 81 ER 1152. These cases are all cited for the remedy of scire facias available to the holder of a prior patent against the holder of a later, inconsistent patent, in which event the King is found "deceived in his grant" and the later patent ruled void.

111. When the three judges of King's Bench (Chief Justice Holt sat by the defendant's table, the defendant happening to be his brother) received the jury verdict in favour of the defendant, they refused to seal a Bill of Exceptions for plaintiffs. The bulk of the report concerns the intricate political and jurisdictional issue of whether the House of Lords could hear a petition complaining of the judges' conduct. The petition was dismissed.

112. Royall Piscarie (1611) 80 Er 540 at 542.

113. Hills v. University of Oxford, supra note 5 (as noted this appears to be the Chancery decision in the Parker litigation). Mayo v. Hill (1673) is described briefly in Lee (1681).

114. The fascination of swans for the common law is suggested by the following lyrical passage, attributable either to defendants' counsel or Coke as reporter:

"And the law thereof [dividing of cynets between the owner of the cock and owner of the hen] is founded on a reason of nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is, to die so joyfully, that he sings sweetly when he dies." (The Case of Swans 77 ER 435 at 437)

115. See notes 187-188, and text accompanying for description and comparison of "fair dealing" and "fair use".

116. Counsel for the stationers in Partridge (1709) warned of the dangers inherent in the "mismanagement of the press" if unregulated (at 648); in Roll's Abridgment (1666), counsel argued that writing one's thoughts had never posed a danger, but publishing them certainly did:

"A man at common law might build a church without licence, for that was but a particular expence, but he could not erect a spiritual body politick without licence. He may write a book and print it without the King's licence, but publish it he cannot....It concerns the peace of the King and kingdom. Printing is of an unusual significance....no man may make sea-works or beacons without licence; and a book may raise as great a dust and alarm as a beacon." (at 843)

117. Company of Stationers v. Lee (1681), dealing with the threat of unregulated importing of ecclesiastical works from Holland:

"...besides it would be of dangerous consequence, that the Hollanders and other foreigners should print our psalms, psalters, almanacks, and singing psalms, for they may and actually do abuse them, for being at no charge for correcting, and printing in a worse character and paper, they will undersell the English, and

destroy our manufacture." (at 927)

118. See discussion in section E, below.

119. Tonson v. Collins (1762) 1 Black W. 321, 96 ER 180, at 187. See discussion of Tonson in Part II, above.

120. For example, see discussion in Harold Fox, Monopolies and Patents (Toronto: University of Toronto Press, 1947) at p. 86 ff.

121. 21 J.1, c.3.

122. This categorization is utilized by D.S. Davies in "Further Light on the Case of Monopolies" (1932) 48 Law Quarterly Review 394. Darcy was a groom of the Queen's Privy Chamber, and had no experience whatsoever in the card-making trade, one of the cardinal abuses cited by the Court according to Coke's report (at 1264).

123. A note should be made at this point concerning the differences in the three reports of Darcy. The report in Moore is in law French. Both that report and the report by Noy appear to give the arguments of Fuller, counsel for Allen, and not the King's Bench ruling. As the defendant succeeded, the report of Fuller's argument implies its acceptance in full by the Court. Coke, who as Solicitor-General defended the patent before the judges despite his contrary views, reports the decision of the Court. Coke's rendering contains his particular emphases, including an express editorial comment at its conclusion (at 1266), and an interpretation of the finding with respect to the Crown's dispensing power that Lord Ellesmere felt it necessary to correct (at 1265).

124. E. Wyndham Hulme, "The History of the Patent System Under the Prerogative and at Common Law" (1896) 12 Law Quarterly Review 141, and "A Sequel" at (1900) 16 Law Quarterly Review 44.

125. See in particular Hulme, "On the History of Patent Law in the 17th and 18th Centuries" (1902) 18 Law Quarterly Review 280.

126. "It is agreed by the Court, that the grants of the King shall not be expounded according to the letter; but according to the antient allowance, and to prove the same, I will put some particular cases. The Kings grants in many cases are controlled by the Judges of the law for the benefit of the King, contrary to the

expresse letters of the grant. "

Noy's Report, 74 ER 1131, at 1133.

127. Margaret Judson discusses this form of 'property right' in craftsmanship in her chapter "Englishmen View the King's Position" in The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645 (London: Rutgers University Press, 1984) 2d ed. at 47 ff.

128. For example:

"It [monopoly] tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary"

77 ER 1260, at 1263.

129. Statute of Monopolies, art. VII; Fuller in Noy's Report, 74 ER 1131, at 1137:

"...whereby the several trades that now maintain many thousand good subjects may be cut off by letters patents in an instant upon bare suggestion, which ought only to be done in Parliament; where amongst the assembly of such wise men, some will consider the inconvenience, some the damage, some the profit, some the mischief"

130. Of course, patents for invention were not objectionable on this score because they involved the introduction of new trades or skills, and did not thereby destroy existing trades. The Statute of Monopolies limited the patent to Fuller's 'reasonable' duration, a period sufficient, for one thing, to allow the acquisition of the new skills by other craftsmen.

131. Barbara Malament, "The 'Economic Liberalism' of Sir Edward Coke" (1967) Yale Law Journal 1321, at 1350. Ms. Malament's article constitutes a critique of the view, attributed to Christopher Hill, inter alia, that Coke, a supporter of the outcome in Darcy despite his official position, drafter of the 1624 Statute, and ardent opponent of James I's use and understanding of the prerogative, was an early capitalist, intent on destroying the state's regulation of trade:

"Darcy had defended his privileges as lawful emanations of the Crown prerogative to regulate foreign trade and generally to act pro bono publico. Neither Coke nor the King's Bench was prepared to deny the legitimacy of this prerogative."
(at 1350)

Her sharp attack on the notion that Coke's views reveal a liberal position on free trade draws heavily on the clear willingness of the Darcy court and the Parliamentary party to accept extensive trade protectionism in the interests of English tradesmen and industry.

132. See discussions of common theoretical views of the basis for patents by Steven N.S. Cheung, "Property Rights and Invention", and Edmund W. Kitch, "Patents: Monopolies or Patent Rights ?", both in Research in Law and Economics, Vol 8: The Economics of Patents and Copyrights (Greenwich, Conn.: JAI Press, 1986), at 5 and 31, respectively.

133. See further discussion of Justice Yates' view of literary property as a monopoly , and to the majority judges' responses, in Part V.

134. See his argument in Tonson v. Collins (1762) 96 Er 180, at 187.

135. Chief Baron Smythe agreed, and drew a distinction between the copied invention as at least an "original work" as opposed to the passing off involved in publishing another's literary composition. Donaldson v. Beckett, Eight Tracts 1774-1775, Pt. F, at 44.

136. Yates J. viewed copyright as a property in ideas (Millar, 230 ff.); the issue of the idea/expression dichotomy in copyright and how the court approached it is discussed in Part IV.

137. Justice Aston largely eschewed the value of precedent for establishing common law copyright, and did not cite the Crown cases. He was prepared to acknowledge copyright as a new right, justified because it fell within the theory of property known to common law. For a further exploration of his views, see Part IV.

138. He continued;

"But still these cases prove 'that the copy-right was at that time a well-known claim; 'though the overgrown rights of the

Crown were, in some instances, allowed and adjudged (as in this case [Seymour]) to over-rule them." (at 209)

The internal quote may be taken from Blackstone's argument in Millar, which Willes J. has just praised.

139. Justice Willes preferred the ruling of King's Bench that favoured Roper, the purchaser of the copy from Croke's estate. He noted that in reversing this decision the House of Lords did not ask the opinion of the judges (presumably of the three common law courts), who Justice Willes believed would have confirmed the decision. (Millar at 208)

140. "...a Court the very name whereof is sufficient to blast all precedents brought from it." (at 239)

141. "The patents were enormous stretches of the prerogative, to raise a revenue, and to gratify particular favourites without the least regard to authors and new compositions." (at 241)

142. "Will you then give this honourable right [to control printing of works of state] to your Sovereign as such ? or will you degrade him into a Bookseller ?"

Eight Tracts 1774-1775, Pt. F, at 31.

143. Justice Yates was vindicated on this point by judgments in Eyre and Strahan v. Carnan (1781) 6 Bac. Ab. (7th ed) 509, and Jefferys v. Boosey (1854) 4 HLC 815, which affirmed his view of the prerogative basis of the surviving Crown printing rights.

144. Crown prerogative rights have been viewed as part of the common law devolving to the colonies and accepted by incorporation into their founding constitutions. In 1924, Canada proclaimed into law its first copyright statute, the Copyright Act 11-12 Geo V, c. 24 (1921), now and as amended the Copyright Act RSC 1985, c. C-42, closely modelled on the 1911 U.K. Copyright Act 1 & 2 Geo V, c.46, and containing a s. 11 identical to the U.K. statute's s. 18:

"Without prejudice to any rights or privileges of the Crown, where any work is, or has been prepared or published by or under the direction or control of Her Majesty or any government department, the

copyright in the work shall, subject to any agreement with the author, belong to Her Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work." (emphasis added)

The phrase underlined acknowledges and preserves Crown prerogatives in copyright. Harold Fox, in his discussion of Crown copyright in Canada in The Canadian Law of Copyright and Industrial Designs, supra note 24, at p. 264 ff., suggests that this phrase was unnecessary and redundant, but it would seem that a Crown claim for perpetual copyright in prerogative works would fail in its absence. Fox's discussion of Crown rights in Canadian copyright law remains the best exposition of this issue.

145. 2 Wm Bl 1004, 96 ER 590.

146. Grierson v. Jackson Ridg L & S 304, 27 ER 512. The Bible continued to be a rich source for litigation. In Manners v. Blair (1825) 3 Bligh N.S., 4 ER 1379, the Court of Sessions decided that the Crown's prerogative over authorized Bibles derived from the King's role as guardian of church and state, not from his position as head of the English Church, so that the prerogative extended to the Bible for the Scottish Church even though the King was not its Head. More recently, a point made by Lord Mansfield in Millar was confirmed in Oxford University and Cambridge University v. Eyre & Spottiswoode Ltd. [1963] 3 All ER 289: the prerogative does not extend to translations of the Bible, only to the Authorized Version.

147. Nicol v. Stockdale (1785) 37 ER 1023.

148. In particular see University of Cambridge v. Richardson, (1802) 6 Ves. Jun. 690, per Lord Eldon at 711.

149. [1938] 3 DLR 548 (N.B.S.C.)

150. [1938] NSW 195.

151. The fascinating case of Prince Albert v. Strange (1849), 64 ER 293, supra note 79, concerning an unauthorised publication of drawings made by Prince Albert, appears to be the only example of a related issue: Crown copyright originating in actual authorship of a member of the Royal Family.

152. The most familiar way in which works enter the public domain in Canada is through the expiration of the applicable copyright period (life of the author plus 50 years in most cases); the failure of copyright to attach in the first place,

for instance through the work's not being viewed as a product of original expression, or not falling within one of the categories of works expressly protected by the statute, also puts a work in the public domain.

Several European countries have adopted the concept of 'domain public payant', which requires users of works whose copyright has expired to pay a modest licensing fee to the state as a means of generating public revenue for purposes related to the preservation of national culture. See Mouchet, Carlos. "Problems of the 'Domain Public Payant'" (1983) 8 Art and the Law 137.

153. Whether the Crown should seek to enforce its rights in all cases is a separate question, which is addressed briefly below.

154. Supra, note 75. A lively account of the institutional implications of Wheaton for the Supreme Court in its efforts during Chief Justice Marshall's tenure to achieve national stature, and of the personalities involved, is given by Craig Joyce in "The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy" (1985) 83 Michigan Law Review 1291.

155. A useful survey of the application of the statutory provisions and the public domain principle they embody is given by John O. Tresansky in "Copyright in Government Employee Authored Works", (1981) 30 Catholic University Law Review 605. Tresansky shows that the principle has been construed narrowly, such that government employees can acquire copyright in works they author outside the strict bounds of their official duties. See, for example, Public Affairs Associates Inc. v. Rickover 268 F. Supp. 444 (D.D.C., 1967), permitting an Admiral to claim copyright over speeches prepared while in government service, but on topics outside the scope of his official responsibilities.

156. 616 F. Supp. 1571 (D. Minn., 1985), aff'd 799 F. 2d 1219 (8th Circuit, 1986), cert. denied 479 U.S. 1070 (1987).

157. The West litigation ultimately settled on the basis of defendant's paying a sizeable licensing fee for the right to use star pagination. For a trenchant critique of the court decisions for their property rights' approach, and a review of the post-Wheaton jurisprudence in the nineteenth century, see article by L.R. Patterson and C. Joyce, supra note 88.

158. The distinction may seem like a fine one, but bears on the question of whether the view of Yates J. in Millar, to the effect that the Crown prerogative copyright derives from the Crown's executive role rather than from property, has

prevailed. Long Innes C.J. had an Australian constitutional issue in mind when answering the question of the nature of the Crown right, not its derivation. Paul Von Nessen notes:

"This case, which reaffirms the right of the Crown in statutes, does not fully clarify the basis of the right. It does indicate that whatever the principle on which it evolved, it is a right proprietary in nature. "

"Law Reporting: Another Case for Deregulation", (1985) 48 Modern Law Review 416 at 419.

159. Fox (1967), *supra* note 24, at 267.

160. Von Nessen, *supra* note 158; Colin Tapper, "Genus and Janus: Information Technology and the Law" (1985) 11 Monash Law Review 75, *ans* "Copyright in Judgments" (1985) 1 Computer law and Practice 76; see also M. Snow, "Who Owns Copyright in Law Reports?" (1982) 64 CPR 2d 49, and B. Torno, Crown Copyright in Canada: A Legacy of Confusion (Consumer and Corporate Affairs, 1981).

161. For Canada, s. 11 of the Copyright Act; this would involve a finding that judges perform their duties under the "direction or control of the government", which, given the doctrine of judicial independence, may be a dubious proposition.

162. Tapper, *supra* note 160, argues for a public domain finding. Despite the promise of his title, Von Nessen's article, *supra* note 158, shows that the different treatment of state ownership, especially as it concerns or may concern law reports, has led to few substantive differences in the nature or quality of reporting between the U.S. and the U.K.; the problem of ensuring accuracy in law reports led most U.S. states to appoint official reporters for their courts (whose publications received a subsidy in place of the unobtainable copyright monopoly), while Britain developed Councils of Law Reporting; both jurisdictions have recently developed mechanisms for restricting the number of reported decisions by regulating the citation of unreported cases.

163. Commonwealth v. John Fairfax & Sons Ltd. (1981) 55 ALJR (Aust. H.C.) (Australian government obtained an injunction to prevent the publishing of a selection of diplomatic cables, to which no confidence or national security claims attached); Attorney General v. Guardian Newspapers Ltd. (No. 2) [1988] 2 WLR 776 (in the notorious Spycatcher litigation, the House of Lords ruled that the author Peter Wright could not have the benefit of copyright in England, as it belonged to the Crown).

164. R. v. James Lorimer & Co. Ltd (1984) 77 CPR 2d 25 (F.C.A.)

165. "Partly because copyists had, after all, never paid those whose works they copied, partly because new books were a small portion of the early book-trade, and partly because divisions of literary labor remained blurred, the author retained a quasi-amateur status until the eighteenth century."

Supra note 7, at 153-154.

166. The four ways, and their artisans:

- (1) write (copy) works of others-- 'scribe'
- (2) write works of others with additions from other sources-- 'compiler'
- (3) combine own with others' work, with latter predominating-- 'commentator'
- (4) combine own with others' work, with former predominating-- 'author'

Ibid., at 121.

167. The result in Gyles is not found in the report of the case, but is disclosed by the Lord Chancellor in Tonson v. Walker and Merchant (1752), at 677. He says the panel reported the defendants had taken 35 of 275 sheets in the original, which the Court ruled made it a "fair abridgment" and thus outside the prohibitions of the Statute of Anne.

168. The Court also referred to Burnett's having ensured his control over the uses made of his book by negotiating with his publisher a declaration of trust over "the copy" to himself. This occurred in 1694, prior to the Statute of Anne. It is surprising the majority judges in Millar did not cite the case as an example of authors and publishers making property-like arrangements between each other.

169. Concerning Pilgrim's Progress. The Licensing Act of 1662 had just expired, so the case could have led to an early decision on the literary property question. Justice Willes notes, however, that after pleadings were filed describing the plaintiff printer as the "true proprietor" of the copy, the matter did not proceed.

Millar v. Taylor, at 209.

170. Concerning a work titled The Whole Duty of Man, published in 1657.

171. Concerning a collection of writings of Pope and Swift published between 1701 and 1708.

172. Concerning Nelson's Festivals and Feasts published between 1712 and 1714.

173. The first injunction proceedings dealing with an edition of Paradise Lost. The later 1752 case between the same parties over the work is not referred to as a continuation of the same proceeding, and appears to concern a new edition.

174. "Cap. LV: Injunction" at 2 Eq. Ca. Abr. 522, 22 ER 440

175. Tonson v. Walker and Merchant (1752), at 1020.

176. The Injunction chapter in Equity Cases Abridgment refers to several other printing cases not cited in Millar or the supporting cases:

Watson v. Jefferies (1737) over "Court Kalendar"
Hitch v. Langley (1739) over "Gibb's Architecture"
Rivington v. Cooper (1740) over "Gardiner's Calendar"
Gilliver v. Snaggs (1729) over "The Dunciad"
Andrews, Millar v. Linch (1742) over "Pamela" by Richardson

177. Blackstone, in his report of Tonson v. Collins (1762), adds in a note an extended passage from Johnson's Life of Pope that suggests Pope had conspired to get his letters into the hands of Curl, knowing the latter would proceed to publish them, thus allowing Pope to follow with his own edition (which he did) without appearing immodest. Tonson v. Collins, at 190-191.

178. The first international agreement on copyright was the Berne Convention of 1886. The U.S. refused to ratify it (indeed, it did so only in 1986). The issue of American 'piracy' of British copyrights was a bitter issue between the two countries through most of the nineteenth century. The implications of this struggle, and of the application of Imperial copyright legislation, for Canada are discussed by John Barnes in Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815-1854 (London: Routledge & Kegan Paul, 1974).

179. Separate statutes enacted through the course of the nineteenth century in the U.K. expanded copyright protection to original works in the following fields:

Sculpture Copyright Act 54 Geo.3, c.107 (1814)
Dramatic Literary Property Act 3 & 4 Will.4 c.15 (1833)

Lectures Copyright Act 5 & 6 Will.4 c.65 (1835)
Prints and Engravings Act 6 & 7 Will.4 c.59 (1836)

These categories were consolidated under the Copyright Act 5 & 6 Vict. c.45 (1842).

The Canadian Copyright Act RSC 1985, c. C-42, as amended, provides copyright for "every original literary, dramatic, musical and artistic work" (s. 4(1)), and then gives inclusive categories within each of those four headings, as well as particular ways in which the works must be expressed in order to qualify for copyright.

180. A contradiction seems to lie in the defendant's concern about whether the edition in issue fell within the terms of the Statute, given that the original letters were unpublished and therefore, presumably, had no statutory protection. Certainly, the judges in Millar, Yates J. included, believed Pope v. Curl to be decided on a common law right in the author of unpublished works to control their publication. See discussion to follow.

181. See discussion in Abrams' article, *supra* note 56.

182. It is significant to note that the literary property debate was restricted entirely to the issue of duration of the exclusive property right. Although the recognition of a common law copyright might have been used to get around other limits imposed by the Statute (such as the term "books") this did not occur.

183. An instance where the merit of a work influenced property rights occurred in Burnett (1722). There, the Lord Chancellor claimed for the judges "a superintendency over all books, [which] might in a summary way restrain the printing or publishing any that contained reflections on religion or morality." (1009) As the author had written in Latin to restrain distribution of his book, which contained disturbing religious ideas, the Court was more inclined to grant an injunction preventing its translation into English.

184. The Copyright Act 5 & 6 Vict., c. 45 (1842) expressly denied copyright to immoral and irreligious works. Both English and Canadian courts denied copyright to obscene works long after this prohibition had been dropped from later statutes. Justice Davies reviewed this line of cases in detail in the B.C. case Aldrich et al v. One Stop Video et al. (1987) 17 CPR (3d) 27 (B.C.S.C.), in which he ruled that obscene works are entitled to copyright, although plaintiffs might still be denied remedies at law and equity if the works are otherwise unlawful.

185. The term "third party" itself calls for explanation. Here, it means "a stranger"; in most instances it corresponds with the alleged infringer in copyright litigation. In that sense, the missing "second party" might be viewed as the assignee or representative of the original owner of copyright.

186. The Copyright Act RSC 1985 c. C-42 provides, inter alia, exclusive rights to dramatise novels, to perform works in public, to make sound recordings and to communicate works by radio (s. 3(1)); the 1988 amendments have added a public exhibition right for artistic works-- the Copyright Amendment Act SC 1988 c. 15, s.2.

187. Section 17(2)(a) of the Copyright Act RSC 1985, c. C-42 reads:

"(2) The following acts do not constitute an infringement of copyright:

(a) any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary"

(emphasis added). The comparable U.S. exception for "fair use" is subject to an extensive definition in s. 107 of the Copyright Act of 1976, Title 17 U.S.C. The section leaves "fair use" open-ended, but requires a court to consider four factors when deciding what constitutes fair use:

1. purpose and character of the use, including whether for profit or for education;
2. nature of the protected work;
3. amount of the work taken;
4. effect of the use on the "potential market" for the protected work.

For a thorough review of the wide-ranging litigation under the fair use provision, see Patry, William. The Fair Use Privilege in Copyright Law (Washington: Bureau of National Affairs, 1985), and Seltzer, Leon. Exemptions and Fair Use in Copyright (Cambridge, Mass.: Harvard University Press, 1978).

188. Such devices make possible, in addition to mass reproduction for resale (which act, if unauthorised, is the classic instance of infringement), reproduction for purposes of personal use, i.e., intrinsic use. The best example to illustrate the point is the use of VCRs for 'time-shifting' television programs, i.e., recording programs for later viewing.

Indeed, the leading U.S. case involving an 'intrinsic

use' as "fair use" is Universal City Studios v. Sony Corporation of America (1984) 464 U.S. 417. There, the Supreme Court ruled by a 5-4 majority that video-recording by home television viewers constitutes fair use of copyrighted programs. The decision has been subject to extensive comment, much of it critical from scholars who believe such an understanding of fair use imports a massive expropriation of value from copyright owners. See, *inter alia*, Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors" (1982) 82 Columbia Law Review 1600; David C. Farmer, "Writing with Light: the Metaphysics of the Copyright Process in the Betamax Case" (1984) 7 COMM/ENT 111.

The issue, in the terms of this paper, is whether "fair use" extends beyond a limited exemption for derivative uses which result in new works using a modest amount of the original, or to intrinsic uses as well. From the consumer's perspective, granting copyright protection to many intrinsic uses may appear to be a massive extension or "realisation" of potential markets for copyright owners, often of a windfall nature.

Generally, Canadian courts, like their Commonwealth counterparts, have been reluctant to read "fair dealing" as exempting intrinsic uses, certainly those of a commercial nature, or those involving a complete taking of the protected work.

189. Patterson cites this point to support his argument that early copyright actually responded to printers' concerns, not authors'. See text accompanying note 87.

190. The dichotomy between ideas (unprotected) and expression (protected) is a judicial construct that has never appeared in British or Canadian copyright statutes. The first express recognition of the principle in the U.K. is found in Jefferys v. Boosey (1854), per Erle J; in Canada, in Cartwright v. Wharton [1912] 1 DLR 392 (Ont. S.C.).

191. Lord Mansfield adopted the positions of Justices Willes and Aston on the proprietary issues, but directed his own remarks at the meaning and implications of the right of the author to first publication of the manuscript; in doing so, he justified the granting of common law copyright more on personal than proprietary interests of the author, a point discussed in detail below, and in Part VI.

192. "Can it be conceived, that in purchasing a literary composition at a shop, the purchaser ever thought he bought the right

to be the printer and seller of that specific work ? The improvement, knowledge, or amusement, which he can derive from the performance, is all his own: but the right to the work, the copy-right remains in him whose industry composed it.

The buyer might as truly claim the merit of the composition, by his purchase, (in my opinion) as the right of multiplying the copies and reaping the profits." (222)

The latter comment, with its implication that the invasion of the property right in commercial exploitation of the work is as 'natural' as the invasion of an author's right to assert his 'paternity', or authorship, over the work, reflects the nexus between personal and proprietary interests in the new right, which is discussed more fully below.

193. A distinction he felt necessary in order to explain why patents for invention did not exist at common law, whereas copyright did. See discussion in Part III, above.

194. Writers in many countries have long asserted rights over public lending of their works. In Canada a lending right received recognition in a 1987 amendment to the Copyright Act. The new right is attenuated through the mechanism of a licensing scheme which compensates registered authors on the basis of a national sampling of lending at a number of unnamed public libraries. For discussion of issues in the British context see Gerald Dworkin, "Public Lending Right--the U.K. Experience" (1988) 13 Columbia-VLA Journal of Law and the Arts 49; and Victor Bonham-Carter, The Fight For Public Lending Right 1951-1979 (Dolverton: Exmoor, 1988).

195. "But the fallacy lies in the equivocal use of the word 'property'; which sometimes denotes the right of the person; (as when we say, 'such a one has this estate, or that piece of goods;') sometimes, the object itself.

Here, the question is put upon the object itself, not the person. I readily admit that the rights of persons may be incorporeal....

No right can exist, without a substance to retain it, and to which it is confined: it would, otherwise, be a right without any

existence." (Millar v. Taylor, at 233)

196. See text accompanying notes 68-81.

197. See discussion at text accompanying notes 87-89, *supra*, and Patterson, *supra* note 24, Chapter 12 "Copyright in Historical Perspective", at p. 222 ff.

198. For a review of statutory developments in the U.S., see Douglas Lubic, "New York Artists' Authorship Rights Act Incorporates European Moral Right Doctrine" (1985) 8 Fordham International Law Journal 362.

199. Copyright Amendment Act SC 1988, c. 15, s. 7. For a discussion of these and other 1988 amendments, see Vaver, David. "The Canadian Copyright Amendments of 1988" (1988) 4 Intellectual Property Journal 121.

200. The new s. 12.1 extends the right of paternity to a right to remain anonymous or use a pseudonym.

201. However, section 18.2(2) extends the right of integrity (for paintings, sculpture and engravings) even where the distortion, mutilation or associational use of the work does not harm the author's honour or reputation.

In one of the few cases decided under the former s. 12(7), Snow v. Eaton Centre (1982) 70 CPR 2d 105 (Ont. S.C.) the Court on an injunction application ruled that the harm to reputation could be assessed subjectively from the author's perspective, which goes some way toward granting the author control over changes in the form and manner of use of his work. For a commentary, see Vaver, David, "Snow v. Eaton Centre: Wreaths on Sculpture Prove Accolade for Artists' Moral Rights" (1983) 8 Canadian Business Law Journal 81.

202. For a critique of an earlier proposal that would have made moral rights alienable, see his "Authors' Moral Rights--Reform Proposals in Canada: Charter or Barter of Rights for Creators ?" (1987) 25 Osgoode Hall Law Journal 749.

203. The problems are, of course, that such conditions only bind the licensee or assignee, and moreover may only be possible for the most successful of artists. The moral right provision intends to create rights that rest with the author even after copyright has been assigned. By allowing the author to waive his moral rights in a work (which results in standard form waivers drawn up by publishers and other assignees of copyright) much of the purpose of the provisions may be lost. Vaver indicates that that is precisely what is happening in the early days of the new waivable moral rights provision.

"Intellectual Property Today: Of Myths and Paradoxes" (1990) 69 Canadian Bar Review 98, at 106.

204. With respect to this point, and generally with respect to the points addressed in this section of the paper, see Gerald Dworkin, "The Moral Right and English Copyright Law" (1981) 12 IIC International review of Industrial Property 476.

205. The 1988 amendments in Canada extend moral rights protection to a vital interest, which is a form of a privacy interest: commercial associations of the work not wanted, or authorised, by the author/ artist.

One such type of association through commercial usage, the imitation or performing of a popular song in radio and television commercials, could now likely be enjoined. The similar circumstance of commercial imitation of a well-known singer's voice was recently found in the U.S. to constitute violation of the right of publicity: Midler v. Ford Motor Company 849 F. 2d 460 (9th Cir., 1988).

206. Section 3(1) of the Copyright Act 11-12 Geo V, c. 24 (1921) included under the general rights of copyright the phrase "if the work is unpublished, to publish the work or any substantial part thereof."

In the U.S., the right to publish was not incorporated into the federal copyright statute until the Copyright Act of 1976, Title 17 U.S.C. Before that it had been viewed as a common law right subject to legislation by the states.

207. See Copyright Act, RSC 1985, c. C-42, s. 6.

208. British Oxygen Co. v. Liquid Air Company [1925] 1 Ch. 383.

209. See note 290, below.

210. See Hunter v. Southam (1985) 11 DLR 4th 641 (S.C.C.), per Dickson, C.J.C. Gerard LaForest, J., speaking at the Faculty of Law, University of British Columbia on September 27, 1990, indicated that the Court has adopted the view that a "right of privacy" underlies several Charter provisions, including and in particular, s. 8 "search and seizure", and s. 7 "life, liberty and security of the person."

211. Privacy Act RSBC 79, c. 336. (B.C.)
Privacy Act RSM 1987, c. P125 (Manitoba)
Privacy Act RSS 1978, c. P-24 (Saskatchewan)

See detailed discussion of these statutes by David Vaver in his 1981 article, "What's Mine is Not Yours: Commercial

Appropriation of Personality Under the Privacy Acts of British Columbia and Saskatchewan", 15 University of British Columbia Law Review 24.

212. (1911) 45 SCR 95.

213. The pressure came from descendants of Mackenzie, by then ensconced in the upper reaches of Ontario society. For an analysis of this interesting litigation (in which LeSueur was ultimately enjoined from publishing his biography by the Ontario Court of Appeal) see Harvey Cameron and Linda Vincent, "Mackenzie and LeSueur: Historians' Rights" (1980) 10 Manitoba Law Journal 281.

214. "Dual rights of commercial exploitation and control of one's artistic reputation thus arise upon the creation of an intellectual work. These rights are protected by statute or by necessary implication in contracts concerning such products of the mind. "

Cameron and Vincent, *supra*, note 47, at 284.

Morang was decided before the right to publish was incorporated into copyright by the Copyright Act in 1921.

215. Louis Brandeis and Samuel Warren, "The Right to Privacy" (1890) 4 Harvard Law Review 193. On the specific issue of letters, see Alan L. Zegas, "Personal Letters: A Dilemma for Copyright and Privacy Law" (1980) 33 Rutgers Law Review 134.

216. *Ibid.* at 205. The American law on the right to privacy is extraordinarily complex, and no attempt is made here to summarise it. Suffice to say, the Brandeis and Warren article was influential in its day, and continues to be cited in most discussions of the right. Further, Brandeis and Warren did not see the right they were espousing as an absolute right that would override other legitimate societal interests; in particular, they believed the right to privacy in writings should not prevent publication of matters in the public interest, or certain other privileged communications.

217. Jon O. Newman, "Copyright Law and the Protection of Privacy" (1988) 12 Columbia-VLA Journal of Law and the Arts 458, at 463-464.

218. See fuller discussion of this aspect of Yates J.'s opinion in Part V.

219. See *supra* notes 204-208 for reference to amendments to the duration of moral rights, and to their being made waivable, both changes causing those rights to coincide more

closely with copyright.

Some debate existed over the duration and alienability of s, 12(7) rights prior to amendment, and the paucity of litigation left the matter open.

220. The phrase is that of C.B. McPherson: Theory of Possessive Individualism (Oxford: Clarendon Press, 1962).

An elaboration of the usefulness and limitations of McPherson's insights to the study of copyright history and theory follows in Part V, below.

221. For commentary see Frederick R. Kessler, "A Common Law for the Statutory Era: The Right of Publicity and New York's Right of Privacy Statute" (1987) Fordham Urban Law Journal 951.

222. For example, see O'Brien v. Pabst Sales Co. 124 F.2d 167 (5th Cir., 1941), and Martin v. F.I.Y. Theatre 1 Ohio Supp. 19 (Ohio S.C., 1938).

223. The first case recognising a right of publicity going beyond the privacy basis was Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. 202 F. 2d 866 (2d Cir., 1953), cert. denied, 346 US 816.

224. Lugosi v. Universal Pictures 603 P.2d 425 (2d Cir., 1979); and see I. Felcher and B. Rubin, "The Descendibility of the Right of Publicity: Is There Commercial Life After Death?" (1980) 89 Yale Law Journal 1125.

225. California Civil Code s. 990. Quoted in Nimmer, Melville. Cases and Materials on Copyright and Other Aspects of Entertainment Litigation. (St Paul: West Publishing Co., 1985).

226. See B.C. and Saskatchewan privacy statutes, *supra* note , and commentary and analysis by David Vaver, (1981), *supra* note 211.

227. Krouse v. Chrysler Canada Ltd. (1973) 13 CPR 2d 28, at 41 (O.C.R.).

228. For a historical review of the cause of action for appropriation of personality in Commonwealth jurisdictions, see two articles by Robert G. Howell: "The Common Law Appropriation of Personality Tort" (1986) 2 Intellectual Property Journal 149"; "Is There an Historical Base for the Appropriation of Personality Tort ?" (1989) 4 Intellectual Property Journal 263.

229. See in the Canadian context David Vaver, *supra* note 211. U.S. writers making a similar point include Robert C. Denicola, "Institutional Publicity Rights: Analysis of the

Merchandising of Famous Trade Symbols" (1984) 62 North Carolina Law Review 603, and Lawrence Saret and Martin Stein, "Publicity and Privacy--Distinct Interests on the Misappropriation Continuum" (1981) 12 Loyola University of Chicago Law Journal 675.

230. Hyman Gross writes of the narrowness of traditional concepts of privacy as follows:

"Seldom is privacy considered as the condition under which there is control over acquaintance with one's personal affairs by the one enjoying it."

"Privacy and Autonomy" (1980) XIX Nomos 163, at 169.

Denicola, *ibid.* at 621, says that the Brandeis and Warren dictum that in essence privacy is the right 'to be let alone' was early on seen as not being comprehensive:

"Yet even in its infancy the privacy right was viewed as an aspect of a more general interest in personal integrity and autonomy."

231. See reference to the recent Bette Midler litigation, *supra* note 205.

232. The image of the published book as ferae naturae actually appears a number of times in the course of the literary property debate. Justice Yates, for instance, referred to a composition as a "bird", which once let go cannot be brought back into possession. (Millar at 234)

In his article "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 Buffalo Law Review 325, K.J. Vandeveld suggests that limits of reasonability placed on the ferae naturae doctrine as it applied to moveable natural resources like oil and water were one of the factors signifying the "new property" concepts.

233. Justice Yates commented:

"...for, however peculiar the laws of this and every other country may be, with respect to territorial property, I will take it upon me to say, that the law of England, with respect to all personal property, had its grand foundation in natural law."

Millar v. Taylor at 229.

234. Supra note 50.

235. This reflects to a large degree the move from natural law to positivism as a basis of legal reasoning. The influence of Jeremy Bentham on the triumph of the doctrine of stare decisis in the 19th century is discussed by Evans, *ibid.*, in some detail.

236. Locke, John. Two Treatises of Government, ed. Peter Laolett (Cambridge: Cambridge University Press, 1964). The Second Treatise contains Locke's theory of property and of civil government.

237. The Political Theory of Possessive Individualism, supra note 220.

238. Dunn, John. The Political Thought of John Locke (Cambridge: Cambridge University Press, 1969).

239. Tully, James. A Discourse on Property: John Locke and His Adversaries (Cambridge: Cambridge University Press, 1980). Tully's thesis is sharply criticised by Jeremy Waldron, supra note 13, at 143 ff.

240. Supra note 19, at 45.

241. Ryan, Alan. Property and Political Theory (Oxford: Blackwell, 1984).

242. "He that had as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to...."

Second Treatise, supra note 236 at Para. 34. Note that Locke linked 'unjust enrichment' to the condition of there still being enough of the commons left for all to till.

243. Second Treatise, *ibid.* at para. 27.

244. Becker, supra note 19, at 49. In this respect Becker would disagree with Ryan's placing Locke solely within a materialist and, ultimately, utilitarian tradition of property theory.

245. See excerpts from Marx's Economic and Philosophic Manuscripts (1844) in Marx's Concept of Man, ed. Erich Fromm, translated by T.B. Bottomore (New York: F. Ungar, 1966).

246. This forms the basis for a trenchant critique by Macpherson, *supra* note 220.

247. Commentaries, *supra* note 10, Book II, at 473.

248. *Ibid.* at 475.

249. *Ibid.* at 471.

250. *Ibid.* at 472.

251. "The New Property of the Nineteenth Century", *supra* note 232.

252. "So absolute were the rights or [sic] property, according to Blackstone, that the law would not permit the smallest infringement of them, even for the good of the entire community."

Ibid. at 332.

253. *Supra* note 10, Book I, at 126.

254. *Ibid.* at 481.

255. Blackstone's advisory opinion from his position as judge in the Court of Common Pleas in Donaldson--delivered in writing because he was home with the gout-- closely tracked the arguments he had made in Tonson v. Collins (1762) and in Millar v. Taylor.

256. "I have avoided a large field which exercised the ingenuity of the Bar. Metaphysical reasoning is too subtle; and arguments from the supposed modes of acquiring the property of acorns, or a vacant piece of ground in an imaginary state of nature, are too remote. Besides, the comparison does not hold between things which have a physical existence, and incorporeal rights." (at 218)

257. In fact, copyright developed an "independent creation" rule. Hollinrake v. Truswell [1894] 3 Ch. 420 appears to provide the first express statement of the principle that creating a similar or identical work to an original does not

constitute an infringement so long as it was created independently, in ignorance of the original. Reasons why the principle did not arise previously would include its rarity as a defence outside the realm of music composition.

258. That is, a right to suppress books that had already been published in some fashion. Justice Yates, as was shown in Part IV, did not question that the common law permitted a writer to suppress publication of manuscripts (including personal letters), albeit on bases of confidentiality or trust, not copyright.

259. "The labours of an author have certainly a right to a reward.... [to rob the author] of the profit of his labour; as if all his emolument was forestalled....it would be the highest injustice." (Millar at 232)

Here Justice Yates engaged in a subtle sleight of hand by shifting from the author's "profit" to "all his emolument". Saying the author has a right to some profit begs the question "how much?"; with the latter phrase he implied only that denying the author any reward would violate the right.

260. See discussion of Justice Aston's position in Part IV.

261. Lord Mansfield in Millar v. Taylor at 252.

262. That is, the factual question of whether a defendant had copied the precise expression of the plaintiff author would be eminently ascertainable, subject nevertheless to a defence of "independent creation".

263. Commentaries, supra note 10, at 480.

264. (1918) 248 U.S. 215.

265. Justice Holmes did not dissent in the result. He found for the plaintiff, however, on the narrower ground of misrepresentation: the defendant reproduced plaintiff's news stories without attribution. Had it given credit to the source, Holmes J. would not have enjoined its copying activities.

266. "But I can never entertain so disgraceful an opinion of learned men, as to imagine the profits of publication for twenty-eight years will not content them." (at 249)

267. In Ewer, Chief Justice Holt said that where a statute like the Statute of Wills gives a right to a party, that party then has a common law action to sue for the statutory benefit.

268. P. S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979), p. 109.

269. On the latter point, see for example, Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: Legal Thought in America 1850-1940" (1980) 3 Research in Law and Society 19; and Morton J. Horwitz, The Transformation of American Law 1780-1860 (Cambridge, Mass.: Harvard University Press, 1977).

270. Daniel M. McClure, "Trademarks and Unfair Competition: A Critical History of Legal Thought" (1979) 69 Trademark Reporter 305.

271. Vandeveld, *supra* note 232.

272. *Ibid.* at 343.

273. *Ibid.* at 346 and 348, respectively.

An analysis of why trademark law has been cited more often by American scholars than copyright as a contributor to the breakdown of absolute natural law property might begin by noting that trademarks are more ephemeral than copyrighted works. As names or logos associated with commercial products or services, they have little independent existence, or at least little recognised by law as worthy of protection. In addition to the limits on the property rights in trademarks mentioned above, the alienability of marks has always been restricted by principles requiring the owner to maintain a degree of control over the uses made by licencees, if the exclusive right to the mark was to be preserved. The greater intangibility of trademarks arguably resulted in its greater limitation as property, which perhaps allows the drawing of more dramatic theoretical conclusions. It is also noteworthy that the literary property debate 'ended' just as common law courts began to deal with trademarks; to American scholars inclined to locate jurisprudential shifts in the second half of the 19th century, during the major industrialising phase of U.S. history, copyright may seem to have less to offer. Of course, the literary property debate took place and was 'resolved' in England, with the U.S. Supreme Court adopting its outcome in 1834.

274. James Oldham "Lord Mansfield and the Modernising of the Common Law" (1990, draft not for publication), presented at a colloquium on "Eighteenth Century Conceptions of Property" at the UCLA Centre for 17th and 18th Century Studies.

275. D. Kennedy and M. Horwitz, *supra* note 269; see also Joseph William Singer "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) Wisconsin Law

Review 975.

276. Vandavelde, *supra* note 232, writes of his approach:

"This essay, then, begins with the conviction that legal historians, whatever their beliefs about causation in history, need to understand the nature of legal thought....Although the language of causation is used occasionally the question of what caused the shift from a Blackstonian convention to a Hohfeldian conception is largely ignored." (at 327)

This paper also eschews an effort to draw causal links in the hope of achieving the more attainable goal of describing an overall shift in legal concepts in which the literary property debate played a part.

277. Bentham, Jeremy. An Introduction to the Principles of Morals and Legislation, ed. H.L.A. Hart, (London: Athlone Press, 1970) (first published in 1789).

278. Closely identified with the University of Chicago Law School, and with the following legal theorists: Richard Posner, Bruce Ackerman, and Guido Calabresi, to name only three.

279. Posner, R., Economic Analysis of Law, (Cambridge, Mass.: Harvard University Press, 1973), p. 10. *ibid.* at 10.

280. "It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage; but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art and labor?"

Supra note 10, Book II, at 475.

281. Becker writes:

"The upshot is that this form of economic utility argument, while ostensibly designed to secure a sweeping variety of full ownership property rights, seems to justify breath-taking cancellations of those rights whenever it would serve to move things in the direction of the ideal model."

Supra note 19, at 74.

282. In this respect, little separates economic/efficiency theorists like Posner from libertarian natural rights theorists such as Robert Nozick (Anarchy, State and Utopia (New York: Basic Books, 1974) and Richard Epstein (see Symposium on his book Takings: Private Property and the Power of Eminent Domain, in (1986) 41 University of Miami Law Review 239).

283. The description of Legal Realism given herein draws liberally from the work of Duncan Kennedy, supra note 269, and Joseph William Singer in two articles, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) Wisconsin Law Review 975; and "Legal Realism at Yale: 1927-1960 by L. Kalman, a Book Review" (1988) 76 California Law Review 465. These are scholars who approach Realism from the critical legal studies perspective. For a seminal piece on property theory from one of the leading figures in the Realist school see Felix Cohen, "A Dialogue on Property", supra note 15.

284. In his 1989 article, *ibid.*

285. Supra note 15.

286. Dworkin, Ronald. Law's Empire (Cambridge: Belknap Press, 1986).

287. As introductions to the critical legal studies approach and perspective, see: Kelman, Mark. A Guide to Critical Legal Studies (Cambridge, Mass.: Harvard University Press, 1987); and Hutchinson, Allan C. Dwelling on the Threshold: Critical Essays on Modern Legal Thought (Toronto: Carswell, 1988).

288. Least of all teachers of law. For example, Mark Kelman in writing of the 'neutral' stance proponents of law and economics take to the institution of private property:

"In a sense, the economists are very much like the typical legal educator playing Realist or positivist, declaring at the grand level both that entitlements can exist only to serve collective purposes (since they are clearly established collectively) and that the very definitions of the entitlements can be understood only by explicit reference to the collective purpose, since politically charged words have no interesting fixed meanings, while suggesting, in their more

revealing day-to-day classroom speech, that it is helpful both to derive proper practice from strong presumptions about individual rights and to derive practice in concrete cases from abstract reflection on the meaning of the words that have been used to define these rights. Having listened to law teachers for many years, as a student and colleague, I have no real faith in either the proposition that legal academics make few presumptions about the economic wisdom of private property or the proposition that consequentialist, nonconceptualist thinking has truly supplanted Formalist rights orientation."

Ibid. at 153.

289. The two principal international agreements are the Berne Convention for the Protection of Literary and Artistic Works (1886) and the Universal Copyright Convention (1952), ratified and acceded to by Canada in 1908 and 1962, respectively.

The Conventions, Inter alia, guarantee a national treatment standard for authors amongst all member countries.

290. A compulsory licence, as the name suggests, permits the automatic use of a protected work for defined purposes by third parties, with compensation (established by regulation or the Copyright Appeal Board).

In Canada, examples of compulsory licences in the Copyright Act include: the mechanical reproduction of sound recordings (s.19); the public performance of musical works (s. 50); and publication of a literary work already published, where the author is deceased and the copyright holder refuses to republish (s. 13).

291. Exceptions to 'life plus 50' rule in Canada include photographs (fifty years from making of the negative--s.9), and government publications (fifty years from publication--s.11).

292. An example of the latter phenomenon occurred in Canada most recently in the Federal Court decision that ruled operating programs for computers fall within the protection of the Copyright Act as literary works: Apple Computer Inc. v. Mackintosh Computers Ltd. et al (1987) 18 CPR (3d) 129 (F.C.A.), on appeal to the Supreme Court of Canada.

293. Keyes, A.A. and Claude Brunet. Copyright in Canada: Proposals for a Revision of the Law (Ottawa; Dept. of Communications, 1977).

294. R.J. Roberts, "Canadian Copyright: Natural Property or Mere Monopoly" (1979) 40 Canadian Patent Reporter 2nd series, 33; A.A. Keyes and C. Brunet, "A Response to Professor Roberts", *ibid.* at 54. In their debate, the parties refer to an earlier discussion over the nature of copyright between Stephen Brodhurst, "Is Copyright a Chose in Action ?", and T.C. Williams, "Property, Things in Action and Copyright" (1898) 11 Law Quarterly Review 64 and 223, respectively.

295. "It [copyright] is not a right of property entitling the creator to compensation for every conceivable use thereof."

Ibid. at 36.

296. Breyer, *supra* note 95. See response by Joseph Tyerman, "The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer" (1974) 21 Copyright Law Symposium (ASCAP) 1.

297. *Supra*, note 45 at 343. Posner's discussion of copyright occurs in the closing section of a book directed primarily at exploring the relevance of legal studies to the study of literature and to challenging what he considers some of the more extravagant claims for finding critical connections between the two.

298. For a useful and comprehensive analysis of copyright in terms of economic theory, and an assessment of the 'monopoly vs. property' debate, see Wendy J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory" (1987) 41 Stanford Law Review 1343.

299. David Ladd, "Securing the Future of Copyright: A Humanist Endeavor". (1985) 9 Columbia Journal of Art and the Law 413.

300. One such way, for instance, would be a debate over attitudes and approaches to public domain. In a world where information is so important both as an economic resource and a way of understanding events in a complex world, the scope of the public domain becomes a crucial question. David Lange and Ralph Brown have each warned of the need to ask 'what does this mean for the public domain' when new exclusive rights in information-related activities are being considered: Lange, *supra* note 21; Ralph Brown, "Copyright and Its Upstart Cousins: Privacy, Publicity, Unfair Competition" (1986) 33 Journal of the Copyright Society of the USA 301.

301. Most significantly in Pope v. Curl (1741) dealing with personal letters. As with the other cases involving unpublished works, the Court was solicitous of the plaintiff's

privacy interests. In Burnett v. Chetwood (1722), the Court was concerned both to respect the deceased author's wishes not to have his theological work translated into English, and to enjoin a translation that was so poor it would harm his reputation. In Gyles v. Walker (1740), the Lord Chancellor expressed his concern about the harm poor abridgments could do to an author's reputation. In several of the prerogative cases, the point was made that the Crown had the right and duty to ensure that no mistakes occurred in state documents--see Seymour (1677) and Baskett (1758), inter alia.

302. Supra note 19, at 52.

303. Of course, the effectiveness of such control in the real world depends very much on the respective bargaining power of the parties involved. As Bonham-Carter points out, supra note 35, at 24, authors were for the most part unable to exercise any significant degree of power in their dealings with publishers until at least the latter part of the 19th century.

Even now, apart from well-established bestsellers, authors and artists have little bargaining power when it comes to dealing with 'producers' (publishers, record companies etc.) of their work. Standard agreements, with fairly standard and low royalty clauses, govern most relationships in copyright industries. See Vaver (1990), supra note 203, at 105-106.

304. Ryan, Supra note 241.

305. In Marx's theory, the relationship between the individual and the products of his labour has a similarly ethical or developmental significance; the divorce between the two effected by the division of labour in capitalist society is experienced as alienation of the worker from himself.

See Marx, excerpts from Economic and Philosophic Manuscripts in Marx's Concept of Man, ed. E. Fromm, supra note 245.

306. The thinkers to whom Ryan devotes his study are: (1) the instrumentalists: Locke, Bentham, J.S. Mill; (2) self-developmentalists: Rousseau, Kant, Hegel, Marx. Ryan does not suggest that the distinction between these groups constitutes a hard and fast line.

The implication that the two traditions Ryan identifies divide along English/ continental lines is unmistakable. This division reflected itself in the evolution of copyright law, which in common law countries developed as a commercial right and on the continent as a right founded in the personal

interests of the author. This Part of the paper does not argue that Lord Mansfield represented a continental European in disguise; his perspective was not foreign to English legal or social thought and, as shown above, conforms to a strand in the Lockean labour theory. Still, this strand did get lost in the shuffle of the literary property debate, later demanding recognition in unacknowledged forms as the discussion which follows attempts to show.

307. Supra note 220.

308. Ibid. at 263.

309. Ibid. at 275.

310. Ibid. at 3.

311. G.W.F. Hegel, The Philosophy of Right, translated and edited by T. Knox (Oxford: Clarendon Press, 1942). The book is actually assembled from notes Hegel's lectures taken by his students.

312. Deterministic and conservative in terms of accepting the world as it is, because at all times it embodies the rational in process of working itself out, like a mystery novel heading inexorably to its conclusion. Marx unlocked a revolutionary power in Hegel's thought by emphasising its dynamic of human consciousness, and, of course, by making consciousness subject to the material struggle in relations of production.

313. Hegel's thought in this respect resembles Blackstone's in defining property as a right relating to things, objects. See Felix Cohen's discussion of this point in "Dialogue on Property", supra note 15. Indeed, this appears to be at the root of Hegel's evident difficulty in theorising the difference between owning a "book" and owning "copyright" in The Philosophy of Right.

Also like Blackstone, Hegel postulates a virtually absolute subjection of nature to human will:

"A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things.'"

Supra note 34, s. 44. at 41.

314. See Hegel's critique of slavery, *ibid.*, s. 57A at 47.

315. *Ibid.*, s. 51 at 45.

316. *Supra* note 241, at 123-124.

317. *Supra* note 34, s. 69, at 55.

318. *Ibid.*, s.62, at 50. Hegel's critique of English common law rested on his belief that the division of use and ownership, found in the doctrine of trusts and uses, was nonsensical.

319. *Ibid.*, s. 69, at 55.

320. *Ibid.*, s. 69, at 56. To the question what constituted plagiarism, Hegel responded:

"There is no precise principle of determination available to answer these questions, and therefore they cannot be finally settled either in principle or by positive legislation." (56)

He felt, however, that claims of plagiarism had greatly diminished in his own day, either because honour had checked it, plagiarism had ceased to be dishonourable, or originality now was recognised in the making of trivial changes to existing work.

321. Margaret Jane Radin, "Property and Personhood". (1982) 34 Stanford Law Review 957. See also her "The Consequences of Conceptualism" (1986) 41 University of Miami Law Review 239, a contribution to a symposium on the work of Richard Epstein, *supra* note 282.

322. Radin (1982), *ibid.* at 957.

323. *Ibid.* at 958.

324. *Ibid.* at 960.

325. Radin cites, for instance, the 1967 decisions of the Supreme Court of the United States which found in the Fourth Amendment a privacy protection for individuals, as opposed to the protection of physical premises on a property basis alone—see Warden v. Hayden 387 US 294 (1967), and Katz v. U.S. 389 US 347 (1967); Radin also speculates that the high degree of protection in law accorded to tenants' interests as explainable on a personhood basis. *Ibid.* at 998 ff.

326. For example, Radin draws on the work of Calabresi and Malamed, "Property Rules, Liability Rules, and Inalienability" (1972) 85 Harvard Law Review 1089 to show the kind of

differential in protection she has in mind. They had divided property into "rules of property" and "rules of liability" in which the former represents an 'absolute' ownership, and the latter a lesser ownership which is subject to expropriation with market value compensation.

327. To establish a concept of "healthy" object relations, Radin posits a "deep consensus" in American society concerning what constitutes mental health. If such "consensus" exists, which may be doubted, there is no reason to believe it to be more stable and disinterested a consensus than that concerning Japanese Americans during World War II. Ibid. at 968-969.

328. Ryan, *supra* note 241, at 120ff.

329. As suggested earlier, Lord Mansfield's views are likely consistent with a reading of Locke as justifying property, in part, as the expression of individual labour.

330. While Radin consciously restricts her study to property in tangible objects, she does make reference in an extended footnote to the personal interests inherent in copyright, specifically in the concept of moral rights. *Supra* note 321, (1982) at 1014.

331. (1988) 77 Georgetown Law Review 287.

332. "A universal definition of intellectual property might begin by identifying it as nonphysical property which stems from, is identified as, and whose value is based upon some idea or ideas. Furthermore, there must be some additional element of novelty."

Ibid. at 294. Hughes' concentration on intellectual property as protecting ideas is no doubt in part influenced by patent law. He is hardly oblivious of the idea/ expression dichotomy in copyright by which it is said that copyright does not protect ideas. He has a useful discussion of how the labour theory provides the basis for the dichotomy (in that expression is a material embodiment of the labour to be rewarded, without which the law would encounter extraordinary problems of evidence--essentially, the point made by Yates J. in Millar;--see 310 ff.) His use of 'ideas' as the subject matter of copyright is justifiable in the two senses which he appears to adopt: (1) that ideas in a broad sense are the starting point of protectible expression; (2) that when it comes to artistic expression, copyright can amount to the protection of ideas of form, style and even content. See further discussion of this point below.

333. Ibid. at 330.

334. "...attainments, eruditions, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them."

Hegel, Supra note 34, s. 43, p. 40.

335. Supra note 331, at 345.

336. Supra note 34, ss.66-69 at 54.

337. Supra note 13, at 355 ff. Waldron's point is similar to Macpherson's effort to return to "property" the ethical significance he believes it had before it became a market-ordered category in and after the seventeenth century. See his concluding chapter to Property: Critical and Mainstream Positions, supra note 14.

338. Copyright Act RSC 1970, c. C-30, s. 3(1).

339. Section 2. By 1988 amendment, "literary work" now also includes "computer programs." Copyright Amendment Act SC 1988, c. 15, s. 5.

340. Section 3(1)(b) and 3(1)(c).

341. Latour v. Cyr (1951) 11 Fox Patent Reports 136 (Exch. Ct.).

342. Massie & Renwick Limited v. Underwriters' Survey Bureau Limited et al. [1940] SCR 218.

343. Cardwell v. Leduc (1963) 23 FPC 99 (Exch. Ct.).

344. Kilvington Bros. Ltd. v. Goldberg et al. (1957) 16 FPC 14 (Ont. S.C.).

345. Ascot Jockey Club Ltd. v. Simons (1966) 39 FPC 52 (B.C.S.C.).

346. University of London Press Ltd. v. University Tutorial Press [1916] 2 Ch. 601.

347. Ibid. at 609.

348. (1957) 16 FPC 185 (Ont.S.C.).

349. Ibid. at 188.

350. [1982] RPC 69.

351. Ibid. at 83.

352. Apple Computer , supra note 292.

353. Harold Fox writes, for example:

"Thus, it will be seen that compilations constitute or form the subject of a different principle than works of an entirely original character. Copyright in works of an original character is more easily infringed than in the case of works of the type under discussion."

Supra note 24, at 351.

354. B.C. Jockey Club et al. v. Standen (1985) 8 CPR (3d) 283 (B.C.C.A.). A racetrack's racing schedule had previously been recognised as copyright in the Ascot Jockey Club case, supra note 345.

355. It is not clear from the facts as they appear in the judgments to what extent the defendant copied the form of presentation from the original. It is, however, difficult to see how he could avoid substantial copying if he was to produce a marketable product.

356. B.C. Jockey Club v. Standen (1982) 73 CPR (2d) 164, at 173, per Legg J. (B.C.S.C.).

357. Ibid. at 175.

358. See brief comment on same point by David Vaver (1990), supra note 203, at 110, note 36.

359. In Garland v. Gemmill (1888) 14 CLR 321, a pre-Copyright Act case, a defendant was found to have infringed the copyright in the Parliamentary Guide, by copying some biographical sketches of MPS, updating others, and adding other new material; in Latour v. Cyr (1951) 11 FPC 136, defendant was enjoined from producing a business directory for the Valleyfield, Que., region despite proving he had updated and corrected parts of plaintiff's earlier directory.

360. (1912) 25 DLR 357 (Ont. S.C.).

361. Ibid. at 362.

362. See discussion of this point in the U.S. context in a note, "Compilations of Public Facts in a Directory" (1982) 71 Northwestern Law Review 833.

363. Supra note 264.

364. Lac Minerals Ltd. v. Corona Mining Corporation et al. [1989] SCR 574. In this case the Supreme Court unanimously held for the plaintiff Corona on the basis of a "springboard" doctrine of a duty of confidentiality: in circumstances establishing a confidential relationship between two parties, the "confidee" cannot make use of information obtained in the course of the relationship from the confider to the latter's detriment, and so as to afford itself a "springboard" advantage in a venture of interest to both parties. This doctrine comes close to the unfair competition tort recognised in the Associated Press case, but is limited, of course, to parties in a relationship of confidence and to information acquired from one another.

365. That is, Standen sought to produce a handicapping sheet for horse races put on by the plaintiff. The plaintiff's business was that of producing the races and reaping the benefits of betting at the track. The "Overnight" sheet merely summarised information about the race program. Standen could not do without that information; but the material he provided for bettors was entirely his own. The Court protected a 'market'--the handicapping market-- in which plaintiff was not directly engaged (evidence suggested plaintiff had 'sold' its rights in "Overnight" to another party, which would not itself support a copyright claim). The effect of the decision seems to be to convey to plaintiff a monopoly of information in the fullest sense: every would-be handicapper must now purchase the basic information on plaintiff's racing schedules from the plaintiff.

366. Kaplan, Bernard. An Unhurried View of Copyright (New York: Columbia University Press, 1967), pp. 5-17.

367. Braithwaite, William. "Derivative Works in Canadian Copyright Law" (1982) 20 Osgoode Hall Law Journal 191.

368. This is not to deny that translation, and most particularly the translation of a fictional work, can be (must be) highly creative and "original".

369. Stephanie K. Wade, "Copyright and the Protection of Ideas" (1980) 14 Georgia Law Review 794.

370. Supra note 367, at 203.

371. See classic statement of these issues in Ladbroke Football Ltd. v. William Hill & Co. Ltd. [1964] 1 All ER 465 (C.A.).

372. [1894] 3 Ch. 109.

373. [1916] 1 Ch. 261. The court's consideration of plaintiff's case was not wholly dispassionate; it believed the novel to be obscene, and was prepared to deny copyright on that basis as well. See discussion of copyright for obscene works, *supra* note 184.

374. 45 F.2d 119, (2d Cir., 1930) at 133.

375. [1967] 2 All ER 324. Defendants had been offered the film rights to a book, turned the offer down, and then retained a screenwriter to develop a script on the same subject.

376. There was no question that the defendants had used the plaintiff's book in research for the screenplay. The issue, therefore, was, in one part, the substantiality of their use of the original rather than an argument (evidentiary in nature) over wholly independent creation. Also at issue, however, was the alleged public domain nature of the historical material presented in plaintiff's book.

377. (1890) ILR 17.

378. Quoted by Goff J. in Harman, *supra* note 375, at 331.

379. *Ibid.* at 334.

380. Breen v. Hancock House Publishers Ltd. et al. (1985) 6 CPR (3d) 433 (F.C.T.D.). Here, the evidence indicated what could be seen as substantial reproduction on a quantitative measure. The defendant's assertion that the small market for an academic work should lead to no damages being awarded was rejected by the Court.

381. (1985) 471 U.S. 539.

382. *Ibid.* at 547.

383. The plaintiff publisher succeeded in Harper & Row on the basis that defendant had copied verbatim 400 words from the original book in a magazine article of approximately 2,500 words. The finding on these facts of "substantial reproduction" turns very much on the circumstances, which included a 'pre-emptive' publication of the article just prior to general release of the book. The Court gave little weight to a unique factor pertaining to autobiographies, as opposed to biographies and historical works: the alleged copier likely

has no alternative sources for the information he wishes to reproduce. For free speech implications of the case, see David E. Shipley, "Conflicts Between Copyright and the First Amendment after Harper & Row, Publishers v. Nation Enterprises" (1986) Brigham Young University Law Review 983.

Similar issues arose in a case dealing with a biography of the reclusive author J.D. Salinger-- Salinger v. Random House 811 F.2d 90 (2d Cir., 1987). Salinger succeeded in enjoining an unauthorized biographer from using verbatim excerpts from a number of Salinger's personal letters he had donated to a university library, but over which he continued to assert copyright. The biographer was forced to paraphrase those excerpts to which he still wished to make reference. For a critique of extending copyright protection to biographical information, see Jee Hi Park, "The Chilling Effect of Overprotecting Factual Narrative Works" (1988) 11 COMM/ENT 75, or L. Dohm, "Fact vs. Fiction" (1988) 18 Memphis State Law Review 99; but contra, see E.D. Lazar, "Towards a Right of Biography" (1979) 2 COMM/ENT 489.

The Salinger litigation, in which the Courts showed some frustration at the unavailability of confidentiality or privacy, per se, as causes of action, could be seen as a classic instance of using the property right of copyright to protect a personal interest in privacy.

384. " This...is the easiest way to demarcate copyright from patents: copyright protects persons who work in garrets, patents protect those who work in basements."

Vaver (1990), *supra* note 203, at 103, note 10.

BIBLIOGRAPHY

1. BOOKS

Atiyah, Patrick S. The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979)

Baker, James. An Introduction to English Legal History (London: Butterworths, 1979) 2d ed.

Barnes, John. Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815-1854 (London: Routledge & Kegan Paul, 1974)

Barthes, Roland. "The Death of an Author" in Images, Music, Text: Essays Selected and Translated by Stephen Heath (New York: Hill and Wong, 1977)

Becker, Lawrence C. Property Rights: Philosophic Foundations (London: Routledge and Kegan Paul, 1977)

Blackstone, William. Commentaries on the Laws of England (Chicago: Callaghan & Co., 1884, 3rd ed.)

Bonham-Carter, Victor. Authors by Profession (London: Society of Authors, 1978)

_____. The Fight for Public Lending Right 1951-1979 (Dulerton: Exmoor Publishing Co., 1988)

Darnton, Robert. The Kiss of Lamourette: Reflections in Cultural History (New York: W.W. Norton & Co., Inc., 1990)

Dunn, John. The Political Thought of John Locke (Cambridge: Cambridge University Press, 1969)

Dworkin, Ronald. Law's Empire (Cambridge: Belknap Press, 1986)

Eisenstein, Elizabeth. The Printing Press as Agent of Change. (London: Cambridge University Press, 1979)

Fontaine, P.L., D. A. Smith and P. Grant. Developing a Reprography Collective in Canada: Final Report (Toronto: Stevenson, Kellogg, Ernst & Whinney, 1986)

Fox, Harold. The Canadian Law of Copyright and Industrial Designs (Toronto: Carswell, 1967)

----- Monopolies and Patents (Toronto: University of Toronto Press, 1947)

Fromm, Erich, ed. Marx's Concept of Man. Trans. T.B. Bottomore (New York: F. Ungar Ltd., 1966)

Hegel, Georg W.F. The Philosophy of Right, translated and edited by T. Knox (Oxford: Clarendon Press, 1942)

Holdsworth, W.H. A History of English Law (London: Sweet and Maxwell, 1966, 6th ed.)

Hutchinson, Allan C. Dwelling on the Threshold: Critical Essays on Modern Legal Thought (Toronto: Carswell, 1988)

Judson, Margaret. The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645 (London: Rutgers University Press, 1984) 2d ed.

Kaplan, Bernard. An Unhurried View of Copyright (New York: Columbia University Press, 1967)

Kelman, Mark. A Guide to Critical Legal Studies (Cambridge, Mass.: Harvard University Press, 1987)

Keyes, A.A. and Claude Brunet. Copyright in Canada: Proposals for a Revision of the Law (Ottawa; Dept. of Communications, 1977)

Kirschbaum, Leo. Shakespeare and the Stationers (Columbus: Ohio State University Press, 1955)

The Literary Property Debate: Six Tracts 1764-1774 (London: Garland Publishing Inc., 1975)

--Seven Tracts 1747-1773 (1974)

--Eight Tracts 1774-1775 (1974)

McLuhan, Marshall. The Gutenberg Galaxy: The Making of Typographical Man (Toronto: University of Toronto Press, 1962)

Macpherson, C.B. Property: Mainstream and Critical Positions (Toronto: University of Toronto Press, 1982)

----- Theory of Possessive Individualism (Oxford: Clarendon Press, 1962)

Mallon, Thomas. Stolen Words: Forays into the Origins and Ravages of Plagiarism (New York: Ticknor & Fields, 1989)

Nimmer, Melville. Cases and Materials on Copyright and Other Aspects of Entertainment Litigation. (St Paul: West Publishing Co., 1985)

Partridge, Eric. Origins: A Short Etymological Dictionary of Modern English. (London: Routledge & Kegan Paul, 1958)

Patry, William. The Fair Use Privilege in Copyright Law (Washington: Bureau of National Affairs, 1985)

Patterson, L. Ray. Copyright in Historical Perspective (Nashville: Vanderbilt University Press, 1968)

Posner, Richard. Law and Literature: A Misunderstood Relation (Cambridge: Harvard University Press, 1988)

----- Economic Analysis of the Law (Cambridge: Harvard University Press, 1973)

Rosenberg, Norman L. Protecting the Best Men: An Interpretive History of the Law of Libel (Chapel Hill: University of North Carolina Press, 1986)

Ryan, Alan. Property and Political Theory (Oxford: Blackwell, 1984)

Seltzer, Leon. Exemptions and Fair Use in Copyright: The Exclusive Rights Tensions in the 1976 Copyright Act (Cambridge, Mass.: Harvard University Press, 1978)

Skone James, E.P. Copinger and Skone James on Copyright (London: Sweet and Maxwell, 1971) 11th edition

Sterling, J.A.L. and M.C.L. Carpenter. Copyright Law in the United Kingdom and the Rights of Performers, authors and Composers in Europe (London: Legal Books Pty Ltd., 1986)

Stevens, Robert. Politics and the Law: The House of Lords as a Judicial Body, 1800-1976 (London: Weidenfeld and Nicolson, 1979)

Thomas, Donald. A Long Time Burning: The History of Literary Censorship (New York: Frederick A. Praeger, 1969)

Torno, Barry. Crown Copyright in Canada: A Legacy of Confusion (Consumer and Corporate Affairs, 1981)

Tully, James. A Discourse on Property: John Locke and His Adversaries (Cambridge: Cambridge University Press, 1980)

Wersheimer, Joel. Imitation (London: Routledge & Kegan Paul, 1984)

Wincor, Richard. From Ritual To Royalties (Toronto: George J. McLeod, Limited, 1962)

2. ARTICLES

Abrams, Howard, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright" (1983) 29 Wayne Law Review 1119

Anon. (Note) "Compilations of Public Facts in a Directory" (1982) 71 Northwestern Law Review 833

Braithwaite, William. "Derivative Works in Canadian Copyright Law" (1982) 20 Osgoode Hall Law Journal 191

Brandeis, Louis and Samuel Warren, "The Right to Privacy" (1890) 4 Harvard Law Review 193

Breyer, Stephen. "The Uneasy Case for Copyright in Books, Photocopies, and Computer Programs" (1970) 84 Harvard Law Review 21

Brodhurst, Stephen. "Is Copyright a Chose in Action ?" (1898) 11 Law Quarterly Review 64

Brown, Ralph. "Copyright and Its Upstart Cousins: Privacy, Publicity, Unfair Competition" (1986) 33 Journal of the Copyright Society of the USA 301

Calabresi, Guido and T. Malamed, "Property Rules, Liability Rules, and Inalienability" (1972) 85 Harvard Law Review 1089

Cameron, Donald. "Copyright and Copying Machines" (1986) 4 Canadian Computer Law Review 186

Cameron, Harvey and Linda Vincent. "Mackenzie and LeSueur: Historians' Rights" (1980) 10 Manitoba Law Journal 281

Cheung, Steven N.S. "Property Rights and Invention", in Research in Law and Economics, Vol 8: The Economics of Patents and Copyrights (Greenwich, Conn.: JAI Press, 1986) at 5

Cohen, Felix. "Dialogue on Private Property" (1954) 9 Rutgers Law Review 357.

Davies, D.S. "Further Light on the Case of Monopolies" (1932) 48 Law Quarterly Review 394

Denicola, Robert C. "Institutional Publicity Rights: Analysis of the Merchandising of Famous Trade Symbols" (1984) 62 North Carolina Law Review 603

Dohm, L. "Fact vs. Fiction" (1988) 18 Memphis State Law Review 99

Donaldson, "Some Thoughts on the State of Literary Property" (undated), in The Literary Property Debate: Six Tracts 1764-1774 (London: Garland Publishing Inc., 1975), Part A

Dworkin, Gerald. "The Moral Right and English Copyright Law" (1981) 12 IIC International review of Industrial Property 476

------. "Public Lending Right--the U.K. Experience" (1988) 13 Columbia-VLA Journal of Law and the Arts 49.

Evans, James. "Change in the Doctrine of Precedent During the Nineteenth Century" in Precedent in Law (Oxford: Clarendon Press, 1987), ed. L. Goldstein.

Farmer, David C. "Writing with Light: the Metaphysics of the Copyright Process in the Betamax Case" (1984) 7 COMM/ENT 111

Felcher, I. and B. Rubin, "The Descendibility of the Right of Publicity: Is There Commercial Life After Death ?" (1980) 89 Yale Law Journal 1125

Foucault, Michel. "What is an Author ?" in Language, Counter-Memory, Practice: Selected Essays and Interviews, ed. Donald F. Bouchard, (Ithaca: Cornell University Press, 1977)

Gordon, Wendy J. "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors" (1982) 82 Columbia Law Review 1600

------. "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory" (1987) 41 Stanford Law Review 1343

Gray, W. Forbes, "Alexander Donaldson and the Fight for Cheap Books" (1926) 38 Juridical Review 180

Gross, Hyman. "Privacy and Autonomy" (1980) XIX Nomos 163, at 169

Hammond, Grant. "Property Rights to Information" (1981) 27 Mcgill Law Journal 47

Hohfeld, Wesley N. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale Law Journal 16

-----". "Fundamental Legal Conceptions" (1917) 26 Yale Law Journal 710

Howell, Robert G. "The Common Law Appropriation of Personality Tort" (1986) 2 Intellectual Property Journal 149"

-----". "Is There an Historical Base for the Appropriation of Personality Tort ?" (1989) 4 Intellectual Property Journal 263

Hughes, Justin. "The Philosophy of Intellectual Property" (1988) 77 Georgetown Law Review 287

Hulme, E. Wyndham. "The History of the Patent System Under the Prerogative and at Common Law" (1896) 12 Law Quarterly Review 141

-----"A Sequel" at (1900) 16 Law Quarterly Review 44

-----"On the History of Patent Law in the 17th and 18th Centuries" (1902) 18 Law Quarterly Review 280

Joyce, Craig. "The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy" (1985) 83 Michigan Law Review 1291

Kessler, Frederick R. "A Common Law for the Statutory Era: The Right of Publicity and New York's Right of Privacy Statute" (1987) Fordham Urban Law Journal 951

Keyes, A.A. and Claude Brunet, "A Response to Professor Roberts" (1979) 40 Canadian Patent Reports 2d series, 54.

Kitch, Edmund W. "Patents: Monopolies or Patent Rights ?", both in Research in Law and Economics, Vol 8: The Economics of Patents and Copyrights (Greenwich, Conn.: JAI Press, 1986) at 31

Ladd, David. "Securing the Future of Copyright: A Humanist Endeavor". (1985) 9 Columbia Journal of Art and the Law 413

Lange, David. "Recognizing the Public Domain" (1981) 44 Law and Contemporary Problems 147

Lazar, "Towards a Right of Biography" (1979) 2 COMM/ENT 489

Lubic, Douglas. "New York Artists' Authorship Rights Act Incorporates European Moral Right Doctrine" (1985) 8 Fordham International Law Journal 362

Macaulay, Catherine. "A Modest Plea for Copyright" (1775), found in Literary Property Debate: Eight Tracts 1774-1775, (London: Garland Publishing Inc., 1974) Part C

McClure, Daniel M. "Trademarks and Unfair Competition: A Critical History of Legal Thought" (1979) 69 Trademark Reporter 305

Malament, Barbara. "The 'Economic Liberalism' of Sir Edward Coke" (1967) Yale Law Journal 1321

Mouchet, Carlos. "Problems of the 'Domain Public Payant'" (1983) 8 Art and the Law 137

Nabhan, Victor. "The New Copying Methods: Reprography, Sound and Audio-Visual Recording" (1987) 3 Intellectual Property Journal 49

Newman, Jon O. "Copyright Law and the Protection of Privacy" (1988) 12 Columbia-VLA Journal of Law and the Arts 458

Odgers, William Blake. "Sir William Blackstone" (1919) 28 Yale Law Journal 542

Oldham, James. "Law Reporting in the London Newspapers: 1756-1786" (1987) 31 American journal of Legal History 177

----- . "Lord Mansfield and the Modernising of the Common Law" (1990, draft not for publication), presented at a colloquium on "Eighteenth Century Conceptions of Property" at the UCLA Centre for 17th and 18th Century Studies

----- . "Reinterpretation of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes" (1988) 76 Georgetown Law Journal 1949

----- . "Eighteenth-Century Judges' Notes: How They Explain, Correct and Enhance the Reports" (1987) 31 American Journal of Legal History 9

Park, Jee Hi. "The Chilling Effect of Overprotecting Factual Narrative Works" (1988) 11 COMM/ENT 75

Patterson, L. Ray. "Free Speech, Copyright and Fair Use", (1987) 40 Vanderbilt Law Review 1

-----, and Craig Joyce, "Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations", (1989) 36 U.C.L.A. Law Review 719

Radin, Margaret Jane. "Property and Personhood". (1982) 34 Stanford Law Review 957

------. "The Consequences of Conceptualism" (1986) 41 University of Miami Law Review 239

Roberts, R.J. "Is Information Property ?" (1987) 3 Intellectual Property Journal 209

------. "Canadian Copyright: Natural Property or Mere Monopoly" (1979) 40 Canadian Patent Reporter 2nd series, 33

Rosenthal, Laura. "Literary Property and the Adaptation of Shakespeare" (1990 draft, not for publication, presented at a colloquium on "Conceptions of Property in the Eighteenth Century" at the UCLA Center for 17th and 18th Century Studies, 1990)

Shipley, David E. "Conflicts Between Copyright and the First Amendment after Harper & Row, Publishers v. Nation Enterprises (1986) Brigham Young University Law Review 983

Singer, Joseph William. "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) Wisconsin Law Review 975

------. "Legal Realism at Yale:1927-1960 by L. Kalman, a Book Review" (1988) 76 California Law Review 465

Snow, Michael. "Who Owns Copyright in Law Reports?" (1982) 64 Canadian Patent Reports (2d series) 49

Tapper, Colin. "Genus and Janus: Information Technology and the Law" (1985) 11 Monash Law Review 75

------. "Copyright in Judgments" (1985) 1 Computer law and Practice 76

Tresansky, John O. "Copyright in Government Employee Authored Works", (1981) 30 Catholic University Law Review 605

Tyerman, Joseph. "The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer" (1974) 21 Copyright Law Symposium (ASCAP) 1

Vandevelde, K.J., "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property", (1980) 29 Buffalo Law Review 325

Vaver, David. "The Canadian Copyright Amendments of 1988" (1988) 4 Intellectual Property Journal 121

------. "Authors' Moral Rights--Reform Proposals in Canada: Charter or Barter of Rights for Creators ?" (1987) 25 Osgoode Hall Law Journal 749

------. "Snow v. Eaton Centre: Wreaths on Sculpture Prove Accolade for Artists' Moral Rights" (1983) 8 Canadian Business Law Journal 81

------. "What's Mine is Not Yours: Commercial Appropriation of Personality Under the Privacy Acts of British Columbia and Saskatchewan" (1981) University of British Columbia Law Review 241

Von Nessen, Paul. "Law Reporting: Another Case for Deregulation", (1985) 48 Modern Law Review 416

Weinrib, A. "Information and Property" (1988) 38 University of Toronto Law Journal 117

Williams, T.C. "Property, Things in Action and Copyright" (1998) 11 Law Quarterly Review 223

Zegas, Alan L. "Personal Letters: A Dilemma for Copyright and privacy Law" (1980) 33 Rutgers Law Review 134

3. STATUTES

A. Canada

Copyright Act 11-12 Geo V, c. 24 (1921); as amended, Copyright Act RSC 1985, c. C-42

Copyright Amendment Act S.C. 1988, c. 15

Privacy Act RSBC 1979, c. 336

Privacy Act RSM 1987, c. P125

Privacy Act RSS 1978, c. P-24

B. United Kingdom

Act for the Encouragement of Learning by the Vesting of the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned (the Statute of Anne) (1709) 8 Anne c. 19

Copyright Act 5 & 6 Vict., c. 45 (1842)

Copyright Act 1&2 Geo.5, c. 46 (1911)

Dramatic Literary Property Act 3 & 4 Will.4 c.15 (1833)

Lectures Copyright Act 5 & 6 Will.4 c.65 (1835)

Licensing Act 13 & 14 Car. II, c.33 (1642)

Prints and Engravings Act 6 & 7 Will.4 c.59 (1836)

Sculpture Copyright Act 54 Geo.3, c.107 (1814)

Statute of Monopolies 21 James 1, c.3 (1624)

C. United States

Copyright Act of 1976, Title 17 U.S.C.

D. International Conventions

Berne Convention for the Protection of Literary and Artistic Works (1886)

Universal Copyright Convention (1952)