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The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship

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

—Michel Foucault, "What Is an Author?"¹

I

ON FRIDAY, 4 FEBRUARY 1774, the House of Lords, acting as the final court of appeal for Great Britain, began to hear arguments in the landmark case of *Donaldson v. Becket*. "The great cause concerning literary property" was at last about to be definitively resolved. Immediately at issue was whether Alexander Donaldson, a Scottish bookseller who had built a successful business on cheap reprints of the classics, had acted as a pirate when six years before he published an edition of James Thomson's *The Seasons*, a work for which Thomas Becket and a group of other London booksellers and printers claimed the copyright. The principle in question was whether literary property was a statutory right, a limited creation of the state, or a common-law right and therefore absolute and perpetual. Did the Statute of Anne (1709), the long-standing copyright law under which the term of copyright was strictly limited, determine the whole extent of protection, or did the statute merely supplement the common-law right? Becket and the respondents asserted the theory of an underlying common-law right and the principle of perpetual copyright. Donaldson maintained that once the twenty-eight-year maximum term of copyright under the statute had expired a work was freely available.

Donaldson v. Becket was before the House of Lords for nearly three weeks until on 22 February the peers voted in favor of Donaldson and the principle that copyright should be limited in time. Throughout the proceedings public interest was intense. On the first day of argument, according to a letter from London in Donaldson's newspaper the *Edinburgh Advertiser*, several hundred people had to be turned away for lack of space,² and the *Morning Chronicle* reported that the

“House below the bar was . . . exceedingly crowded,” and that “Mr. Edmund Burke, Dr. Goldsmith, David Garrick, Esq; and other literary characters, were among the hearers.”³ Samuel Johnson probably was not present but he was, as one would expect, interested. On 7 February he wrote James Boswell noting that the question of literary property was before the Lords, that their friend Arthur Murphy had drawn up Donaldson’s case, and that he himself opposed making copyright perpetual.⁴ Meanwhile, the London newspapers devoted multiple columns to the proceedings, reporting the arguments of the lawyers and judges in great detail, and they printed dozens of letters to the editor from lawyers, booksellers, and others commenting, often very colorfully, on the case as it was developing. The general interest even spawned at least one rather feeble joke. Having been reprimanded for stealing an old woman’s gingerbread cakes baked in the form of letters, a cheeky schoolboy was supposed to have defended himself by explaining that “the supreme Judicature of *Great Britain* had lately determined that *lettered Property* was common.”⁵

“No private cause has so much engrossed the attention of the public, and none has been tried before the House of Lords, in the decision of which so many individuals were interested. During the whole time of its duration in the House of Lords, (three weeks including adjournments, and eight days debate) a great number of peers were present, and paid the greatest attention.” So reported the *Edinburgh Advertiser* after the decision was rendered,⁶ and though Donaldson’s paper can hardly be regarded as a neutral source there is no reason to doubt its assertion about the perceived significance of the case at the time.

Why was there such general interest in *Donaldson v. Becket*? For one thing the case represented the climax in a commercial and legal struggle between the booksellers of the capital and those of the provinces that had been going on for the better part of a century. In 1694 the Licensing Act, the statute that regulated the British press, had been allowed to lapse because it was apparent that it was operating primarily as a restraint on trade. Most affected negatively were the small group of powerful London booksellers who under the ancient rules of the Stationers’ Company had come to control nearly all the old copyrights of value. This group, whose dominance of the book trade was threatened by the provincial booksellers of Ireland and Scotland (who were not bound by the rules of the Stationers’ Company), petitioned Parliament for permission to bring in a bill to regulate the trade, and in 1709 the Statute of Anne, the world’s first copyright act, was passed.⁷ The statute was essentially a codification of long-standing practices of the Stationers’ Company, but, whereas under the guild regulations copyright was perpetual, under the statute the term was limited to fourteen years with a possible second term if the author were still living. For books already in print the statute provided a twenty-one-year term. The London booksellers were, for obvious reasons, dissatisfied with this aspect of the statute. For a time they sought parliamentary extensions of the terms, but these attempts were unsuccessful, and

in any case what they really wanted was confirmation of the customary perpetual copyright of the Stationers' Company. Starting in 1735, therefore, after the expiration of the twenty-one-year term for existing copyrights, the major copyright holders turned to the courts, first to seek injunctions in particular cases that they regarded as piracy, and later to establish in principle that copyright was a common-law right and therefore continued in perpetuity despite the specifications of the statute. The first case in which the common-law issue was directly confronted was *Tonson v. Collins* (1760), which came before the Court of King's Bench under the formidable Lord Mansfield, the founder of English commercial law. But when it emerged that Tonson and Collins were acting in collusion in order to test the law on the matter the court refused to proceed to judgment. A decade later, however, in the landmark case of *Millar v. Taylor* (1769) the London booksellers secured the judgment they wanted. By an unprecedented split vote of three judges to one the Court of King's Bench affirmed the common-law right of literary property and the principle of perpetual copyright. *Donaldson v. Becket* in 1774 was in effect an appeal of *Millar v. Taylor*, and the Lords' decision against the perpetuity constituted a dramatic reversal of the earlier judgment.⁸

Because the issue that climaxed in *Donaldson v. Becket* was so fundamental, the entire publishing industry was implicated, and being directly concerned with the outcome the press naturally focused special attention on the matter. "There hardly exists a person connected in the most distant manner with the press, who will not, in some degree, be affected by the event of this appeal," wrote William Woodfall in the *Morning Chronicle* as he acknowledged his own warm interest in the outcome of *Donaldson v. Becket*.⁹ Moreover, the economic stakes were felt to be truly great. A paragraph that appeared in the *Morning Chronicle* and in a number of other places after the decision claimed that as a result of the Lords' vote a vast amount of property by contemporary values had been annihilated:

By the above decision of the important question respecting copy-right in books, near 200,000 l. worth of what was honestly purchased at public sale, and which was yesterday thought property, is now reduced to nothing. The booksellers of London and Westminster, many of whom sold estates and houses to purchase copy-right, are in a manner ruined; and those who after many years industry thought they had acquired a competency to provide for their families; now find themselves without a shilling to devise to their successors.¹⁰

Whether the London booksellers' panic was justified is doubtful—they were by no means ruined by the decision—but the note of desperation that marks their utterances is probably sincere enough. The works of Shakespeare, Bacon, Milton, Bunyan, and others, all the perennials of the book trade that the booksellers had been accustomed to treat as if they were private landed estates, were suddenly declared open commons.

The struggle over copyright also had an ideological dimension, and this, too, contributed to the general interest, for the contention brought into play deeply

held and often deeply conflicting sets of assumptions. Some of these had to do with such crucial liberal values as “property” and “freedom.” Others, more specifically literary, had to do with the conception of the author’s role in society, a matter that was rapidly changing in the years immediately preceding *Donaldson v. Becket* as patronage was declining and authors were becoming independent professionals able to support themselves by writing for the enormously increased reading public.¹¹ For some, brought up in the aristocratic tradition of polite letters, the conception of the author as a professional who wrote for money was profoundly distasteful.

Glory is the Reward of Science, and those who deserve it, scorn all meaner Views: I speak not of the Scribblers for bread, who teize the Press with their wretched Productions; fourteen Years is too long a Privilege for their perishable Trash. It was not for Gain, that *Bacon, Newton, Milton, Locke*, instructed and delighted the World; it would be unworthy such Men to traffic with a dirty Bookseller for so much as a Sheet of Letter-press. When the Bookseller offered *Milton* Five Pounds for his *Paradise Lost*, he did not reject it, and commit his Poem to the Flames, nor did he accept the miserable Pittance as the Reward of his Labor; he knew that the real price of his Work was Immortality, and that Posterity would pay it.¹²

So spoke Lord Camden, a former lord chancellor and a figure of great authority in the House of Lords, on the day the *Donaldson* appeal came to a vote. For others, however, the author’s dignity lay precisely in the position of proprietor that copyright created for him. As an article in the *Monthly Review* put it, the present was the “Golden Age of Authors,” for now instead of having to depend upon the patronage of the great, authors had it “in their power to repay themselves for their labours, without the humiliating idea of receiving a favour, where they had the right to claim a debt.”¹³

II

“What is an author?” Foucault asks. The distinguishing characteristic of the modern author, I would answer, is that he is a proprietor, that he is conceived as the originator and therefore the owner of a special kind of commodity, the “work.” And a crucial institutional embodiment of the author-work relation is copyright, which not only makes possible the profitable publishing of books but also, by endowing it with legal reality, produces and affirms the very identity of the author as author.

Copyright had traditionally been a publisher’s not an author’s right. Under the Stationers’ Company regulations only members of the guild could hold copyright. Authors had no explicitly recognized place in the scheme. This is not to say that English authors had no recognized rights in their work, for it appears that from the beginning the stationers acknowledged an obligation to obtain the author’s permission before publishing and to pay him for his work if payment

were appropriate.¹⁴ But authors did not “own” their works. A writer of course owned his physical manuscript, and it was this that he might sell to a bookseller or a theatrical company, but the concept of owning a work did not fit the circumstances of a traditional status society that functioned largely through patronage. Before about the middle of the eighteenth century the author’s primary relations were typically with patrons rather than with booksellers. In a complex exchange of material and immaterial benefits, patrons honored and sustained worthy authors and themselves received honor and status in return. Indeed, even the early printing privileges, which are generally regarded as anticipations of modern copyright, can perhaps best be understood as versions of patronage. When the Venetian republic in 1515 granted Ariosto a lifetime privilege in his *Orlando furioso*, or a century later when King James granted Samuel Daniel a ten-year exclusive right to print his *History of England*, both the republic and the king were acting as patrons of worthy individuals.¹⁵

The earliest statement that I know which speaks of the author in something like the modern mode as a proprietor comes from John Milton. Milton’s best known dictum on copyright, one that was frequently cited in the eighteenth-century court cases, appears in *Aereopagitica* (1644) where he speaks of “the just retaining of each man his several copy (which God forbid should be gainsaid).”¹⁶ But the “copy” to which Milton here refers is plainly the publisher’s copyright of the Stationers’ Company and not an authorial property right. In *Eikonoklastes* (1649), however, Milton speaks of the “human right, which commands that every author should have the property of his own work reserved to him after death as well as living.” The context in which this statement comes is Milton’s denunciation of King Charles’s appropriation of Pamela’s prayer from Sidney’s *Arcadia* as his personal meditation on the eve of his execution. Milton’s first objection is religious: it was not appropriate for a Christian in time of trouble to use a pagan prayer taken from a “vain amatorious poem.” “But leaving aside what might be justly offensive to God,” he continues,

it was a trespass also more than usual against human right, which commands that every author should have the property of his own work reserved to him after death, as well as living. Many princes have been rigorous in laying taxes on their subjects by the head, but of any king heretofore that made a levy upon their art and seized it as his own legitimate, I have not whom beside to instance.¹⁷

The issue here is of course not commercial gain; the king was not seeking to make money through his use of Sidney’s text. Nevertheless, at least rhetorically the matter is cast in the mode of alienable property rights by the conceit of taxation according to which Charles is represented as seizing Sidney’s property.

Milton’s statement perhaps prefigures the concept of the modern proprietary author, but that concept could not be elaborated quite yet. Before the modern proprietary author could come into being there had to exist a sufficient market

for books to sustain a commercial system of cultural production, and this market did not develop until the middle of the following century.¹⁸ The concept of the author as the originator of a literary text rather than as the reproducer of traditional truths also had to be more fully realized than it could be in Milton's day, and this involved a major aesthetic realignment in which such concepts as "art," "genius," and "originality" were transvalued.¹⁹ As late as 1711 Alexander Pope could still speak of "*True Wit*" as "*Nature to Advantage drest, / What oft was Thought, but ne'er so well Exprest.*"²⁰ By 1779, however, Samuel Johnson in his "Life of Milton" stated flatly, "The highest praise of genius is original invention."²¹ Finally, there had to be an adequate theory of property, or, more precisely, an adequate mode of discourse about property, a language in which the idea of the proprietary author could be elaborated. This discourse developed as it were under the sign of John Locke and his theory of the origins of property in individual acts of appropriation from the general state of nature. The key to Locke's theory was the axiom that an individual's "person" was his own property. From this it could be demonstrated that through labor an individual might convert the goods of nature into private property. The famous passage from the *Two Treatises of Government* (1690) is worth quoting:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.²²

The act of appropriation thus involved solely the individual in relation to nature. Property was not a social convention but a natural right that was prior to the social order. Indeed, the principal function of the social order was to protect individual property rights. Extended into the realm of literary production, the Lockean discourse with its concerns for origin and first proprietors blended readily with the aesthetic discourse of originality.

All of these cultural developments—the emergence of the mass market for books, the valorization of original genius, and the development of the Lockean discourse of possessive individualism—occurred in the same period as the long legal and commercial struggle over copyright. Indeed, it was in the course of that struggle under the particular pressures of the requirements of legal argumentation that the blending of the Lockean discourse and the aesthetic discourse of originality occurred and the modern representation of the author as proprietor was formed. Putting it baldly and exaggerating for the sake of clarity, it might be said that the London booksellers invented the modern proprietary author, constructing him as a weapon in their struggle with the booksellers of the provinces.

But in fact it was Parliament that first introduced the author into the copyright struggle. The Stationers' Company rule was that only members of the com-

pany could hold copyright. Accordingly, the original draft of the bill that eventually became the Statute of Anne made no mention of authors. In committee, however, the booksellers' bill was amended to allow authors as well as publishers to secure copyrights. Furthermore, the title of the act was also amended to emphasize both this and the second major change from traditional guild practices, namely the limitation of the term of protection. Thus as passed the statute was called "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."²³ The reference to authors in the act is striking, and it is often said that the Statute of Anne established the author's copyright. Nevertheless, as Lyman Ray Patterson suggests, Parliament's purpose both in limiting the term of copyright and in introducing the author into its provisions was not so much to create an author's copyright as to prevent the perpetuation of the London booksellers' monopolistic control of all the most valuable old copyrights.

Emphasis on the author in the Statute of Anne implying that the statutory copyright was an author's copyright was more a matter of form than of substance. The monopolies at which the statute was aimed were too long established to be attacked without some basis for change. The most logical and natural basis for the changes was the author. Although the author had never held copyright, his interest was always promoted by the stationers as a means to their end. Their arguments had been, essentially, that without order in the trade provided by copyright, publishers would not publish books, and therefore would not pay authors for their manuscripts. The draftsmen of the Statute of Anne put these arguments to use, and the author was used primarily as a weapon against monopoly.²⁴

Modeled on the ancient Stationers' Company copyright, the copyright provided in the act was still essentially a publisher's right, but in its language the act anticipated the future.

In pressing for the bill that was to become the statute, the booksellers had spoken about benefits to authors, but the property rights they had claimed had been their own. Thus an early broadside from the period of agitation for the bill was called *The Case of the Booksellers Right to Their Copies*. However, in the 1730s when the statutory copyrights began to expire, the London booksellers found that the author, employed by Parliament as a weapon in the statute, could also be a useful instrument for their own purposes. Thus *The Case of Authors and Proprietors of Books*, a representative booksellers' pamphlet from this period, opened with a militant assertion of the author's property right:

Authors have ever had a Property in their Works, founded upon the same fundamental Maxims by which Property was originally settled, and hath since been maintained. The Invention of Printing did not destroy this Property of Authors, nor alter it in any Respect, but by rendering it more easy to be invaded.²⁵

Adapting the discourse of Lockean possessive individualism to the literary property issue, the booksellers developed the theory of the author's common-law

right. Every man was entitled to the fruits of his labor, they argued, and therefore it was self-evident that authors had an absolute property in their own works. This property was transferred to the bookseller when the copyright was purchased, and thereafter it continued perpetually just like any other property right. The statute merely provided a further basis of protection, a supplement to the underlying common-law right.

Thus the booksellers became, at least in theory, shadowy secondary characters, mere assigns of the author, and in *Tonson v. Collins*, *Millar v. Taylor*, and *Donaldson v. Becket* legal battle was joined not on the matter of the London booksellers' claim as such but on the question of the author's common-law right. In this way the focus of the literary property debate shifted from the bookseller to the author, and in the process the representation of the author as a proprietor was elaborated. Ironically, authors themselves were conspicuously absent from the formal proceedings in which this process of elaboration occurred. Tonson, Collins, Millar, Taylor, Donaldson, and Becket—all the principals in “the great cause concerning literary property” were booksellers.

III

Law cases such as *Donaldson v. Becket* have not figured prominently in literary history, and yet the eighteenth-century struggle over copyright clearly was important in the development of the modern idea of the author as the creative originator of a work that bears the imprint of his or her unique personality. As Martha Woodmansee, who has studied the interaction between aesthetic and legal developments in Germany in the period just after the conclusion of the English struggle, has remarked, the problem of how the legal-economic and the aesthetic levels of discourse interact is one that literary historians—and, I would add, legal historians as well—have barely explored. “This is unfortunate,” Woodmansee comments, “because it is precisely in the interplay of the two levels that critical concepts and principles as fundamental as that of authorship achieved their modern form.”²⁶

The English struggle over copyright, fought in polemical pamphlets as well as in the actual legal cases, generated a body of texts in which aesthetic and legal questions are often indistinguishable.²⁷ What constitutes a literary work? How is a literary composition different from any other form of invention such as a clock or an orrery? What is the relationship between literature and ideas? These were some of the questions that the eighteenth-century lawyers found themselves dealing with as the process of argument and counter-argument took on a kind of life and logic of its own. What I want to do now, then, is to trace the trajectory of this debate, suggesting the way in its sometimes very abstruse course the modern

system of the author and the “work”—the reified aesthetic object, unitary, closed, and caught up in relations of ownership—was institutionalized in the discourse of the law.

“Labour gives a man a natural right of property in that which he produces: literary compositions are the effect of labour; authors have therefore a natural right of property in their works.”²⁸ Reduced to essentials this was the essence of the London booksellers’ argument for the author’s right. It was compelling precisely because it so perfectly incorporated the Lockean discourse with its assumptions about the priority of the individual and the sanctity of property. Liberty and property: the freedom of the individual to employ his efforts to create property and the freedom to dispose of that property as he saw fit. These were the principles inscribed by reason in the very order of nature. How could they be denied in the case of the author?

The issues that the booksellers’ argument raised might have been addressed, we would think, as a conflict between individual rights and the broader needs of society at large. The author has a right to the fruits of his labor, but society has a need to maintain the circulation of ideas. Somehow the conflict must be adjudicated so that neither the individual nor society is required to surrender entirely to the claims of the other. This was how Samuel Johnson understood the matter. On the one hand the author’s claim to a property in his composition was “a metaphysical right, a right, as it were, of creation, which should from its nature be perpetual.” But no matter how strong this claim, the “interests of learning” and the need to provide for wide dissemination of knowledge were against perpetual copyright.²⁹ The compromise that Johnson proposed was that copyright should be limited in time but that the term should be substantially longer than that provided in the statute. The author’s lifetime plus thirty years would be appropriate, he thought.

Johnson’s proposal anticipates modern copyright law in Britain and the United States, which compromises between the conflicting claims of the individual and society by recognizing just such a long but limited term. But the eighteenth century was a period of increasing idealization and rationalization in legal thinking in which the common law was coming to be understood not only as the repository of past practices but as the embodiment of an ideal and absolute body of principles.³⁰ This tendency to abstraction made it difficult for eighteenth-century jurists to approach the literary property issue as a matter of finding a solution to a conflict of legitimate interests. Instead the issue was addressed as a matter of determining through reason and scholarship how the law stood. The London booksellers’ claim was not that there ought to be an authorial property right but that there always had been one even though it had not been rigorously asserted in the past. Was their claim correct? Both in polemical pamphlets and in the court arguments this question was typically addressed in two parts. First it

was argued abstractly at a theoretical level to show, according to general principles, either that there was or was not a common-law right of literary property. Second, there was an historical survey to demonstrate either that English law had or had not always recognized this right. For our purposes it is the argument at the theoretical level that is most interesting.

Framed in terms of the author's right to be regarded as the proprietor of the work he created, the London booksellers' case for perpetual copyright seized the ideological center of contemporary political thought. Given this strategic advantage and given the idealized style of contemporary legal thinking, their argument proved difficult to challenge directly. Most of the objections that the opponents of perpetual copyright raised might be effectively countered. For example, wasn't perpetual copyright actually a monopoly? Not at all, the London booksellers' lawyers responded; the author's exclusive right to his work did not deprive the public of anything that had existed before the composition was created. An alternative line of attack involved the fact of publication: granted that an author might be supposed to have a common-law right in his composition, wasn't publication a surrender of his exclusive right? No, responded the proponents, only an explicit transfer of the property could take it away; moreover, would it not be absurd to grant that an author had a property in his work and that the first moment he endeavored to exploit it the law compelled him to surrender it? One of the strongest objections was the proposition that the statute terminated the common-law right. The issue here turned on Parliament's intent in the act, and therefore much attention was devoted to close analysis of the wording. But since the statute had been modeled on the old Stationers' Company regulations and had emerged from a system of cultural production in which authors' relations were still primarily with patrons, arguments about the implications of the wording with respect to an author's common-law right were bound to be inconclusive. It was hard to argue convincingly that the framers explicitly intended to preserve the author's right, but it was equally hard to argue that they intended to take it away.

Given the ideological power of the argument for the author's right, one of the opponents' most effective tactics was to shift the direction of the debate. The physical manuscript that an author had written with his own hands was undoubtedly his property, but how could an author be said to have a property right in the words he had written? An object of property must be something capable of distinct and separate possession.

But the property here claimed is all ideal; a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence diminish or damage them. Yet these are the

phantoms which the author would grasp and confine to himself: and these are what the defendant is charged with having robbed the plaintiff of.³¹

The same ideas might very well occur independently to different people. Would that mean that each would be a separate proprietor of the same idea? Could Newton claim an exclusive property in the laws of the universe?

The crux of this argument was the premise that a literary composition was essentially a collection of ideas. This was not implausible at a time when the category of “literature” had not yet been specialized toward imaginative writing and Bacon, Newton, and Locke were regarded equally with Shakespeare and Milton as classics of literature. Moreover, the dominant conception of composition at this time was derived from empirical psychology with its notion of the mind as a kind of mechanism producing a train of associated images and ideas. Such ideas were the materials from which the writer, like an intelligent artisan or architect, assembled his composition according to a plan.³²

If a literary composition was essentially a collection of ideas, why should copyrights be treated differently from patents? The basis of patent law had long since been established by the Jacobean Statute of Monopolies, which strictly limited patent grants, providing a fourteen-year-term for new inventions and a twenty-one-year term for patents already in existence. Indeed, the fourteen- and twenty-one-year terms established by the Statute of Anne were evidently modeled on those provided for patents. As one of the jurists in *Donaldson v. Becket* put it, the “Exactitude . . . of the Resemblance between a Book and any other mechanical Invention” is plain:

There is the same Identity of intellectual Substance; the same spiritual Unity. In a mechanic Invention the Corporeation of Parts, the Junction of Powers, tend to produce some one End. A literary Composition is an Assemblage of Ideas so judiciously arranged as to enforce some one Truth, lay open some one Discovery, or exhibit some one Species of mental Improvement. A mechanic Invention, and a literary Composition, exactly agree in Point of Similarity; the one therefore is no more entitled to be the Object of Common Law Property than the other.³³

Thus the proponents of the author’s common-law right were put in the position of demonstrating that a literary invention was in some way essentially different from a mechanical invention. Had the organic analogy of the romantics been available this would have been easy to do, for the romantic organic metaphors were developed precisely in order to distinguish imaginative from merely mechanical operations. Interestingly, it was just as the question of the author’s common-law right was being tried in the courts that Edward Young published his *Conjectures on Original Composition* in which the organic metaphor figured prominently:

An *Original* may be said to be of a *vegetable* nature; it rises spontaneously from the vital root of Genius; it *grows*, it is not *made*: *Imitations* are often a sort of *Manufacture* wrought up by those *Mechanics, Art, and Labour*, out of pre-existent materials not their own.³⁴

Young's treatise was very influential in Germany, where it contributed to the development of romantic doctrine, but at the time it attracted only minor attention in England, where the dominant empiricist tradition provided an unfavorable climate for an antimechanical theory of composition.³⁵

Lacking the possibility of arguing along lines such as Young's *Conjectures on Original Composition* might have suggested, the proponents of the common-law right made the distinction in terms of the opposition between mind and matter. The basic argument was sketched by William Warburton in a much cited pamphlet in which he defended the author's right.³⁶ Moveable property, Warburton maintained, was divided into two categories, things natural and things artificial, and the latter category might be further divided into things produced by mental activity and things produced by manual activity. The property in a manually produced utensil such as a knife extended no further than the single material object. The property in a mental production such as a literary composition, however, was essentially a property in the doctrine itself rather than in the ink and paper on which the doctrine was inscribed, and therefore this kind of property was not limited to any one material object such as the author's manuscript. Mechanical inventions fell in between the two categories of mental and manual products, partaking of the characteristics of both. Thus insofar as a machine was a kind of utensil it was appropriate that the maker's property should terminate in the individual material object. Nevertheless, because the operation of the mind was so intimately concerned in inventions, it was appropriate to extend to the inventors a patent for a limited term of years. The rationale for patent protection, then, was that this special category of limited rights was designed to accommodate the mixed nature of mechanical inventions as opposed to the purely intellectual nature of literary composition.

It is perhaps worth noting that Warburton's argument assumes that each exemplar of a machine, each new clock or orrery, will be painstakingly wrought by hand. Plainly such an argument would not have been put forward in an age of general mass production. What is most interesting, however, is the extreme ingenuity to which Warburton was driven by the problem. Given the contemporary frame of reference, the empirical conception of composition and the breadth of the category of literature, the parallel with patent law was, as one writer put it, "the strongest hold, wherein the opponents of literary property have entrenched themselves."³⁷

The proponents of perpetual copyright focused on the author's labor. Those who argued against it focused on the results of the labor, the work. Thus the two sides established their positions by approaching the issue from opposite direc-

tions. Yet, however approached, the question centered on the same pair of concepts, the “author” and the “work,” a person and a thing. The complex social process of literary production consisting of relations between writers and patrons, writers and booksellers, booksellers and readers was rendered peripheral. Abstracting the author and the work from the social fabric in this way contributed to a tendency already implicit in printing technology to reify the literary composition, to treat the text as a thing. From the classical period through the Renaissance, the dominant conception of literature was rhetorical. A text was conceived less as an object than as an intentional act, a way of doing something, of accomplishing some end such as “teaching and delighting.” Likewise, both the old copyright of the Stationers’ Company and the limited copyright provided in the Statute of Anne were not so much property rights in the sense of rights of possession of an object as personal rights to do something, namely to multiply copies of a particular title. Now, however, in the course of the literary property struggle, a profound transformation would be wrought in which copyright would come to be thought of not just as a regulatory system but as an absolute right of dominion over a property in principle little different from a parcel of land.

An identifiable figure in this transformation was William Blackstone, who consistently supported the author’s common-law right both as a lawyer and as a judge. The opponents of perpetual copyright spoke of literary property as being wholly “ideal” and maintained that therefore no distinction could be made between copyrights and patents. Blackstone, arguing against this position in *Tonson v. Collins*, followed Warburton in claiming that the difference between a literary and a mechanical invention lay in the partly material nature of the latter. A literary composition was wholly a mental production; the paper and ink with which a composition was written were no part of its essence. But whereas both the opponents of perpetual copyright and Warburton characterized the essence of literature as ideas or “sentiments,” Blackstone saw “style” as also essential:

Style and sentiment are the essentials of a literary composition. These alone constitute its identity. The paper and print are merely accidents, which serve as vehicles to convey that style and sentiment to a distance. Every duplicate therefore of a work, whether ten or ten thousand, if it conveys the same style and sentiment, is the same identical work, which was produced by the author’s invention and labour.³⁸

And a few years after working out this position in court, Blackstone restated it in authoritative form in his *Commentaries*:

The identity of a literary composition consists intirely in the *sentiment* and the *language*; the same conceptions, cloathed in the same words, must necessarily be the same composition: and whatever method be taken of conveying that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so conveyed; and no other man can have a right to convey or transfer it without his consent, either tacitly or expressly given.³⁹

Duncan Kennedy has recently analyzed the way Blackstone's *Commentaries* transform what should properly be thought of as social relations into property relations through a process of abstraction and reification.⁴⁰ Blackstone's characteristic strategy was to divorce a personal right such as an "advowson" (the right of choosing a parson for a church—a remnant of the feudal system of tenure that was in principle bound up with a whole system of reciprocal rights and duties) from its corporeal basis and then to treat the abstracted right as a kind of thing. Thus a person could be said to own an advowson. In this process a right of a person could assume the appearance of an absolute property right. This was exactly how Blackstone treated literary property. "The same conceptions, clothed in the same words"—in Blackstone's thought the literary text has become an incorporeal entity that can be conveyed from owner to owner according to the same principles as a house or a cow.

One way the London booksellers had made their argument was by grounding the author's common-law right in "invention." Blackstone, however, chose to emphasize the principle of "occupation"—that is, the Roman law doctrine whereby one might establish an estate simply by taking possession of unclaimed land—and it was in the section devoted to "Title to Things Personal by Occupancy" that he took up the topic of literary property in the *Commentaries*. Occupancy, he explained at the start of this section, was at first the only way of acquiring property, but in civil society it had been restrained, and for the most part things that were found without any other owner belonged to the king. In a few instances, however, "the original and natural right of occupancy is still permitted to subsist."⁴¹ Blackstone listed seven instances, each of which was directly related to the material world, after which he turned to literary property. Thus even as it was being defined as essentially incorporeal—"the identity of a literary composition consists intirely in the *sentiment* and the *language*"—literary property was presented in the *Commentaries* as if it were another in a list of material goods that also included, for example, items seized from an alien enemy or items found in the sea.

The analogy between a literary composition and a landed estate, implicit in Blackstone's use of the category of "occupancy," is explicit elsewhere when Blackstone argues against the proposition that a book when published is given to the public like land thrown onto a highway. On the contrary, he says, "In such a case, it is more like making a way through a man's own private grounds, which he may stop at pleasure; he may give out a number of keys, by publishing a number of copies; but no man who receives a key, has thereby a right to forge others, and sell them to other people."⁴² In fact the London booksellers in making their case for perpetual copyright had long drawn an analogy between literary and real property.⁴³ And elsewhere in the documents of the literary property struggle we find the estate analogy developed in some detail as in the following passage in which it is the author's "fruitful mind" that is compared to the estate:

In this various world, different men are born to different fortunes: one inherits a portion of land; he cultivates it with care, it produces him corn and fruits and wool: another possesses a fruitful mind, teeming with ideas of every kind; he bestows his labour in cultivating *that*; the produce is reason, sentiment, philosophy. It seems but equitable, that a fair exchange should be made of these goods; and that one man should live by the labour of his brain, as well as another by the sweat of his brow.⁴⁴

Just so Edward Young spoke of the “mind of a man of Genius” as “a fertile and pleasant field” and of original compositions as its “fairest flowers.”⁴⁵ And just as a lord might take his title from the name of his estate, so, according to Young, an original author’s “works will stand distinguished; his the sole Property of them; which Property alone can confer the noble title of an *Author*.”⁴⁶

When the London booksellers first pressed the idea of the author’s common-law right they had been careful to note that all they maintained was that the author had a property right in the profits of his book, not in the metaphysical essence of the book as such. But the distinction between a personal right and an object of property was being eroded, and the process of erosion did not go unnoticed at the time. Joseph Yates, a distinguished attorney who argued against perpetual copyright in *Tonson v. Collins* and who then maintained the same position when he delivered his opinion as a King’s Bench judge in *Millar v. Taylor*, was probably the most penetrating legal thinker on the anti-common-law side of the question, and he understood quite clearly what was happening. The fallacy in the assertion that a literary composition could be regarded as property equivalent to an estate lay, he said, 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.”⁴⁷ Yates insisted on maintaining the distinction between a personal right and an object of property. He did not deny that a personal right might be incorporeal, but he did deny that anything incorporeal could be treated as property in the same sense as a house or land.

To summarize the logic of the literary property debate, then, we might say that there were three principal exchanges between the parties. First, the proponents of perpetual copyright asserted the author’s natural right to a property in his creation. Second, the opponents of perpetual copyright replied that ideas could not be treated as property and that copyright could only be regarded as a limited personal right of the same order as a patent. Third, the proponents responded that the property claimed was neither the physical book nor the ideas communicated by it but something else entirely, something consisting of style and sentiment combined. What we here observe, I would suggest, is a twin birth, the simultaneous emergence in the discourse of the law of the proprietary author and the literary work. The two concepts are bound to each other. To assert one is to imply the other, and together, like the twin suns of a binary star locked in orbit about each other, they define the center of the modern literary system.

IV

What bearing did these theoretical arguments have on the actual resolution of the question of perpetual copyright in the courts? Why did the Court of King's Bench decide in favor of perpetual copyright in *Millar v. Taylor*, and on what grounds did the House of Lords reverse this judgment in *Donaldson v. Becket*?

In *Millar v. Taylor* the matter seems to have been determined principally by the way that the London booksellers' claim that the author had a common-law right to a property in his work spoke to the classical liberal assumptions of the judges and the way that those assumptions also colored the judges' reading of the precedents. Lord Mansfield's understanding, for example, was that about the author's common-law right before publication there was no question. This right was based on general principles of fitness:

It is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.⁴⁸

As Mansfield saw it, the issue in question was simply whether it was also "agreeable to natural principles, moral justness and fitness" that the author's right should continue after publication as well as before, and on this matter he found that the "general consent of this kingdom, for ages, is on the affirmative side."⁴⁹

Justices Edward Willes and Richard Aston concurred with Mansfield, and in their opinions, too, the force of classical liberal ideas is evident. To Willes the fundamental principle in the case was simple: "It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man's work."⁵⁰ Likewise Aston found the central issue clear and unproblematic:

The invasion of this sort of property is as much against every man's sense of it, as it is against natural reason and moral rectitude. It is against the conviction of every man's own breast, who attempts it. He knows it, not to be his own; he knows, he injures another: and he does not do it for the sake of the public, but malâ fide et animo lucrandi.⁵¹

Joseph Yates, however, dissented, maintaining that the proposition that ideas might be treated as property was "quite wild."⁵² Yates apologized for the "singularity" of his opinion but explained that, "be it ever so erroneous, it is my sincere opinion."⁵³ Thus by a vote of three to one the court determined that authors had a common-law right of literary property.

The London booksellers had long sought to avoid an appeal of the literary property question to the House of Lords, for the Lords had long been unsym-

pathetic to any plea that smacked of a bid for monopoly in the book trade.⁵⁴ In the law courts where jurists such as Mansfield were trying to rationalize and systematize the law according to classical liberal principles, the copyright question could be effectively approached as a matter of the author's natural right. An appeal to the Lords, however, would be decided not by lawyers alone (the practice of lay peers not being recognized when the house sat as a court had not yet been instituted) but by a general vote of the peers, lawyers and laymen alike. Might not the issue become entangled in the network of political and personal rivalries that characterized the house?

The procedure for hearing an important appeal at this time was for the twelve common-law judges of the realm, the judges of the courts of King's Bench, Common Pleas, and the Exchequer, to be summoned to the House of Lords to hear the arguments of counsel and to advise the house as to their opinions on matters of law, after which the peers would debate the issue and vote. Three questions were put to the judges in *Donaldson v. Becket*. First, did the author have a common-law right to control the first publication of his work? Second, did the author's right, if it existed, survive publication? Third, if the right survived publication, was it taken away by the statute? These questions formulated the matters of law in a nicely graduated series that would allow each judge to state his opinion on the author's right with precision. To these questions Lord Camden, a former lord chancellor and an opponent of perpetual copyright, added two more. Did the author or his assigns have the sole right to a composition in perpetuity? Was this right in any way restrained or taken away by the statute? Insofar as they repeat the substance of the second and third of the original questions, Camden's additions may be regarded as redundant, but Camden was trying to remind the judges that the case was not just one of authors' rights but of booksellers' and that in practice the issue was copyright in perpetuity.

The opinions of the judges, delivered one by one over the course of three days, were very divided. On the first question the judges divided eight to three in support of the author's right. On the second the vote was seven to four, again in support of the author. There is, however, a puzzle connected with the vote on the third question. According to both the *Journal of the House of Lords* and the standard legal and historical references, the vote on this question was six to five against the author's right—that is, the majority of the judges were of the opinion that the statute took away the author's common-law right. But contemporary newspaper and other accounts give good reason to believe that the clerk of the House of Lords made an honest error in recording the opinion of one of the judges. Most likely the tally was six to five in favor of the perpetual right.⁵⁵ We note that only eleven judges voted: Lord Mansfield remained silent. Perhaps, as Sir James Burrow suggested a few years later, Mansfield abstained out of "delicacy," since it was his court's decision that was in effect being challenged.⁵⁶ Nonetheless, Mansfield's support of the common-law right was well known, and had he spoken the

tally would surely have been a substantial seven to five in favor of the perpetual right.

Evidently, then, in voting as they finally did against the perpetual right, the Lords were reversing the collective opinion of the judges. On what basis did they do so? The questions put to the judges asked for their opinions on matters of law. The question as it was finally put to the Lords, however, was limited and practical: should the Chancery decree restraining Donaldson from publishing Thomson's poems be reversed? There was thus no opportunity for the Lords to express themselves as a body on such theoretical matters as whether a literary composition consisted of ideas or whether there was an essential difference between literary and mechanical invention. Nor is there any reason to believe that the Lords as a body were particularly interested in expressing themselves on such matters. What the Lords appear to have been concerned with was simply the prospect of a perpetual monopoly.

The debate on the floor was opened by Lord Camden, who delivered a long and passionate speech that evidently had a considerable effect on the final vote.⁵⁷ Camden, who was well respected as a lawyer, went through the principal legal issues, arguing that there was no precedent for such a property and that ideas could not be treated as property. If there was anything in the world that ought to be free and general it was science and learning. Men of genius did not write for money: "Glory is the Reward of Science, and those who deserve it, scorn all meaner Views," he declaimed in the passage I quoted earlier. If the Lords confirmed the decree against Donaldson they would be sanctifying a monopoly, Camden insisted, and the real beneficiaries would not be authors but the small group of booksellers who controlled the trade: "All our Learning will be locked up in the Hands of the *Tonsons* and the *Lintots* of the Age, who will set what Price upon it their Avarice chuses to demand, 'till the Public become as much their Slaves, as their own Hackney Compilers are."⁵⁸

The obvious person to reply to Camden on the floor of the house was Lord Mansfield, who though he had abstained as a judge was nevertheless expected to participate in the debate as a peer. Mansfield and Camden were bitter enemies who had clashed many times before.⁵⁹ Indeed, given their acrimonious history, it is hard to avoid the suspicion that part of Camden's purpose in leading the attack on the common-law right may have been the desire to embarrass Mansfield by having the Lords reverse his determination in *Millar v. Taylor*. But Mansfield said nothing. Was his silence again a matter of delicacy? The newspapers reported that his failure to speak was "much wondered at."⁶⁰ The London booksellers, who had counted on Mansfield's authority as their strongest bulwark in the House of Lords, were more than surprised; they felt betrayed, and they were furious:

It was his duty to have given an opinion on one side or another, and the neglecting to do so, was a manifest breach of his duty. Judges are paid by the public, and should render

those services attendant on their office; and I should be glad to see a law passed to oblige them to a strict performance of their duty.⁶¹

So spoke one of the booksellers' advocates shortly after the conclusion of the case.

Lord Camden was followed in the debate by Lord Chancellor Apsley, who had issued the original decree restraining Donaldson and who now delivered the *coup de grace* to the London booksellers. He had made the decree, Apsley said, entirely as a matter of course pursuant to the judgment in *Millar v. Taylor*, and he viewed his action merely as a step toward a final determination of the copyright question in the House of Lords. As for the substance of the matter, his opinion was against the common-law right, and therefore he favored reversing his own decree. Three other peers followed, one attempting to respond to Lord Camden by arguing that authors could not be expected to write for glory alone, and the other two arguing against perpetual copyright, after which the question was called. There is some conflict of evidence on the method by which the Lords voted in the case, but probably it was a simple voice vote. As Donaldson's newspaper reported, undoubtedly with some exaggeration about the unanimity of the house, Lord Chancellor Apsley desired "all who were for reversing the judgment, to say Content, and such as were of a different opinion to say, Not: Nothing was heard but the word Content."⁶²

On what basis was the decree reversed? Did the Lords determine that there was no common-law right of literary property, or did they decide that there was such a right but that it was taken away by the statute? In legal history it is usually said that the Lords determined that the statute ended the common-law right. This interpretation derives from the influence of Sir James Burrow's and Josiah Brown's reports of *Donaldson v. Becket*, which make it appear that the Lords in their vote were simply confirming the majority opinion of the common-law judges that the statute took away the common-law right.⁶³ But in fact the Lords addressed only the practical issue of the perpetuity, and they did so in a way that there is good reason to believe ran directly counter to the judges' opinion.

One of the immediate consequences of the end of perpetual copyright was the legitimation of reprint enterprises such as Donaldson's. In the years following the decision, readily affordable editions of classic writers such as John Bell's famous edition of "The Poets of Great Britain Complete from Chaucer to Churchill" in 109 volumes poured into the marketplace, contributing significantly to the further development of the reading public.⁶⁴ Were there other, less tangible, products of the struggle?

The London booksellers failed to secure perpetual copyright, but their arguments did develop the representation of the author as a proprietor, and this representation was very widely disseminated. Moreover, the Lords' decision did not touch the basic contention that the author had a property in the product of his labor. Neither the representation of the author as a proprietor nor the represen-

tation of the literary work as an object of property was discredited. Nor, I suspect, *could* these contentions have been discredited at this point in history: too many and too powerful economic and social and ideological forces were at work. So long as society was and is organized around the principles of possessive individualism, the notion that the author has the same kind of property right in his work as any other laborer must and will recur.⁶⁵

In 1819 Robert Southey, agitating for revision of the copyright law, expressed his contempt for Lord Camden's arguments against the common-law right in *Donaldson v. Becket*. Southey quoted the passage from Camden about glory being the proper reward for authors and asked:

Is it possible that this declamation should impose on any man? The question is simply this: upon what principle, with what justice, or under what pretext of public good, are men of letters deprived of a perpetual property in the produce of their own labours, when all other persons enjoy it as their indefeasible right—a right beyond the power of any earthly authority to take away?⁶⁶

And in 1838 William Wordsworth wrote to his friend Sergeant Talfourd, M.P., who had introduced a bill in Parliament to provide authors with a copyright term of sixty years, saying that while he supported Talfourd's bill he in fact believed the author had a right "for a much longer period than that defined in your Bill—for ever." Wordsworth went on to allude to the eighteenth-century copyright struggle.

Such right . . . was acknowledged by the common law of England; and let them who have cried out so loudly against the extension of the term as is now proposed show cause why that original right should not be restored. . . . This right I hold to be more deeply inherent in that species of property than in any other.⁶⁷

One point to note about these two statements is the persistence of the claim to a perpetual right. Another is that the claim was being put forward not by the booksellers but by authors. The booksellers had promulgated the representation of authorship that writers such as Southey and Wordsworth now adopted as their own.

V

As it happened, both *Millar v. Taylor* and *Donaldson v. Becket* were fought over the same property, Thomson's *Seasons*. This may have been purely accidental; nevertheless, *The Seasons*, first published in collected form in 1730, was an excellent choice for litigation designed to establish the author's common-law right. For one thing, Thomson's poem was not considered a national treasure such as the work of Shakespeare or Milton. Nevertheless, it was one of the most frequently reprinted poems of the century and thus plainly a valuable property.

Moreover, Thomson had a reputation for originality. No one would consider sneering at him as, for instance, Lord Hailes did at the Rev. Thomas Stackhouse in the Scottish case of *Hinton v. Donaldson* when he said that in claiming that Stackhouse's *History of the Holy Bible* was protected by the common-law right the London booksellers were improperly conferring the name of "original author" onto a mere "tasteless compiler."⁶⁸

The Seasons is a descriptive and reflective poem in which a changing landscape of mountains, meadows, forests, rivers, plains, and valleys is portrayed and made the occasion for Thomson's moral and philosophical meditations. As Jacob More wrote in a critical study of the poem published three years after the Donaldson decision, Thomson's general purpose in the poem was to lead his readers to "a filial confidence in the Author of Nature." To this end, according to More, Thomson "paints every part of the year, and every genial form that wakes, to the plastic energy of poetical enthusiasm, in colours peculiarly adapted to his purpose." More goes on to praise Thomson's originality and to describe his process of poetic creation:

He does not satisfy himself, however, with simply arraying the conceptions of others in a dress of his own. This contemptible species of plagiarism, was not more beneath his genius than repugnant to his taste. He had immediate recourse to nature for all his materials, and she intrusted with confidence her secrets to his care. For however in other respects he should offend against the established dogmas of criticism, his poetry every where discovers the strongest traits of originality. . . . And what of all others is perhaps the most decisive mark of a poetical mind, the objects he describes, though frequently common and familiar, strike us some how in a new light.⁶⁹

What we should note here is that the process of Thomson's poetic creation, as More describes it, is strikingly similar to the process of the original creation of private property as Locke had described it: the individual removed materials out of the state of nature and mixed his labor with them, thereby joining them to something that was his own and producing an item of property. Likewise, according to More, Thomson's method was to go directly to nature for his materials and then to impose upon them his ideas, sentiments, and poetic forms, and the result was that familiar objects were cast in a new light. In a sense, then, *The Seasons* was the perfect Lockean poem, the paradigm of the new mode of proprietary authorship, for in it the British landscape was appropriated by the poet and stamped with the mark of his reflective personality.

"I confess, I do not know, nor can I comprehend any property more emphatically a man's own, nay, more incapable of being mistaken, than his literary works," wrote Justice Aston in *Millar v. Taylor*.⁷⁰ What Aston had in mind, clearly, was just this imprinting of the author's personality on his work. A work of literature belonged to an individual because it was, finally, an embodiment of that individual. The basis of literary property, in other words, was not just labor but "personality." Earlier I spoke of the author and the work as twin suns, but now

let us note that, unlike the components of a binary star, the orbiting concepts at the heart of the modern literary system are inherently unstable, for both are dependent on the problematic concept of personality. Let me illustrate this by turning for a moment to a passage from an important pamphlet published in connection with *Donaldson v. Becket*, Francis Hargrave's *Argument in Defence of Literary Property*.⁷¹

Like Blackstone, Hargrave founded literary property on "occupancy," the principle by which one might establish possession of something previously unclaimed. But if anything, Hargrave said, the author's title was stronger than simple occupancy would suggest:

By composing and writing a literary work, the author *necessarily* is the *first possessor* of it; and it being the produce of his own labor, and in fact a *creation* of his own, he has, if possible, a *stronger* title, than the *usual* kind of *occupancy* gives; because in the *latter* the subject has its existence *antecedently* to, and *independently* of, the person from whom the *act of occupancy* proceeds.⁷²

Yet no matter how strong the author's right might be in theory, Hargrave had still to address the counter-argument that the property claimed was merely "a set of ideas which have no bounds or marks whatever." Hargrave attempted to avoid the error of confusing a personal right to do something with an absolute property right: "What the author claims," he maintained, "is merely to have the sole right of printing his own works. As to the ideas conveyed, every author, when he publishes, necessarily gives the full use of them to the world at large."⁷³ But if the author's works do not consist of ideas, what do they consist of? What is the subject of property? Hargrave's answer is in the vein of Blackstone's proposition that "the same conceptions, clothed in the same words, must necessarily be the same composition," but it is particularly suggestive:

The subject of the property is a *written composition*; and that one written composition may be distinguished from another, is a truth too evident to be much argued upon. Every man has a mode of combining and expressing his ideas peculiar to himself. The same doctrines, the same opinions, never come from two persons, or even from the same person at different times, clothed wholly in the same language. A strong resemblance of stile, of sentiment, of plan and disposition, will be frequently found; but there is such an infinite variety in the modes of thinking and writing, as well in the extent and connection of ideas, as in the use and arrangement of words, that a literary work *really* original, like the human face, will always have some singularities, some lines, some features, to characterize it, and to fix and establish its identity; and to assert the contrary with respect to either, would be justly deemed equally opposite to reason and universal experience. Besides, though it should be allowable to suppose, that there *may* be cases, in which, on a comparison of two literary productions, no such distinction could be made between them, as in a competition for originality to decide whether both were really original, or which was the original and which the copy; still the observation of the possibility of distinguishing would hold in *all other* instances, and the *Argument* in its application to them would still have the same force.⁷⁴

The axiom with which Hargrave begins, the proposition “that one written composition may be distinguished from another,” is in fact far from self-evident, for it begs the entire question of literary identity. How may one composition be distinguished from another? Does a composition have an essence that remains the same even if some of the language is changed? Are successive drafts of a composition, nevertheless, the “same” composition? Hargrave elaborates on the axiom that compositions may be distinguished by explaining that “every man has a mode of combining and expressing his ideas peculiar to himself” and that there exists an infinite variety of ways of thinking and writing. But this new proposition, the notion of every man having a distinctive style, is not really an explanation of the axiom so much as a parallel statement that shifts the focus from the composition to the writer. A blurring of categories has occurred, a slide from a statement about a property to one about a proprietor, and this conflation becomes explicit in the remarkable comparison of the literary work to a human face: “a literary work *really* original, like the human face, will always have some singularities, some lines, some features, to characterize it, and to fix and establish its identity.”

Why this resort to metaphor? What kind of gap, what kind of leap, does the metaphor of the face signal? Perhaps we should note that the metaphor seems to be latent even early in the passage when Hargrave speaks of the “strong resemblance of stile, of sentiment, of plan and disposition” that will frequently be found between two compositions. Like two human faces, in other words, two compositions may resemble each other in various ways, but they will always have some distinguishing characteristics, some marks of individuality. The effect of the metaphor is to collapse the category of the work into that of the author and his personality. Hargrave’s purpose has been to define the distinctiveness of the literary work, to show that its identity can be fixed and established. But he has demonstrated one kind of distinctiveness only at the expense of another. He has shown the individuality of the work to be identical to that of the author, and in the process the category of the work has dissolved. Interestingly, this action traces in reverse the Lockean notion of the creation of property in which property originates when an individual’s “person”—already understood as a kind of possession—is impressed upon the world through labor:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.⁷⁵

Seeking to establish the distinctiveness of the literary work, what Hargrave has actually done is to retell the standard narrative of the creation of private property. And in this narrative the origins of the property are not located but deferred, transferred backward from the material possession to the individual’s “person.”

There is a further instability to be observed in the passage. We should note that Hargrave makes categorical statements about every man having “a mode of combining and expressing his ideas peculiar to himself” and about there being an “infinite variety” of such modes of thinking and writing. Nevertheless, he does not state categorically that every literary composition has a distinct identity, but qualifies his statement, asserting only that “a literary work *really* original . . . will always have some singularities, some lines, some features, to characterize it.” The key notion here is “original,” but in what sense is it used? Does Hargrave mean merely a composition that has not been copied? Or does he mean one that is novel, that exhibits a certain freshness of character? This second sense was emerging just at the time Hargrave was writing. If the sense of *original* is simply a work that has not been copied, then every composition actually produced by the writer will be distinct. If the sense is “novel and fresh,” however, then many compositions will not be original. Significantly, the ambiguity on this point recurs in the long and obscure sentence that concludes the passage:

Besides, though it should be allowable to suppose, that there *may* be cases, in which, on a comparison of two literary productions, no such distinction could be made between them, as in a competition for originality to decide whether both were really original, or which was the original and which the copy; still the observation of the possibility of distinguishing would hold in *all other* instances, and the Argument in its application to them would still have the same force.

Is Hargrave saying that in certain cases literary productions themselves are individuated, or is he saying simply that it is sometimes impossible to determine which is the original?

Hargrave’s obscurity, his inability to speak clearly on the matter of whether every literary production is necessarily individuated, reflects his indecision about whether every writer is truly an “author.” Stripped to essentials, the argument is that since all men are distinct, all literary compositions must be distinct. But as a man of the late eighteenth century, Hargrave is evidently not comfortable with a position that fails to distinguish between an “original genius” and a mere hack writer. Hence he hedges, asserting only that “a literary work *really* original” will always be distinguishable. Once qualified in this way, Hargrave’s proposition is transformed, for it now appears that only some men—those who have been blessed with at least modest powers of original genius—can produce distinct literary works. The two forms of the proposition are not compatible: one asserts that all literary compositions are individuated, the other that only some are individuated. Are we to infer that only some men have “personality”?

I could go on to explore the further area of slippage when Hargrave, after asserting that every man has an individual style, nevertheless allows that the same doctrines, the same opinions, never come “even from the same person at different

times, clothed wholly in the same language.” But I think that enough has been said to suggest the instability of Hargrave’s discourse. To his contemporaries, however, the arguments that Hargrave presented for the distinctiveness of the literary work based on the distinctiveness of the author’s personality would have seemed, at least to those who shared his point of view on the literary property question, simple, direct, and solid. Indeed, in a survey of current discussions of the literary property question published in the *Monthly Review* shortly after the Donaldson decision, Hargrave’s *Argument* received high praise for its “great clearness of thought and expression.”⁷⁶

Hargrave’s *Argument* suggests the curious way in which both in legal and in literary discourse the literary work was coming to be seen as something simultaneously objective and subjective. No longer simply a mirror held up to nature, a work was now above all the objectification of a personality. The commodity that changed hands when a bookseller purchased a manuscript or when a reader purchased a book was thus personality no less than ink and paper. The emergence of this new commodity should surely be connected with such other emphatic marks of Foucault’s “privileged moment of individualization” as the increasing tendency in the eighteenth century to read authors’ works in the contexts of their biographies—Johnson’s *Lives of the Poets* is the most prominent example—and the rise of the novel, the literary form explicitly devoted to the display of character. *Pamela*, *Clarissa*, *Tom Jones*, *Tristram Shandy*—the very titles of the eighteenth-century novels suggested that what was changing hands in the purchase of reading matter was the record of a personality. Moreover, readers increasingly approached literary texts as theologians had long approached the book of nature, seeking to find the marks of the divine author’s personality in his works. M. H. Abrams quotes Carlyle to the effect that the key question for criticism is the discovery of the “peculiar nature of the poet from his poetry,” and Abrams remarks on the novelty of this approach, which emerged at the end of the eighteenth and beginning of the nineteenth centuries:

There could be no more striking antithesis to the practice of critics (with the partial exception of Longinus) from the dawn of speculation about art through the greater part of the eighteenth century. So long as the poet was regarded primarily as an agent who holds a mirror up to nature, or as the maker of a work of art according to universal standards of excellence, there was limited theoretical room for the intrusion of personal traits into his product.

But now a new theory of poetry was forming, one in which the poem was regarded as “primarily the expression of feeling and a state of mind.”⁷⁷

Many of the elements of romantic literary theory, specifically the mystification of original poetic creation and the concept of the creative process as organic rather than mechanical, were anticipated in Young’s *Conjectures on Original Com-*

position, a work that, as I mentioned earlier, had its greatest impact in Germany. There German theorists from Herder and Goethe to Kant and Fichte elaborated Young's ideas and formulated the basis of romantic literary theory. And they did so, as Martha Woodmansee has shown, in the course of a legal and economic struggle that in some of its concerns recalls the English "question of literary property." The German "debate over the book," which spanned two decades between 1773 and 1794, focused on the question of "whether or not the unauthorized reproduction of books [*Büchernachdruck*] should be prohibited by law."⁷⁸ Both writers and publishers were involved, and the theoretical questions that were taken up included such matters as whether a book was a material or an ideal object. One of the products of the debate was the series of copyright laws that, beginning in 1794, the various German states enacted in the final years of the century. Another was the articulation of elements of romantic theory including Fichte's concept of "form," which, as Woodmansee shows, was crucial in establishing the philosophical grounds upon which the German writer could lay claim to ownership of his work. What did a literary work consist of? In his essay "Proof of the Illegality of Reprinting: A Rationale and a Parable" (1793), Fichte distinguished between the physical and the ideal aspects of a book. He then divided the ideal aspects into *content* (the ideas the book presents) and *form* (the combination of phrasing and wording in which the ideas are presented). The content of the book, the ideas, could not be considered property. The form of the book, however, remained the author's property forever, for, as Fichte put it, "each individual has his own thought processes, his own way of forming concepts and connecting them."⁷⁹ Thirty-three years earlier, arguing in *Tonson v. Collins* against the proposition that the essence of a book was the ideas it contained and that therefore there should be no difference between copyright and patent law, William Blackstone had come close to anticipating Fichte when he maintained that not ideas as such but "style and sentiment are the essentials of a literary composition."⁸⁰

A discussion of the development of German romantic theory in the final years of the eighteenth century and then of the importation of romantic theory into England at the start of the nineteenth century is obviously beyond the scope of this study. My point, however, is that when those ideas were introduced into English thought by Coleridge the ground had been prepared by the long debate over copyright. Indeed, the romantic elaboration of such notions as originality, organic form, and the work of art as the expression of the unique personality of the artist was in a sense the necessary completion of the legal and economic transformation that occurred during the copyright struggle. Why should an author have a property right in his work? What does that work consist of? How is a literary composition different from a mechanical invention? It was precisely the theoretical problems raised by the copyright struggle that romantic theory resolved.

VI

The Courts of *Westminster* would be filled with Suits hitherto unheard of. Poet would commence his Action against Poet, and Historian against Historian, complaining of literary Trespasses. Juries would be puzzled, what Damage to give for the pilfering an Anecdote, or purloining the Fable of a Play. What strange Changes would necessarily ensue. The Courts of Law must sagely determine Points in polite Literature, and Wit be entered on Record.⁸¹

So wrote one controversialist in 1762 as he predicted the dire consequences that would follow the establishment of authorial copyright. Seven years later, Joseph Yates, writing in *Millar v. Taylor*, predicted that if literary compositions were admitted into the law as genuine objects of property endless litigations might arise, including

disputes . . . among authors themselves—“whether the works of one author were or were not the same with those of another author; or whether there were only colourable differences:”—(a question that would be liable to great uncertainties and doubts).⁸²

The creation of a metaphysical entity, the “work,” would lead in other words to metaphysical disputes.

What damages should be awarded for the pilfering of an anecdote or the purloining of a plot? How many elements in two stories need to be similar before we conclude that there are only, as Yates put it in eighteenth-century terminology, “colourable differences” between them? These are the kinds of questions that our own law courts deal with every day. We are the heirs of the institution of literary property that emerged in the eighteenth century and of the problems and paradoxes that treating literary texts as private property involves. In a famous opinion in which he distinguished “originality” from “novelty” as the test of copyrightability, Judge Learned Hand somewhat impishly remarked in 1936: “If by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”⁸³ One thinks of Jorge Luis Borges’s fable “Pierre Menard, Author of the *Quixote*,” in which a modern writer is presented whose great accomplishment has been to compose—not to copy but to write anew from his own experience—several chapters of *Don Quixote*. Every word in Pierre Menard’s *Quixote* is identical to Cervantes’, and yet the text, Borge insists, is different.

Many jurists have been aware of the awkwardness of treating literary texts as private property.⁸⁴ Nevertheless, the institution of literary property is so deeply rooted in our society that many jurists and even some legal historians regard it as a transcendent moral idea that has been available in all times and places. One such writer, speaking explicitly of “the ancient and eternal idea of intellectual property,” argues that classical Greek and Roman practices anticipate modern institutions;⁸⁵ and others have claimed that early rabbinical precepts about the

importance of “reporting a thing in the name of him who said it” show an awareness of the ethical principle underlying copyright.⁸⁶ But neither the Roman concern with authorial *dignitas* nor the Jewish concern with the relative authority of rabbinical sayings has much to do with copyright in the sense of literary property, that is, with a notion of marketable rights in texts that are conceived as commodities.

Before the structuralist and poststructuralist transformation of the intellectual scene, literary scholarship with its concern for the integrity of the individual work as an aesthetic artifact and its respect for the author’s proprietary rights in his meaning was committed to the same mode of thinking as the legal system. Thus traditional textual study was concerned with establishing authoritative texts, with determining what an author *really* wrote (as if there were always a single theoretically determinable literary object), and traditional source study was controlled by a judicial and economic metaphor in which the critic was seen as determining the extent of one author’s “indebtedness” to another. Now, however, a gap has appeared between the dominant mode of legal thinking and that of literary thinking. “Originality,” the necessary and enabling concept that underlies the notion of the proprietary author, is at best a problematic term in current thought, which stresses rather the various ways in which, as it is often put, language speaks through man. Where does one text end and another begin? What current literary thought emphasizes is that texts permeate and enable each other, and from this point of view the notion of distinct boundaries between texts, a notion crucial to the operation of the modern system of literary property, becomes difficult to sustain.

The gap between poststructuralist thought and the institution of copyright brings into view the historicity of the seemingly “solid and fundamental unit of the author and the work.” Much work remains to be done in the construction of what Foucault would have called a “genealogy” of literary property. One important moment in the production of the modern cultural system, however, was evidently the landmark case of *Donaldson v. Becket* and the English debate over the nature of copyright that it climaxed.

Notes

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1. Michel Foucault, “What Is an Author?” in *Textual Strategies*, ed. Josué V. Harari (Ithaca, N.Y., 1979), 141.
2. *Edinburgh Advertiser*, 8 February 1774. Founded by Alexander Donaldson ten years

- earlier, the *Edinburgh Advertiser* was published at the time of the appeal by his son, James.
3. *Morning Chronicle*, 5 February 1774.
 4. James Boswell, *The Life of Samuel Johnson*, ed. George Birkbeck Hill and L. F. Powell, 6 vols. (Oxford, 1934), 2:272–73.
 5. “Preface,” *The Cases of the Appellants and Respondents in the Cause of Literary Property Before the House of Lords* (London, 1774). This is one of two anonymous reports of the case published shortly after the decision. The other was *The Pleadings of the Counsel Before the House of Lords in the Great Cause Concerning Literary Property* (London, n.d.). The fullest newspaper accounts appeared in the *Morning Chronicle*. Other papers, including the *Gazetteer*, the *London Evening Post*, the *London Chronicle*, and the *Public Advertiser*, also reported the case, as did the *Gentleman’s Magazine*. The standard legal reports are Sir James Burrow’s account, first published in 1776 as an appendix to his report of *Millar v. Taylor*, and Josiah Brown’s account, published in 1783; see *English Reports, Full Reprint*, 176 vols. (Edinburgh and London, 1900–1930), 98:257–62 and 1:837–49. There is also an account of the case in William Cobbett’s *Parliamentary History of England, 1066–1803*, 36 vols. (London, 1813), vol. 17, cols. 953–1003.
 6. *Edinburgh Advertiser*, 1 March 1774.
 7. The U.S. Copyright statute of 1790 was next; France followed in 1793; the German states began passage of copyright statutes in 1794.
 8. A. S. Collins, *Authorship in the Days of Johnson* (New York, 1929), 54–113, provides a convenient but in some respects dated account of the copyright struggle. See also Gwyn Walters, “Booksellers in 1759 and 1774: The Battle for Literary Property,” *Library* 29 (1974): 287–311. Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, Tenn., 1968) is excellent in its treatment of the legal issues. Cyprian Blagden, *The Stationers’ Company: A History, 1403–1959* (London, 1960) is the standard history of the guild.
 9. *Morning Chronicle*, 5 February 1774.
 10. *Ibid.*, 23 February 1774.
 11. Alvin Kernan discusses this change and many other matters that impinge upon my subject in *Printing Technology, Letters, and Samuel Johnson* (Princeton, N.J., 1987).
 12. *Cases of the Appellants and Respondents*, 54.
 13. *Monthly Review* 51 (1774): 81.
 14. According to Alfred W. Pollard, in the Elizabethan period the printing of works without permission or payment rarely involved living writers, or if it did the author was usually a person whose rank would have forbidden accepting payment; *Shakespeare’s Fight With the Pirates* (Cambridge, 1937), 32–33. On the author’s rights before the eighteenth century see also Leo Kirschbaum, “Author’s Copyright in England before 1640,” *Publications of the Bibliographical Society of America* 40 (1946): 43–80; and Patterson, *Copyright in Historical Perspective*, 66–77. Joseph Loewenstein, “The Script in the Marketplace,” *Representations* 12 (1985): 101–14, discusses Ben Jonson as a crucial figure who was “groping forward toward later authorial property rights.”
 15. On the Venetian *privilegi* and other developments relevant to what might be called the prehistory of copyright see Horatio F. Brown, *The Venetian Printing Press, 1469–1800* (London, 1891), 50–108. Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* (Washington, D.C., 1967), 12–56, surveys early developments on the Continent as well as in England. See also Frank D. Prager, “A History of Intellectual Property from 1545 to 1787,” *Journal of the Patent Office Society* 26 (1944): 711–60; and

- the same author's "The Early Growth and Influence of Intellectual Property," *Journal of the Patent Office Society* 34 (1952): 106–40.
16. John Milton, *Complete Poems and Major Prose*, ed. Merritt Y. Hughes (Indianapolis, Ind., 1957), 749.
 17. *Ibid.*, 794. I am indebted to Richard Helgerson for pointing out this passage to me.
 18. See Richard D. Altick, *The English Common Reader* (Chicago, 1957), esp. 30–66, on the development of the market for books.
 19. David Quint, *Origin and Originality in Renaissance Literature* (New Haven, 1983) discusses the emergence of originality as the source for authority. Milton's attitude toward autonomous literary originality was problematic, Quint suggests, but by 1704 John Dennis was making Milton's originality rather than his inspiration into the criterion for judgment of *Paradise Lost*. My own reading suggests that the eighteenth-century debate over the originality of *Paradise Lost* was an important site in the production of the new aesthetic. See William Lauder's exposure of Milton's "plagiarisms" in *An Essay on Milton's Use and Imitation of the Moderns in His Paradise Lost* (London, 1750); and the response by Rev. John Douglas, *Milton Vindicated from the Charge of Plagiarism Brought Against Him by Mr. Lauder* (London, 1751); also John Bowle, *Reflections on Originality in Authors* (London, 1766), which was a response to Bishop Richard Hurd's *Discourse Concerning Poetical Imitation* (London, 1751) and his *Letter to Mr. Mason on the Marks of Imitation* (1757). The *locus classicus* for the new aesthetic of originality is Edward Young's *Conjectures on Original Composition* (London, 1759). *Originality* itself is a relatively modern word that came into common use in the eighteenth century. On this and other relevant terms such as *art* and *genius* see Raymond Williams, *Keywords* (London, 1983).
 20. Alexander Pope, "An Essay on Criticism," in *Poems*, ed. John Butt (London, 1963), lines 297–98.
 21. Samuel Johnson, *Lives of the English Poets*, ed. George Birkbeck Hill, 3 vols. (Oxford, 1905), 1:194.
 22. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, 1967), 305–6. On the development of property theory see Richard Schlatter, *Private Property: The History of an Idea* (New Brunswick, N.J., 1951); and C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford, 1962).
 23. See Harry Ransom, *The First Copyright Statute* (Austin, Tex., 1956), 94–97.
 24. Patterson, *Copyright in Historical Perspective*, 147.
 25. *The Case of Authors and Proprietors of Books* (London, n.d.), 1.
 26. Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'" *Eighteenth-Century Studies* 17 (1984): 425–48.
 27. This body of texts consists of several dozen tracts and pamphlets together with the reports on the leading cases in which the common-law right issue directly figured, especially *Tonson v. Collins* (*English Reports*, 96:169–74, 180–92), *Millar v. Taylor* (*English Reports*, 98:201–57), *Donaldson v. Becket* (see note 5 above), and the Scottish case of *Hinton v. Donaldson*, reported by James Boswell as *The Decision of the Court of Session upon the Question of Literary Property* (Edinburgh, 1774), in which the common-law claim was held invalid in Scottish common law. In addition there are various parliamentary records and newspaper and magazine pieces. No complete bibliography of these materials exists, but Thorvald Solberg provides a still useful "Bibliography of Literary Property" as an appendix to R. R. Bowker, *Copyright: Its Law and Its Literature* (New York, 1886). Collins, *Authorship in the Days of Johnson*, mentions many of the significant pamphlets in his chapter on the copyright struggle.

28. William Enfield, *Observations on Literary Property* (London, 1774), 21.
29. Boswell, *Life*, 2:259. See also Johnson's letter to the bookseller William Strahan dated 7 March 1774 in which Johnson develops his ideas on copyright and suggests the term of life plus thirty years; *Johnsonian Miscellanies*, ed. George Birkbeck Hill, 2 vols. (Oxford, 1907), 2:442–46. Edward A. Bloom conveniently gathers Johnson's statements on the subject in "Samuel Johnson on Copyright," *Journal of English and German Philology* 47 (1948): 165–72.
30. William Blackstone's *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765–69), attempts to rationalize and systematize English law in just this way. On Blackstone's project see Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (Cambridge, Mass., 1941); and Duncan Kennedy, "The Structure of Blackstone's *Commentaries*," *Buffalo Law Review* 28 (1978): 205–382. On Lord Mansfield's approach to the law as a kind of Platonic ideal fully associated with reason see C. H. S. Fifoot, *Lord Mansfield* (Oxford, 1936), esp. chap. 7.
31. Justice Joseph Yates, in *Millar v. Taylor*, *English Reports*, 98:233.
32. See M. H. Abrams, *The Mirror and the Lamp* (New York, 1953), esp. 159–67.
33. Baron James Eyre, as reported in *Cases of the Appellants and Respondents*, 34.
34. Young, *Conjectures*, 12.
35. See Abrams, *Mirror and the Lamp*, 201–3.
36. William Warburton, *A Letter from an Author to a Member of Parliament Concerning Literary Property* (London, 1747).
37. Anon., *A Vindication of the Exclusive Rights of Authors* (London, 1762), 8–9.
38. *Tonson v. Collins*, *English Reports*, 96:189.
39. Blackstone, *Commentaries*, 2:406.
40. Kennedy, "Structure of Blackstone's *Commentaries*," 334–50.
41. Blackstone, *Commentaries*, 2:401.
42. *Tonson v. Collins*, *English Reports*, 96:188.
43. See for example the broadside *The Case of the Booksellers Right to Their Copies* (London, 1708?): "And we conceive, this Property is the same with that of Houses and other Estates."²
44. Enfield, *Observations*, 21–22. 45. Young, *Conjectures*, 9. 46. *Ibid.*, 54.
47. *Millar v. Taylor*, *English Reports*, 98:233.
48. *Ibid.*, 98:252. 49. *Ibid.*, 98:253. 50. *Ibid.*, 98:218.
51. *Ibid.*, 98:222. 52. *Ibid.*, 98:230. 53. *Ibid.*, 98:248.
54. In the 1730s the House of Lords defeated several attempts by the London booksellers to extend the copyright term; see Patterson, *Copyright in Historical Perspective*, 154–58. *Tonson v. Collins*, as mentioned before, was aborted when it turned out that the parties were acting in collusion; probably one reason for the collusive action was to avoid the possibility of an appeal to the House of Lords, for as Justice Willes remarked in *Millar v. Taylor*, "A judgment in favour of the plaintiff [in *Tonson v. Collins*] would certainly have been acquiesced in"; *English Reports*, 98:214. After the decision in *Millar v. Taylor* the defendant initiated an appeal to the Lords, but the booksellers prevented this appeal from going forward by coming to terms with him; see anon., *Observations on the Case of the Booksellers of London and Westminster* (London, 1774).
55. I am indebted to Paul Goldstein for referring me to John Whicher, "The Ghost of *Donaldson v. Beckett*," *Bulletin of the Copyright Society of the U.S.A.* 9 (1961–62): 102–51, 194–229. Whicher was the first to note the conflict between the two anonymous pamphlet accounts of *Donaldson v. Becket* (see note 5 above) and the later standard accounts by Burrow, Brown, and Cobbett. Though he suspects that the standard accounts must

be wrong, Whicher remains puzzled by how Burrow and Brown came to report Justice George Nares as voting against the author's common-law right on the third question whereas the two earlier pamphlet accounts report Nares as voting in favor of the author's right. Neither Burrow nor Brown gives the substance of Nares's reasoning on the question, but both pamphlet accounts do, and his arguments as they report them clearly support the author's right. Cobbett, who evidently used the pamphlets in compiling his narrative, reports Nares's reasoning in favor of the author's right but then records him as voting against it, an extraordinary contradiction.

The difficulty in the report of Nares's vote begins before Burrow and Brown with the clerk of the House of Lords who recorded both in his manuscript *Minute Book* and the official *Journal* that Nares voted against the common-law right on the third question. The clerk did not record either Nares's or any of the other judges' reasoning. Burrow's 1776 report of the judges' votes is a transcription of the *Journal*. Contemporary newspaper accounts, with one interesting exception, report Nares as voting in favor of the common-law right. Particularly important is William Woodfall's—"Memory" Woodfall as he was called in testimony to his prodigious reportorial feats—account in the *Morning Chronicle* on 16 February 1774 immediately following the first day of opinions. Woodfall reports Nares's reasoning in favor of the author's right and then says "after having spoke near an hour he concluded with answering the questions in a manner directly opposite to that of Mr Baron Eyre. Judge Ashurst then rose, and accorded in the same opinion with Mr Justice Nares." Ashurst's opinion on the third question was that the statute did not take away the common-law right. Baron Eyre was the judge who spoke immediately before Nares. Eyre had given as his opinion on the first question that the author did not have a common-law right even to control first publication. Consistent with this opinion, he had voted no on the second question: if there was no common-law right it could not survive publication. On the third question Eyre's opinion was that the statute was so written that it took away every principle of a common-law right. The clerk therefore recorded him as voting yes on this question, that is, voting that the statute took away the common-law right. Possibly, however, he actually voted no, maintaining as in the case of the second question that since there was no common-law right there was nothing for the statute to take away. (This was why Baron Richard Adams on the following day answered all three questions in the negative.) If Eyre did vote no on all three questions and if Nares concluded his speech by saying that his opinion on the questions was directly opposite to that of Baron Eyre, then the reason for the clerk's confusion about how to record the vote is evident. Indeed, the clerk was not the only person who misinterpreted Nares's vote: the *Edinburgh Advertiser*, 22 February 1774, reported that Nares "stated to the House the reasons why he thought a common-law right did exist; but he was clearly of opinion, that that common-law right was taken away by the Statute of Queen Anne." Of course the reporter for the appellant's paper, perhaps Donaldson himself, would have been pleased to understand Nares's opinion in this way. To summarize: my hypothesis about the genesis of this little historical puzzle is that confusion was introduced by the difficulty that the clerk had in recording Baron Eyre's opinion—should he record it literally or should he interpret Eyre's intent?—and that a problem was created when Baron Nares who spoke next concluded by saying that his position was on each point opposite to that of Eyre.

56. *Millar v. Taylor*, *English Reports*, 98:262.

57. One indication of the special significance of Camden's speech was the great length at which it was recounted by the newspapers. The *Morning Chronicle* report extended

over two issues, 24 and 25 February, 1774. In *A Modest Plea for the Property of Copyright* (London, 1774), published immediately after the Lords' decision, the historian Catharine Macaulay attributed great influence to Camden's eloquence and personal authority.

58. *Cases of the Appellants and Respondents*, 54.
59. See Fifoot, *Lord Mansfield*, 45–46; and Henry S. Eeles, *Lord Chancellor Camden and His Family* (London, 1934), 113–14.
60. *Morning Chronicle*, 23 February 1774.
61. *Edinburgh Advertiser*, 29 April 1774. The speaker was Col. George Onslow, who was addressing the House of Commons in support of a bill of relief for the London book-sellers after the Donaldson decision. The bill, which would have extended the term of existing copyrights, passed the Commons but was killed in the House of Lords, which thereby reaffirmed its decision.
62. *Edinburgh Advertiser*, 1 March 1774. Cobbett, *Parliamentary History*, vol. 17, col. 1003, reports a vote of 22 to 11, but the *Journal of the House of Lords* does not indicate a division and neither do the newspapers. I do not know how to account for Cobbett's report of the vote. According to the *Journal*, eighty-four peers were present on the day of the vote. This extraordinary attendance—for comparison, sixty-eight peers attended on 13 January, the opening day of the session when the king addressed the house from the throne—confirms the great interest in the case.
63. See Whicher, "Ghost of *Donaldson v. Beckett*," 130. Since completing this essay Howard B. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common-Law Copyright," *Wayne Law Review* 29 (1983): 1119–91, has been brought to my attention. Abrams's purpose is to demonstrate that "there is no historical justification whatsoever for the claim that copyright was recognized as a common-law right of an author" (1128). The crux of his argument is that the notion that common-law copyright did exist but was then preempted by statutory law is based on a failure to understand that in *Donaldson v. Becket* it was not the common-law judges but the Lords who decided the case. Abrams argues that the speeches of the Lords in the House, particularly the speeches of Lord Camden and Lord Chancellor Apsley, both of whom deny that common-law copyright ever existed, articulate the grounds for the Lords' decision. The Lords' holding in *Donaldson v. Becket* "was clearly that the common law had not and did not recognize the existence of copyright" (1164). Abrams's article is interesting and valuable, but I find it difficult to accept that the legal grounds for the Lords' decision were quite so clear. The speeches of the participants in the debate after the judges had rendered their opinions do not quite have the status of formal judicial opinions. Moreover, how are we to ascertain what understanding of the knotty common-law question was in each Lord's mind as he voted? Indeed, we don't even know for certain how many peers voted or whether there was a formal division of the house, as Cobbett reports, rather than a simple voice vote. Above all, we must remember that the issue voted on in the House of Lords was not the common-law question as such but simply whether or not to reverse the Chancery decree.
64. See Altick, *English Common Reader*, 54–57; also W. Forbes Gray, "Alexander Donaldson and His Fight for Cheap Books," *Juridical Review* 38 (1926): 180–202.
65. Whicher, "Ghost of *Donaldson v. Beckett*," argues that the author's common-law right has reappeared in U.S. law in the form of common-law doctrines of "unfair competition."
66. Robert Southey, in "Inquiry into the Copyright Act," *Quarterly Review* 21 (1819): 211–12.

67. *The Prose Works of William Wordsworth*, ed. W. J. B. Owen and Jane Worthington Smyser, 3 vols. (Oxford, 1974), 3:313. I am indebted to Alan Y. Liu for this reference.
68. Boswell, *Decision*, 7.
69. Jacob More, *Strictures Critical and Sentimental on Thomson's Seasons* (London, 1777), 167–68.
70. *Millar v. Taylor*, *English Reports*, 98:224.
71. Francis Hargrave was counsel for the London booksellers in the Chancery case of *Becket v. Donaldson* that led to Donaldson's appeal to the House of Lords. Thereafter, he composed the written argument for the respondents in *Donaldson v. Becket*, and he was also, it appears, prepared to argue orally before the Lords. When, for some reason that remains unclear, that opportunity was denied him, Hargrave published his prepared speech as a pamphlet, *Argument in Defence of Literary Property* (London, 1774).
72. *Ibid.*, 35–36. Less than a year earlier Samuel Johnson was making a similar claim about the author's right in dinner conversation with Boswell and others: "There seems, (said he,) to be in authours a stronger right of property than that by occupancy; a metaphysical right, a right, as it were, of creation"; Boswell, *Life*, 2:259. Both Johnson and Hargrave probably had Blackstone's discussion of literary property in the *Commentaries* in mind, and therefore no direct influence need be supposed, but perhaps Hargrave had heard of Johnson's remarks.
73. Hargrave, *Argument in Defence of Literary Property*, 16.
74. *Ibid.*, 6–7.
75. Locke, *Two Treatises of Government*, 305–6.
76. *Monthly Review* 51 (1774): 209.
77. Abrams, *Mirror and the Lamp*, 226. In this period, too, the figure of the poet as hero was becoming familiar. As Robert Folkenflik remarks, "In the Renaissance Tasso wrote *Gerusalemme Liberata* and Milton wrote *Paradise Lost*; but in the late eighteenth century and the early nineteenth, Goethe wrote *Torquato Tasso* and Blake wrote *Milton*. An artist-hero was not in itself new. . . . Yet to find such a hero in the acknowledged major genres, tragedy and epic, is something new and suggests the wider significance of the artist's image in this period." See "The Artist as Hero in the Eighteenth Century," *Yearbook of English Studies* 12 (1982): 91–108.
78. Woodmansee, "Genius and Copyright," 442. For a related discussion of the economic grounding of the aesthetic theory of "disinterestedness" as it developed in this period in Germany see also Martha Woodmansee's "The Interests in Disinterestedness: Karl Philipp Moritz and the Emergence of the Theory of Aesthetic Autonomy in Eighteenth-Century Germany," *Modern Language Quarterly* 45 (1984): 22–47.
79. Quoted by Woodmansee, "Genius and Copyright," 445.
80. *Tonson v. Collins*, *English Reports*, 96:189.
81. Anon., *An Enquiry into the Nature and Origin of Literary Property* (London, 1762), 13. Collins, *Authorship in the Days of Johnson*, 85, attributes this pamphlet to Warburton, who fifteen years earlier had defended the author's common-law right in *Letter from an Author*, but without indicating the basis for his attribution.
82. *Millar v. Taylor*, *English Reports*, 98:250.
83. Quoted in Ralph S. Brown and Robert C. Denicola, eds., *Cases on Copyright* (New York, 1985), 190.
84. Often quoted is Justice Joseph Story's 1841 dictum that copyrights, along with patents, "approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent"; quoted in *ibid.*,

238. For a wise and suggestive discussion both of some aspects of the history of copyright and of some modern problems see Benjamin Kaplan, *An Unhurried View of Copyright* (New York, 1967).
85. Prager, "Early Growth and Influence of Intellectual Property," 106.
86. Victor Hazan, "The Origins of Copyright Law in Ancient Jewish Law," *Bulletin of the Copyright Society of the U.S.A.* 18 (1970): 23–28.