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Cover Page Footnote

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A Tale of Sovereignty and Liberalism: The Lockean Myth of Intellectual Property

Shaoul Sussman*

The influence of John Locke's thought upon the general legal perception of property rights cannot be overstated. Locke's Labor theory of property holds that property originally comes about through individual exertion upon natural objects and that legal rights in the result of this labor are in fact property rights. The Lockean theory of property has dominated the Anglo-American legal discourse and is frequently used to justify various property regulation schemes. Despite this fact, many scholars have struggled to apply the theory to the field of intellectual property, and in particular to the field of patents and copyright. Many have attempted to square the circle, but the results of these efforts are rather unpersuasive.

This Note proposes to introduce a different framework of jurisprudence that better explains the underpinnings of the current intellectual property legal regime. This framework builds upon and applies the Aristocratic concepts of commutative and distributive justice to the concept of intellectual property. The Note argues that the notion of intellectual property is a legal concept that is first delineated by sovereign authorities in an act of commutative justice. Only after the 'rules of the game' are articulated by the sovereign, private actors can enter the legally delineated markets and engage in acts of commutative exchange. The Note demonstrates that from

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its inception, the field of intellectual property was fundamentally a sovereign legal endeavor and that despite Locke's theoretical contributions to the field, at no time did the courts of England ever applied his own theory to the administration of intellectual property. Instead, the courts of England have time and again reaffirmed the fact that intellectual property is legal right that is granted by a sovereign and is founded upon the principals of distributive justice.

INTRODUCTION

On September 16, 2011, the America Invents Act (AIA) was signed into law with the objective of establishing a more efficient and streamlined patent system.[1] The AIA's most significant change was the conversion of the United States patent system from a "first-to-invent" to a "first-inventor-to-file" framework.[2]

Theoretically, this law should also apply in the rare event in which two scientists are racing simultaneously for years to develop an identical cure to the same life-threatening disease while being unaware of the other's laborious progress.[3] In this case of accidental competition, the patent protection would only be granted to the first inventor who successfully filed their invention with the U.S. Patent and Trademark Office (USPTO).[4] It follows that what ultimately determines the inventors' patent rights is not the inventor's actual labor but merely their good fortune: that their application was adequate and filed just in time, leaving the other scientist with nothing to claim but their shattered ambitions.[5]

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1 35 U.S.C. § 102(a)(1) (2012) (enacted as the Leahy-Smith America Invents Act, 125 Stat. 284, 285–86).

2 *See id.*

3 *See* Bristol-Myers Squibb Co. v. Teva Pharm. USA, Inc., 769 F.3d 1339, 1349 (Fed. Cir. 2014) (acknowledging that the AIA first-to-file system puts pressure on companies to file early in order to not lose priority).

4 *See* 1 DONALD S. CHISUM, CHISUM ON PATENTS, § 3 (3d ed. 2013).

5 *See id*.

What is most surprising perhaps in this rather harsh law is that it stands in clear contradiction to Locke's theory of property—which asserts that property is generated and determined by labor.[6] According to Locke's account, since both inventors came up with the same cure at approximately the same time through their independent and respective labor, both should be conferred with equal patent rights, regardless of the time in which they submitted their applications.[7] Yet, this view completely undermines the current patent system, whose value rests entirely upon the ability to both determine and maintain commercial exclusivity.[8] Hence, Locke's labor theory cannot help us to explain the foundation of intellectual property jurisprudence.[9]

The purpose of this Note is not to question the AIA's validity nor that of our prevailing legal doctrines, but rather to challenge its current theoretical grounding and to provide a more accurate account thereof. This alternative theoretical foundation is by no means new[10]; it can be traced back at least 2,400 years to the writings of Aristotle and his division of the administration of justice into two basic forms: distributive and commutative.[11] According to Aristotle, distributive justice concerns the relationship between the sovereign body and its individual members.[12] It describes the process by which rights and legal privileges are distributed by the sovereign among the private individuals by the state, according to a

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6 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT, SECOND TREATISE §§ 27–43, at 18–27 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690).

7 *See id*.

8 Some "copy-left" advocates argue that this result is preferable in reducing the price of technological innovation. *See, e.g.*, Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 819 (1990).

9 *See* Adam D. Moore, *Intellectual Property and the Prisoner's Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 833, 833–34 (2018) (acknowledging that Lockean theory faces challenges when applied to IP, while other scholars have offered a defense).

10 *See* Dr. Shlomit Yanisky-Ravid, *The Hidden Though Flourishing Justification of Intellectual Property Laws: Distributive Justice, National Versus International Approaches*, 21 LEWIS & CLARK L. REV. 335, 335–36 (2017) (proposing that modern models of IP, including Lockean theory, fail to consider distributive justice).

11 ARISTOTLE, NICOMACHEAN ETHICS, 84–85 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000) (c. 349 B.C.E.).

12 *See id*.

common, measurable dispensation scheme.[13] By contrast, commutative justice is a private type of regulation that orders and characterizes the relationship of the individual members of the political body amongst themselves.[14] This relationship encapsulates the commensurable commercial exchange between specific individuals and is the basis of all private transactions.[15]

The field of intellectual property law adheres to this basic Aristotelian division. First, the state provides a particular class of individuals (namely inventors) with property rights through legislation. Legislation assigns to this class a particular right of ownership: the right to exclude all others from introducing or offering inventions that are substantially similar and from selling goods that embody them.[16] Then, the state designates a certain period of time for such privigle.[17] And lastly, but perhaps most importantly, the state provides the inventor with a legal forum to prevent others from infringing upon this right during the limited period in which their invention is protected by law.[18] All of these actions represent sovereign acts of "distributive justice" in which the state distributes the exclusive rights in a given property to one individual and actively precludes all others from using it in any unauthorized way.[19]

Following this distributive allocation of rights, the sovereign allows private individuals to interact freely within this legally

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13 *See id*.

14 *See id*.

15 *See* THOMAS AQUINAS, SUMMA THEOLOGICA, 2086–90 (Christian Classics 1981) (1265–1274).

16 *See generally* Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB POL'Y 593 (2008). It is also interesting to note that this designation is also applied by the state in other fields such as criminal law. Some possessions such as illicit drugs are not legally recognized as property and governments prohibit any type of ownership in these tangible objects. In fact, all private citizens are excluded from a right to own this type of object. *See id.* at 609 n. 61.

17 *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8. ("The Congress shall have power . . . [t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . . .").

18 *See* 35 U.S.C. § 146 (2012).

19 Theories of distributive justice seek to specify what is meant by a just distribution of goods among members of society. Brian Duignan, *Justice, Social Concept*, ENCYC. BRITANNICA, https://www.britannica.com/topic/justice-social-concept [https://perma.cc/X4ZR-JDJH] (last visited Apr. 16, 2019).

established marketplace in accordance with the laws of "commutative justice." Private individuals are allowed to voluntarily bargain for the trade of goods. For example, inventors may authorize others to embody those inventions in their products, adapt them into tangible goods, and use them in any other way agreed upon by both parties.[20] The current field of intellectual property also demonstrates the Aristotelian principle that from a procedural prespective distributive justice precedes and facilitates commutative justice. Indeed, it is only once the 'rules of the game' are set and clearly stated (e.g., what constitutes intellectual property; the length of time that it is protected; and so on) that individual actors can enter the scene and negotiate meaningfully the terms of the various relevant exchanges.[21] Delineating property rights and enforcement are a necessary condition for efficient market exchange.[22]

By surveying the history of intellectual property in England since the invention of the printing press up until the late 18th century, this Note demonstrates that the Aristotelian principle not only explains our current legal regime but also the regime that existed at the time in which Locke articulated his own revisionist theory.

This Note suggests that Locke's labor theory was a crucial and extremely influential part of an organized theoretical assault upon the role of the English absolute monarch in regulating property through the legal administration of distributive justice. The three main theoretical protagonists in this story are Edward Coke, John

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[20] *See, e.g.*, 17 U.S.C. § 101 (2012). This provision allows "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license."

[21] In the United States, these commutative rights of exchange are carefully delineated by statutory law. *See supra* notes 17–20 and accompanying text.

[22] It is essential not to conflate this understanding of the law with the traditional utilitarian rationale of copyright. Utilitarianism was only first formulated during the late 18th Century and can be seen as directly criticizing this view. For further reading see Quentin Skinner, A Genealogy of Liberty, Presented at Stanford Humanities Center for the Harry Camp Memorial Lecture (Oct. 27, 2016), https://cluelesspoliticalscientist.wordpress.com/2017/01/27/a-genealogy-of-liberty-by-quentin-skinner-lecture-transcript/ [https://perma.cc/CDU2-5H3D].

Locke and William Blackstone.[23] Each of the three sought to contribute to, and thereby further consolidate his predecessors' attempt to formulate a theory of property that severed the well established connection between sovereignty and commerce or better still: between state regulation and private interest.

Intellectual property jurisprudence proved to be a particularly thorny issue for these thinkers. For unlike land or chattel, which conformed rather nicely into the liberal myth of common law property, both Locke and Blackstone recognized the difficulty in explaining intellectual property by relying only upon the vocabulary of commutative justice. Each contemporary attempt to conform intellectual property to their views was met with great practical difficulties and the theoretical barriers which had to be overcome are charted in detail.[24] The most disquieting conclusion that this Note makes is that despite all of these theoretical and concrete failures, Locke's and Blackstone's view ultimately won the day and became the orthodox dogma in the field of intellectual property law thoery. This is especially surprising given the fact that their theory was never adopted by the courts of law nor applies to present day legal practice. This historical schism produced a pronounced dissonance between legal theory and practice which is apparent to this day and which, further, suggests that at times illusory legal ideology can exist alongside the actual law.

Part I of this Note reviews the historical development of rights in copies in England from 1455 up until 1688. It illustrates how Absolutism and later populism played a pivotal role in shaping the actual structure of copyright law to this day.[25] In particular, the fact that rights in copies were accurately regarded as a sovereign grant

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[23] Edward Coke was an English barrister, judge and member of the English Parliament (1552–1634). Gareth H. Jones, *Sir Edward Coke*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Edward-Coke [https://perma.cc/SS9H-8NA8] (last updated Aug. 30, 2018). John Locke was an English philosopher and physician (1632–1704). Graham A.J. Rogers, *John Locke*, ENCYC. BRITANNICA, https://www.britannica.com/biography/John-Locke [https://perma.cc/CY9E-D644] (last updated Oct. 24, 2018) . William Blackstone was an English barrister and judge (1723–1780). *Sir William Blackstone*, ENCYC. BRITANNICA, https://www.britannica.com/biography/William-Blackstone [https://perma.cc/U89E-P3VQ] (last updated July 6, 2018).

[24] *See, e.g.*, Moore, *supra* note 9, at 33–34.

[25] *See generally* PETER W. M. BLAYNEY, THE STATIONERS' COMPANY AND THE PRINTERS OF LONDON, 1501–57 (Cambridge Univ. Press 2013).

of exclusive dispensation of rights over a given literary work. This view of rights in copies was also entirely consistent with the overall legal perception of property during that time.[26]

In Part II, this Note traces the growing influence of Locke's labor theory alongside the gradual demise of the royal prerogative and explains how these processes influenced copyright law in the late Seventeenth century. Locke's theory argued that role of government is to protect "natural" private property from wrongful usurpation.[27] This vision of government was held as antithetical to the notion that the state should be charged with the dispensation of property rights through the administration of distributive justice. In addition, Locke's ontological account of property deliberately obscured the sovereign-distributive framework of property by suggesting that property is exclusively established and shaped through commutative justice. This Part also charts Locke's historical lobbying efforts in the field of intellectual property law and the way he sought to reconcile the abstract principles of his universal theory with actual legal regulation. In line with previous research, it is argued that the substance of Locke's proposal in the field of intellectual property clearly contradicted his abstract theoretical conception of property.

Part III of this Note surveys the Battle of the Booksellers. It is viewed in a wider context that considers the influence of sovereignty theory and distributive justice upon the field of intellectual property law. By this time, Coke's and Locke's views on property penetrated the legal discipline to such an extent that despite the inability to apply their views to legal practice, not a single member of the Court of Chancery or the House of Lords including William Blackstone had disputed the soundness of their theory.

The conclusion suggests that from a general theoretical standpoint, William Blackstone's role in fortifying Locke's scholarly legacy is reflected in the current general acceptance of the commutative theory of intellectual property.[28] This acceptance is

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26 *Id.*

27 LOCKE, *supra* note 6, § 27, at 306.

28 An exception in this respect is the outstanding contribution of Laura R. Ford. In her work she argues that "[i]ntellectual property is thus a creature of the nation-state, just as much for Eighteenth Century Britain, as for the United States and France" and that "the

manifested in the academic engagement with Locke's work which has only increased in the last twenty-five years.[29] In particular, both proponents and critics of Locke's thinking accept the notion that the role of intellectual property law is to balance the commutative rights of individuals in their property against the rights of others.[30] Even Locke's most staunch critics do not question the theoretical validity of his direct attack on the role of sovereign distributive dispensation in intellectual property law.[31] The conclusion of this Note also bears some practical suggestions: (1) further research should focus upon how sovereign frameworks informed the formation of legal rights in other fields of property and, (2) Eighteenth century English jurisprudence should play a lesser role in shaping our current understanding of American intellectual property law.

I. THE HISTORICAL ORIGIN OF INTELLECTUAL PROPERTY

A. The Scope of Sovereign Authority and Royal Prerogative Under the Rule of Henry VIII

As opposed to the political and commercial situation in Locke's time, both Parliament, the common law courts, and commerce courts in the beginning of the Sixteenth century were in practice subjected to the ultimate sovereign will of the king. Within this constitutional scheme, it was the role of the courts of common law to enforce the royal laws against crimes and to adjudicate civil disputes.[32] The

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Prerogative tradition implicitly excluded the 'Lockean' natural law argument." Laura R. Ford, *Prerogative, Nationalized: The Social Formation of Intellectual Property*, 97 J. PAT. & TRADEMARK OFF. SOC'Y 270, 304–05 (2015).

29 *See* Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891, 892 (2006).

30 *See, e.g.*, Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75 (2004); *see also* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1998).

31 *See* Benjamin G. Damstedt, Note, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine,* 112 YALE L.J. 1179, 1181 (2003). Zemer claims that Locke's lobbying efforts in the field indicate that he was concerned with balancing the rights of individuals with the common good. If adopted at face value, this argument further supports the notion that Locke's theory and political practice are squarely at odds. Zemer, *supra* note 29, at 895.

32 *See* PHILIP EDWARDS, THE MAKING OF THE MODERN ENGLISH STATE, 1460–1660, at 216–19 (2001).

exact hierarchal organization of these courts was contested at times, but despite their seemingly arbitrary positioning within the general legal structure, all of these courts were formally overseen and sanctioned exclusively by the king.[33] Officially, the king was considered as the 'author' of the common law. This notion was reinforced by the careful historical documentation of the fact that the English judiciary was a creation of Henry II and that his judges were directly dependent on the king, in whose name they dispensed justice.[34] The king also retained his historical privilege to decide any case that was brought before the courts, although actual direct sovereign intervention was infrequent.[35]

With regards to property rights, the king, as in the days of Henry II, retained his formal position as the sole allodial owner of land in England, despite the ever-increasing control of private entities over land possessions and a general lack of respect to medieval legal traditions.[36] The king and his appointed agents were in charge of the dispensation of property rights. The highest form of property right, as in the days of William the Conqueror, remained the possession of fiefs or rights in fee simple, and property disputes were resolved by the king's judges in the various royal courts of common law.[37] Of particular importance for this Note, the king was also entitled to create royal patents and construct monopolies in certain fields of commerce or upon certain industries such as mining.[38]

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[33] *See* George Burton Adams, *Origin of the English Courts of Common Law*, 30 YALE L.J. 798, 802 (1921).

[34] *See* RALPH V. TURNER, THE ENGLISH JUDICIARY IN THE AGE OF GLANVILL AND BRACTON C. 1176–1239, at 25–39 (Cambridge Univ. Press 1985).

[35] *See* DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS, AND JURISPRUDENCE, 1578–1616, at 16–18 (Cambridge Univ. Press 2014).

[36] *See* E. Wyndham Hulme, *The History of the Patent System Under the Prerogative and at Common Law*, 46 THE L. Q. REV. 141, 144 (1896).

[37] *See* COLIN KIDD, SUBVERTING SCOTLAND'S PAST: SCOTTISH WHIG HISTORIANS AND THE CREATION OF AN ANGLO-BRITISH IDENTITY, 1689– C.1830, at 131–34 (Cambridge Univ. Press 2003).

[38] *See generally* Adams, *supra* note 33. Allodial is a legal construct that refers to the ultimate owner of a given property item. *See* G. E. Aylmer, *The Meaning and Definition of Property in Seventeenth Century England*, 86 PAST & PRESENT 87, 87–89 (1980).

B. Copyright Law Under the Rule of King Henry VIII

Modern printing was introduced to London during the 1470s and ever since then, the English book trade was subject to some kind of sovereign oversight.[39] From 1487 every form of printed material could potentially undergo sovereign inspection in which its content was examined and at times censored if it was deemed to contain materials that were considered by the censors as heretical or treasonous.[40] By the time Henry VIII assumed the throne, a number of medieval guilds were engaged in the business of book printing.[41]

The first chronicled interest in some form of copyright protection emerged during the early years of Henry VII's reign.[42] Unlike manuscripts, which were produced upon demand and in small quantities, book printing involved a significant initial investment of capital in order to produce a book template.[43]

This financial risk was compounded with another new commercial risk: unwarranted mechanical book copying. Traditionally, qualitative differences which were readily apparent in hand-written manuscripts suppressed book pirating on a commercial scale.[44] However, with the introduction of the printing machine, such qualitative differences were suddenly less noticeable. As a result, the unwarranted copying of the content of books became a far more lucrative endeavor that posed a real commercial risk for book printers.[45]

In light of these new threats, publishers actively sought for means by which they could protect their investment.[46] As a result, a series of royal grants were instituted by Henry VII's court in order to ensure the economic viability of this newly introduced trade.[47]

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39 *See* Ian Gadd, *The Stationers' Company in England Before 1710*, *in* RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW 81, 81–82 (Isabella Alexander & H. Tomás Gómez-Arostegui eds., 2016) [hereinafter Gadd, *Stationers' Before 1710*].

40 *Id* at 82.

41 *Id.*

42 *Id.* at 86.

43 *Id.* at 82.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* at 83.

This rather trivial royal decree marks a significant moment in the development of intellectual property law. From its inception, it became clear to all the interests involved that the book printing business could not rely only upon the rudimentary protection of the 'commutative' common law.[48] Such protection would be limited only to the actual book manuscripts and would therefore afford little-to-no economic security to the book printers. In light of this, since its legal conception it was clear that official sovereign intervention was essential in establishing a viable market in copyrights.[49] Consequently, the early royal printing privileges in copies were designed to provide real protection, albeit, by a somewhat cumbersome and ineffective bureaucratic authority.[50] In practice, this protection was brought about by a sovereign decision to actively preclude all but one printer from printing a given book. Remarkable as it may seem, even at this very early stage the book printing industry relied upon a distinct form of distributive law that regulated property rights in the infant industry.[51] Thus, even during its initial stages, intellectual property, like other forms of goods or chattels, essentially owed its actual commercial viability to the distributive legal mechanism of the Crown and its courts of law.[52] Hence, and similarly to other fields of the law, it seemed prefectly normal to exercise distributive law in other fields of commerce such as the granting of various trade monopolies.[53]

By the mid 1520s, over half of the active printers in England obtained some form of royal privilege for their works and by the late 1530s, over a third of all the books that were printed in London maintained some sort of derivative royal protection.[54] The prevalence of such printing privileges was ever growing but nonetheless remained entirely voluntary.[55] Typically, sovereign protection was extended to a printer or a book after a petition to the

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48 *Id.* at 87.

49 *Id*. at 87–88.

50 *Id.*

51 *Id.*

52 *Id.*

53 *See* M. Frumkin, *The Origin of Patents*, 27 J. PAT. OFF. SOC'Y 143, 144–45 (1945).

54 *See* BLAYNEY, *supra* note 25, at 322–26.

55 In fact, more than two thirds of the books printed in London were unprotected by privilege. Gadd, *Stationers' Before 1710*, *supra* note 39, at 83–85.

Crown was made by the individual who sought protection.[56] As historians have observed, these royal privileges were simply a grant of temporary commercial monopoly and by no means translated into an official royal endorsement of the book's actual content.[57]

In practice, Henry VIII's court failed to develop an actual legal enforcement mechanism to protect the privileges it granted and this fact rendered the issuance of royal privilege less and less meaningful.[58] But despite these issues of enforcement, up until 1510, the young book printing market required minimal legal protection and sovereign regulation.[59] This was due to the fact that the entire printing industry was in the process of initial expansion and its members were still limited in number.[60] Moreover, infringement was uncommon because printing privileges were inherently temporary and even if the king at times granted a specific printer a 'perpetual privilege,'that privilege was extended until either the printer's or king's death.[61] Even in the rare cases of actual infringement, the printer whose work was copied had to litigate his case in the Court of Chancery—a costly affair which further deterred actual litigation.[62]

C. The Influence of the 'Absolutist' State Theory upon the English Constitutional Scheme

Under Henry VIII's rule, England was a politically turbulent society. Henry's religious reform led to substantial clashes with the English clergy and other political actors that swore their allegiance to the Pope.[63] In other parts of Europe, the Protestant reformation resulted in outbreaks of religious wars that greatly threatened a number of well-established continental monarchies.[64]

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56 *Id.*

57 While the printing privilege of the book was protected, the content of it was not, and it was entirely possible for a book printer to be prosecuted for the unlawful content that was contained in his privileged copy. *Id* at 84.

58 *See* Gadd, *Stationers' Before 1710*, *supra* note 39 at 86.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id*.

63 *See* G. R. ELTON, REFORM AND REFORMATION: ENGLAND, 1509–1588, at 103–07 (Arnold Publ. 1977).

64 *Id.* at 15–18.

This period of unprecedented geopolitical instability gave birth to the first early-modern monarchist state theory.[65] This political theory, which is termed by historians as "Absolutist state theory," is generally attributed to the French jurist Jean Bodin (1530-1596) and is found in his seminal theoretical work '*Les Six Livres de la République*' (1576).[66] Bodin argued that any political body or state is, in fact, a union of people under the same sovereignty or government.[67] In essence, a state is a particular type of civil association in which a mass of individuals is united in their subjection to a ruling group.[68] Bodin pointed out that in most cases this ruling class is consistent of a monarch which is described as a "head of state," but in his treatises, Bodin admitted that sovereign power could be held by the people themselves such as in the ancient polity of Athens.[69] Bodin nonetheless insisted that a strong natural preference existed for the establishment of monarchical regimes over any other form of government.[70]

The second contribution of the Absolutist theory was to galvanize the metaphor of the king's two bodies.[71] In opposition to medieval understandings of monarchy that identified the king as a temporary wielder of sovereign power, the Absolutists held that any monarch has two bodies.[72] The first body was of course the corporal person that was designated as king.[73] The second body was that of the eternal and ideal legal person of the monarch.[74] The implications

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65 *See* Quentin Skinner, *The Sovereign State: A Genealogy, in* SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 28–30 (Hent Kalmo & Quentin Skinner eds., 2010) [hereinafter Skinner, *Genealogy*].

66 As opposed to the feudal conception of monarchy which rooted the king's privileges and allodial possessions in divine right, Absolutist thinkers like Bodin sought to trace the legal origins of monarchical rule and justify them on the grounds of Aristotelian and Ciceronian principles of political philosophy. *See* JULIAN H. FRANKLIN, JEAN BODIN AND THE RISE OF ABSOLUTIST THEORY 85–92 (Cambridge Univ. Press 1973).

67 *See* JEAN BODIN, ON SOVEREIGNTY: SIX BOOKS OF THE COMMONWEALTH 156–72 (CreateSpace 2009) (1576).

68 *Id*.

69 *Id*.

70 *Id*.

71 *Id*.

72 Quentin Skinner, *The Body of the State, in* IMAGINING THE STATE 16–17 (Mark Neocleous, 2003) [hereinafter Skinner, *The Body*].

73 *Id*.

74 *Id*.

of this distinction might seem trivial at first, but they denote a significant milestone in the development of political and constitutional theory.[75] In feudal thought, the death of a king marked a point of sovereign crisis in which multiple political actors and factions came to assert their right to assume the throne.[76] Additionally, the death of a king also marked a period of juridical instability. By distinguishing between the king's corporal existence and the king's legal person, Absolutist thinkers sought to stabilize the process of monarchial succession and ensure legal stability upon the king's death.[77]

D. 'Absolutism' and Property Rights

In medieval England the monarch's allodial ownership over property was granted to each of its kings in their coronation ceremony in accordance with the principles of primogeniture hereditary succession.[78] As a result, the ascendance to the throne of a new monarch also marked a period of significant property redistribution in accordance with the will of the newly anointed sovereign.[79] The formal justification for these acts of political redistribution was that the Kings of England held a legal royal dominion over all of the kingdom's lands and property. In fact, the king held the titles of all actual personal ownership of that property and could determine who were his tenants. Consequently, all land grants, patents, and royal court appointments or any other legal permits that constituted acts of distributive justice were, in feudal

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75 *Id.*

76 *Id.*

77 *Id.*

78 *See* Aylmer, *supra* note 38, at 87–89.

79 For example, the *Act for the Dissolution of the Lesser Monasteries* (1536) which was enacted by Parliament in the reign of Henry VIII to transfer English Papal properties in to the hands of the Church of England stated that "*his majesty shall have (these properties) and enjoy to him and his heirs forever.*" In other words, the kings' rights over the Papal property emanated from the fact that he was the lawful heir of the lands of England. This act was legitimate because the king retained a right of entry as a grantor who has the legal power of termination if a condition is violated and the grantor decides to reclaim the estate. *See* Suppression of Religious Houses Act 1535, 27 HEN. 8 c.28 (Eng.).

times, limited to the life of the king and were subsequently automatically revoked upon his death.[80]

In light of this inherent commercially unstable reality, the adoption of the Absolutist theory by the English Crown during the 1550s had momentous ramifications. The influence of this sovereignty theory upon the legal tradition of common law property became immediately apparent. In contrast with medieval legal theory, the Absolutist view held that the king, as the sole legitimate head, both practically and figuratively, of the state was the lawful allodial owner of all the land that belongs to it.[81] Hence, the king's legal rights over the land of the state did not stem from his historical factual possession of the land or alternatively, due to his corporal hereditary inheritance, but rather from his authoritarian powers as the head of the state.[82] In accordance with this theory, even if the king's successor does not actually possess rights of primogeniture, he was nonetheless the rightful owner of the crown's properties by attaining the legal position of head of state.[83] In more abstract terms, if in medieval England distributive justice was in fact redefined and redistributed with each royal succession, in renaissance England, the role of distributing justice was removed from the direct perview of the actual corporal monarch and was subsequently assigned to the king, as the head of the English state. This change allowd for greater stability in the field of distributive justice and facilitated a more independent sphere of commutative transactions.

The emergence of the Absolutist theory also provides a better understanding of the gradual yet significant changes in the status of sovereign authority over the judiciary and the lands of England that occurred in the first half of the Sixteenth century. During the first few decades of Henry VIII's reign sovereign authority seemed to emanate from the king's own royal heritage;[84] however, by the end of his reign during the 1550s, the king and royal sovereignty came to be perceived in a different light.[85] The right of kings was still

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80 *See* HOWARD NENNER, THE RIGHT TO BE KING: THE SUCCESSION TO THE CROWN OF ENGLAND, 1603–1714, at 7–10 (MacMillan Press 1995).

81 *See* Aylmer, *supra* note 38, at 87–89.

82 *Id.*

83 *Id*.

84 WEIR, *supra* note 72, at 21.

85 *See* Skinner, *The Body*, *supra* note 69, at 12–15.

justified as a divine one, but the legal conception of monarchy had developed.[86] Henry was no longer only the sole rightful owner of the lands of England but also the 'head of the English State' and his sovereign legitimacy emanated from his role as the head of the English body politic and not from his actual ownership of its lands.[87]

E. The Effect of 'Absolutism' on Rights in Copies in the Second Half of the Sixteenth Century

The Absolutist theory also had a significant impact on the book trade, although its real effects became apparent only after the death of Henry VIII's son Edward VI in 1553. In fact, it was the subsequent ascendance of Mary to the throne and the counter movement of the Court from Protestantism to Catholicism that brought about this change.[88] Within the first year of Queen Mary's reign, over half of the printers of London lost their printing rights, while only a handful of privileges were either renewed or created due to the Catholic 'restoration' that was taking place.[89] After a four-year period of legal vacillation, violent purges, and the general uncertainty among the members of the London book trade, the Catholic-leaning Stationers' Company emerged as the dominant entity in the realm of book printing.[90] In 1557, Queen Mary decided to grant the company an almost monopolistic right over book printing.[91] The grant stipulated that every owner of a printing press in England must be a member of the Stationers' Company unless he was granted a direct superseding privilege from the monarch himself.[92] The grant transformed the Stationers' Company from a medieval guild to the de-facto regulator of the English book trade.[93]

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86 *Id*.

87 *Id*.

88 *See* BLAYNEY, *supra* note 25, at 756–58.

89 *Id.*

90 *See* Royal Charter of the Company of Stationers (1557), *reprinted in* 1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON xxx-xxxi (Edward Arber ed., 1950), available at http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1557 [https://perma.cc/XA8E-79TM].

91 *See id.*

92 *See id.*

93 *See id.*

The Royal Charter of 1557 delegated the sovereign power of 'privilege granting' exclusively to the Stationers' Company.[94] This act resulted in the transformation of the Stationers' Company into a quasi-administrative agency of the Crown.[95] This delegation was further reinforced by the fact that the new privileges were granted on behalf of the company but were legally enforced by the Crown's Courts. This seemingly minor formal alteration in the title of the granting authority might seem trivial, but it had a significant impact. Privileges were no longer granted by a mortal person and therefore limited to the duration of a king's life, but rather by a royally-sanctioned corporation.[96] Thus, while sovereigns come and go, and while the individual members of the company continuously joined and eventually died, the company as a royally incorporated entity was designed to endure. It could therefore grant privileges and enforce legal obligations or rights far beyond the lifetime of any of its individual members.[97] Subsequently, the company could secure in perpetuity the rights of its members in book copies.[98] This commercial stability stood in stark contrast with the old property regime that was subject to the will of an idiosyncratic and transient monarch. In abstract terms, this process can be seen as an attempt to buttress the manner in which distributive justice dispenses privilege.

If we examine these changes from a sovereign perspective, the Royal Charter of 1557 can be seen as the establishment of an entirely new regime in the field of copyright. Although the Crown itself became once removed from the formal process of granting rights, the de-facto authority and control that the royal prerogative exerted over the domestic book trade through the royally-sanctioned Stationers' Company was stronger than ever.[99] In a practical sense, the dispensation of distributive justice in the field of copyright became insulated from the turbulent political reality of Sixteenth

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94 *See id.*

95 *See* Gadd, *Stationers' Before 1710*, *supra* note 39, at 88.

96 *Id.*

97 *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); *see also* Arthur Machen, *Corporate Personality*, 24 HARV. L. REV. 253 (1911).

98 *See* Gadd, *Stationers' Before 1710*, *supra* note 39, at 92–93.

99 *See id.* at 88–90. In terms of its function within the sovereign scheme, the company can be compared to the function of the USPTO.

century England. This was achieved by entrusting this dispensation procedure in the hands of a quasi-administrative professional body that had a vested interest in promoting the commercial viability of the book printing business.

Any prior rights in copies which were obtained before the Charter were rendered invalid.[100] The Queen vested the Stationers' Company with exclusive authority over the registration of copies and arbitration of property disputes between the individual owners of those rights.[101] Most importantly, the legal right in copies was not limited to the life of the owner (in a life estate), or to a limited duration (in an estate for years) but was granted as a fee simple.[102] In short, the Charter was structured in light of a new vision of monarchical rule and consequently, of distributive justice.[103]

Since all printing houses effectively became members of the company, the company had to develop a way to mediate the various competing interests of its numerous commercial stakeholders. To achieve this goal, the company instated a fundamental rule that would eventually become a hallmark of intellectual property: the registration of copies.[104] Each member of the company that wished to publish a book had to visit the Stationers' Hall to register their rights in the copy.[105] In a similar manner to the grant of royal privileges under King Henry VIII, the company did not peruse the nature or content of the work and its decision to allow registration was purely based on commercial considerations.[106] The Stationers' Company simply granted a trade privilege and the printer was expected to seek printing authorization for his book from the ecclesiastic and political authorities who were permitted by the Queen to license these works.[107]

Registration offered a monopoly over the copy and, to a certain extent, over its content.[108] Registration also allowed any printer to

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100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.* at 88.
106 *See* SMITH, *supra* note 35, at 168–74.
107 *See* Gadd, *Stationers' Before 1710*, *supra* note 39, at 88–90.
108 *Id.*

inquire in advance whether the book he was planning to print was already registered and more crucially, to validate his printing rights in case of a dispute with another printer.[109] The Royal Charter of 1557 also established an internal bureaucratic system to oversee the process of copy registration, to facilitate transactions among the members of the company and to arbitrate between disputing printers.[110] Clerks and wardens were assigned to monitor these tasks and their operations were fully funded by the registration fees that were collected from the individual members upon the registration of their copies.[111] All of these administrative mechanisms were introduced in order to facilitate and regulate the commutative voluntary exchange of goods between private merchants in the newly established copyright market.[112]

F. The Routine Function of Copy Registration in Elizabethan England

After the grant of the Charter, the Stationers' Company effectively became a printer's guild.[113] Every printer who sought permission to print a book had to register their copy by entering the Stationers' Hall and presenting the book to one of the Stationers' wardens.[114] The warden's task was to determine if the submitted work would trespass upon the pre-registered rights of another copy.[115] In reaching this determination, the warden had to evaluate whether the newly submitted copy was, in fact, an act of piracy—the printing of a registered copy without authorization.[116] If the copy was deemed worthy of registration, the clerk would make an entry in the register as well as in the procedural notebook of the clerk.[117] The printer had to pay the clerk's fee and received a receipt in the form of a parchment that ensured his registration.[118]

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109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 *See* Graham Pollard, *The Early Constitution of the Stationers' Company*, 18 LIBRARY 235, 242–43 (1937).
114 *Id.* at 248–55.
115 *Id.* at 255.
116 *Id.*
117 Sisson, *infra* note 125, at 18.
118 *Id.*

In this context, a second important distinction must be made: entry in the register was not necessary to enable printing and publication, and only safeguarded the right in the copy and allowed the possibility of judicial relief.[119] The registration of a copy in fact, did not create the chattel itself; that is, the actual manuscript and no such sort of legal fiction was ever recognized or endorsed. Instead, certification granted access to sovereign remedial justice.[120] The act of registration was considered as a contract in which the printer pays a registration fee in exchange for sovereign protection and a guarantee that the courts of law will recognize a cause of action and will police the rights in the copy in a case of pirating.[121] Most notably, this right in property was in fee simple and could also be conveyed to another or even mortgaged, similarly to any other form of common law property.[122]

G. The Legal Jurisdiction of the Stationers' Bench

Since the Stationers' Company had a de facto monopoly upon the creation of rights in copies and in facilitating the exchange of property rights in publications among its members, it naturally followed that this Company was also endowed with some judicial authority, namely, in resolving ownership disputes.[123] This dispute resolution procedure was administered by the Stationers' Bench, a quasi-juridical body that consisted of distinguished members of the company as well as its chief wardens.[124] In cases of disputed ownership, it was the duty of the moving party, a stationer alleging the equivalent of modern-day infringement, to provide the Bench

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119 *See Id.*

120 Interestingly, the wardens did permit the 'pirating' of copies which were not registered in the Stationers' Register, since copies of non-member printers were not considered as entitled for legal protection. Rights in copies could only be established through a sovereign grant of these rights. Therefore, in essence, any right to a copy could only be achieved through registration in the Stationers' Register or by a direct act of the Court. This practice might seem unjust or egregious to the contemporary observer, but it is important to remember that the notion of property rights was intrinsically connected to sovereignty. *See* Gadd, *Stationers' Before 1710*, *supra* note 39, at 89.

121 *Id.*

122 This distinction was not unheard of in Sixteenth Century English law or foreign to English printers. *See* Feather, *supra* note 113, at 464–66.

123 *Id.* at 244–48.

124 *Id.*

with evidence that they owned the disputed copy, the correlated license to print it, and a valid registration of the copy in the Stationers' Register.[125] The vast majority of cases were relatively simple. Any printer that attempted to print or register a copy that was already in the register could be brought in front of the Stationers' Bench and held accountable for his infringement.[126] In simple cases the members of the bench only had to review the clerk's minutes of the original registration and decide the case after the opposing parties presented their oral argument.[127] This system was extremely efficient and practical because the bench had immediate access to self-authenticating evidence of ownership of copy in the form of the Stationers' Register which served as undisputed proof of valid ownership. In addition to its quasi-judicial role in resolving ownership disputes, the Company was tasked with the daily administrative role of overseeing the assignment and transfer of the ownership in copies from one stationer to another.[128] This transactional procedure was procedurally similar to the registration of a new copy and the transaction itself was sanctioned and deemed valid only if it was overseen by one of the Company's wardens which was tasked with making an official revision of the original ownership entry in the register record.[129]

From a theoretical perspective, the Company created a legally sanctioned procedural framework that facilitated both private transactions between the individual members of the Company and an effective enforcement mechanism that secured the property rights of these members in their copies. In essence, the entire registry system was designed to ensure the voluntary exchange of commensurable goods between two private individuals.[130] This regulatory framework also explains the severe prohibition that existed in those days to transfer these rights to copies without official Company oversight. This prohibition not only served as a measure that prevented nefarious acts such as the involuntary

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125 *See* C. J. Sisson, *The Laws of Elizabethan Copyright: The Stationers' View,* 15 THE LIBR. 8, 10–11 (1960).

126 *Id.* at 10.

127 *Id*. at 18.

128 *Id*. at 15–16.

129 *Id.*

130 *Id.* at 15, 18.

exchange of property between individual members of the Company, but more fundamentally ensured that all individual transactions were both commensurable and voluntary.[131]

H. Appealing to the Court of Chancery and the Private Transfer of Rights

In rare cases, disputes could be appealed from the Stationers' Bench to the Court of Chancery.[132] The benefit of appealing to the Court of Chancery, apart from getting a second chance at prevailing in the suit, was that intrinsic evidence could be introduced into the record in order to question the Stationers' Bench prior decision.[133] Such intrinsic evidence could potentially undermine the Company's records or establish a remedy in cases of irregularities in the registration procedure.

Modern research has discovered a number of cases from the Elizabethan period which have been pursued in the Court of Chancery.[134] One of these cases serves as a good illustration of the complex nature of these disputes. It involved an attempt to transfer the right in a copy of one stationer to another privately and without the Stationers' authority by bypassing the official process of registering the transaction in the Company's register according to standard procedure.[135] Although one can only speculate, it seems that the primary motivation for this illicit transfer had to do with the nature of the intended transfer. As was previously noted, rights in copies were granted in the form of fee simple property and remained in the exclusive possession of the printer until his death, upon which, the copy along with the rest of his inheritance was transferred to his beneficiaries.[136] The printer could alternatively transfer his rights in the copy to another printer but such action amounted to complete

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131 *Id.* at 14.

132 In such infrequent events, the Court of Assistants, a specialty court that dealt exclusively with matters of trade and commerce and which was comprised of members from the major guilds and companies of London, would meet in the Court of Chancery to provide expert guidance to the judges in the laws of copying and pirating. *See* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE, 29–34 (Vand. Univ. Press 1968).

133 *Id.* at 34.

134 *See, e.g.*, Sisson, *supra* note 125, at 9. The unreported case in the article is named Barnes v. Man (1616–1617). *Id.* at 10.

135 *Id.* at 10.

136 *See* Gadd, *Stationers' Before 1710*, *supra* note 39, at 89.

alienation that foreclosed any possibility of reverter or "term of years" transfer.[137] In light of these restrictions, the attempted private transfer that was documented in this specific case can be understood as an attempt to undermine the Stationers' system by limiting the transfer itself to a specified amount of printed copies. In other words, the original owner of the copy granted another printer the right to print a limited amount of copies in exchange for a sum of money without giving up his rights in it. This transaction could be equated to a modern license in patent. It remains unclear why such licensing was itself forbidden, but it seems that it emanated from a concern that such a license would lessen the future value of the copy due to excessive printing.

Another potential motivation of the parties in the case was perhaps to avoid the payment of the transfer fee which was imposed by the Stationers' warden upon the parties when they registered the transfer of rights in the Stationers' Hall.[138] In other words, the private contract might have been a simple attempt to circumvent the Company's regulations.

Notwithstanding the contracting parties' original motivation, the suit which was brought by them against the Stationers' Company was transformed by their counsel into a full-fledged attempt to challenge the prevailing notion that the assignment of copies was a public transaction that had to be supervised by the Company and required the Company's agreement for an absolute transfer of the copy.[139] In essence, the suit attempted to establish the equitable validity of a private contract between two voluntary contracting parties despite the lack of official documentation and procedure. In a more theoretical sense, the appealing party questioned the distributive authority which was bestowed upon the Stationers' Company by a royal grant to delineate the legal contours of the private commutative exchange of rights in book copies.

The reasoning of the court in dismissing this suit is noteworthy because it further elucidates the relationship between sovereignty and property during the sixteenth and early seventeenth centuries. In

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137 *See id.*

138 *See* Sisson, *supra* note 125, at 18.

139 *Id.* at 19.

its decision, the court reiterated the notion that any two parties are free to contract in order to transfer ownership in property.[140] However, this right is limited and circumscribed if the property in question enjoys any sovereign protection in regulation.[141] Therefore, if the copy was never registered in the Company's Register, there may be no restriction on the assignment of copy.[142] But from the moment the printer decided of his own accord to register his copy in the Stationers' Register, he entered into a binding contract with the Company (with the registration fee as consideration).[143] The contract endowed the printer with an exclusive monopoly right in the copy and in exchange the company was granted the sole authority to oversee and police the author's rights in the property.[144] In other words, the Court did not question the ability of two parties to contract freely in order to transfer goods but denied the ability of two parties to contract in order to transfer rights. Theoretically, the Court asserted that the commutative rights that existed in registered book copies was intrinsically dependent upon the sovereignly sanctioned distributive mechanisms that facilitated this type of commutative exchange in the first place.

In light of this decision, the second and private agreement between the printers violated the terms of the initial contract between the printer and the company. The decision highlights the assertion that the royal courts did not perceive the Company as the creator of the property right in the tangible manuscript itself but rather as the creator and facilitator of a market for copies.[145]

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140 *Id.* at 16–19.

141 *Id.*

142 *Id.*

143 Patterson argues that " . . . *the stationers owned only the right to publish, not the work itself*." PATTERSON, *supra* note 132, at 10. This assertion is anachronistic and frames the historical research in Lockean terms. The prohibition against partition was imposed due to commercial considerations in the form of a unique regulatory entail. If the owner of the copy could license its printing, this would diminish the value of the copy itself. Thus, the records indicate that publishing rights were strictly reserved to the actual owners of the "book to print."

144 *Id.* at 91.

145 *Id.* This complex mixture of private initiative in public market creation, quasi-judicial policing, and minimal direct sovereign intervention also ensured a higher degree of insulation from the ensuing political turmoil of the first half of the 17th century.

II. CONSTITUTIONAL REFORM AND THE SHIFTING CONCEPTION OF RIGHTS IN PROPERTY

A. The Demise of 'Absolutism' and the Rise of Populism

In the early 1600s, England gradually sank into a constitutional crisis that would eventually result in the regicide of 1648.[146] Mounting pressure from both Parliament and the judiciary limited the scope of monarchical sovereignty by questioning the supremacy of the king and his divine or absolutist right.[147] As part of this effort, the absolutist theory of sovereignty also came under direct attack. In Parliament, a growing number of members questioned the theoretical basis that justified the king's supremacy over the court by developing a new 'populist' theory of the state.[148] At the same time, judges and legal theorists disputed the royal origins of the English common law.[149]

Both efforts would also have a significant influence on the laws of copyright and the fate of the Stationers' Company. The advocates of Parliamentarian supremacy would eventually transfer the authority to police the rights in copies and patents from the Crown to Parliament by the 1660s and the proponents of judicial independence would reject the validity of the contracts which were created in the name of the king in the ensuing century.[150] This dramatic shift in political authority eventually reconfigured the field of copyright law into a system that resembles to a great extent the framework of contemporary intellectual property jurisprudence.

B. Judicial Jurisdiction and the Royal Prerogative

The first significant legal critique of the Crown was levied by Sir Edward Coke in the early decades of the 17th century. As Chief

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146 Traditionally, the roots of this sovereign crisis are traced to the fundamental conflict between King and Parliament over taxation and, in particular, over the growing reluctance of the English magnates to fund the Crown's wars with Spain. But the crisis was also fueled by the Common Law Court's ever-growing assertion of judicial autonomy and claims of legal independence from the Crown. *See* SMITH, *supra* note 35, at 168–75.

147 *Id.* at 249.

148 *See* John Barnard, *London Publishing 1640–1660: Crisis, Continuity and Innovation,* 4 BOOK HIST. 1, 2–5 (2001).

149 *See* SMITH, *supra* note 35, at 12.

150 *See* PATTERSON, *supra* note 132, at 6–7.

Justice of the Court of Common Pleas, Coke rejected the notion that the king was entitled to decide cases that were brought before the court.[151] Coke also claimed that it was the common law that protected the king and not the king that defended the common law.[152] Later, as Chief Justice of England, Coke continued to challenge the royal prerogative by triggering a series of infamous jurisdictional disputes that demanded the King's personal intervention. From his seat at the bench, Coke asserted that the supremacy of the common law was derived from his perception of it as a continuous body of law, handed down and developed since the pre-Norman conquest and which was in itself the most accurate reflection of the natural law.[153] Coke's views were deliberately based upon a distorted adaptation of the history of English common law and served him in his personal ambitious plan to undermine the authority of James.[154] But falsified history does not necessarily make a bad argument and Coke's celebrated opposition to James as well as his extremely popular legal writings were an invaluable intellectual contribution to the political enemies of King James who sought to limit the scope of sovereign authority. More abstractly, Coke argued, contrary to both Aristotle and Aquinas, that commutative justice ontologically predates any form of distributive justice and that the 'natural' commutability of common law principles is the jurisprudential foundation of any form of positive law.

In the decades that followed, Coke's persuasive and daring assertions came to galvanize the notion that the common law was both older and superior to the will of the king and became accepted as a historical fact that was merely obscured by the relatively recent and constant tyrannical abuse of the Tudor and Stuart Absolute monarchs.[155] In the broader perspective, Coke was also the first legal thinker that established a direct logical connection between the

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151 *See* SMITH, *supra* note 35, at 176.

152 *Id.*

153 *See.* P. A. Keane, Hon. J., *Sir Edward Coke,* Lecture at Sup. Ct. Libr. Queensland (Apr. 23, 2015), transcript available at http://media.sclqld.org.au/documents/lectures-and-exhibitions/2015/Justice-Keane-Selden-Society-lecture-one.pdf [https://perma.cc/R994-5U9F].

154 *Id.*

155 *Id.*

origin of property and the scope of the royal prerogative. This logical connection would be further substantiated by John Locke, albeit in the context of a more sophisticated theory regarding the origin of property.[156]

C. Populism and Parliamentary Supremacy

Shortly after this frontal assault from the Bench, in 1616 Coke joined Parliament. Here he united with a group of vocal critics of the Crown who espoused similar anti-Absolutist views.[157] This group would be later known as the Levellers, a political movement that emphasized popular sovereignty and the sovereign primacy of Parliament and its representatives over the King.[158] In 1628, Coke and his allies in Parliament introduced the 'Petition of Right' as a response to Charles I's attempt to enforce "forced loans" upon the members of Parliament in order to finance his military expeditions.[159] The 'Petition of Right' set out in clear and unambiguous terms what Coke considered as the pre-existing rights of Englishmen to be free from martial law, billeting of soldiers, non-Parliamentary taxation and imprisonment without cause.[160] Charles initially rejected the petition but the pressure of Parliament ultimately forced him to ratify it. By ratifying the petition, the king had to fundamentally acknowledge the existence of a number of cardinal individual rights on which he could not infringe and the scope of the royal prerogative was greatly reduced.[161] In essence, the 'Petition of Right' can also be seen as the first instance in which an official legal document implicitly acknowledged the notion that certain common law commutative rights predate and are therefore exempt from any form of sovereign distributive intervention.

In parallel to these legislative efforts, Coke and his fellow pre-Levellers espoused the view that the 'Petition of Right' merely reinstated the fundamental rights which were already recognized by the Kings of England following the ratification of the Magna

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156 *See* SMITH, *supra* note 35, at 6–7.
157 *See* Keane, *supra* note 153.
158 Cromartie, *supra* note 148, at 143.
159 *Id.* at 152.
160 *Id.*
161 *See* Keane, *supra* note 153.

Carta.[162] Some legal historians described this polemical view as the moment in which "The Myth of Magna Carta" was established and observed that "It was an age in which historical discoveries were received with credulity and in which the canons of historical criticism were yet unformulated."[163] The unadulterated mingling of politics and faux historical research, although recognized as such by many of Coke's contemporaries, remained largely unchallenged due to the mounting popular pressure in Parliament to curtail the deeply incompetent King.[164] Coke and his supporters not only managed to establish The Myth of Magna Carta among their contemporaries, but almost surprisingly, the myth itself was perpetuated in later years by new waves of jurists and politicians that might have deemed themselves more critical and will be examined in the next Sections of this Note.[165]

This political achievement also brought about a significant shift in the perception of property and its relation to sovereignty. Prior to the 1640s, property rights were widely conceived as rights that were conferred upon individuals by the sovereign.[166] But in his polemics, Coke made the now infamous assertion that, "A man's house is his castle."[167] This proclamation sought to sever the connection between the state and personal property and portrayed the sovereign not as the fountainhead of property rights but rather as the most significant threat to these rights.[168] Essentially, Coke asserted that sovereign distributive justice seeks to disrupt and undermine the natural tranquility that is the cornerstone of private commutative justice.

D. The End of Royal Control Over Property Rights and Law

The second stage in the development of the counter Absolutist thought emerged during the 1630s and 1640s and was led by

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162 *See* SMITH, *supra* note 35, at 193–95.

163 *See* Keane, *supra* note 153.

164 *Id.*

165 *Id.*

166 To be noted in particular is Richard Overton, among the first to theorize the principle of self-ownership. *See* Martin Dzelzainis, *History and Ideology: Milton, the Levellers, and the Council of State in 1649*, 68 HUNTINGTON LIBR. Q. 269, 271–72 (2005).

167 *See* SMITH, *supra* note 35, at 164–67.

168 *Id.*

political thinkers such as John Milton, Richard Overton, and Henry Parker.[169] These thinkers represented similar but distinct strands of political thought.

Milton and Overton adopted a radical 'populist' position as part of their political association with the Levellers by arguing that the seat of ultimate sovereign supremacy must be located with the people and not with the king.[170] These radical populists argued that the source of sovereignty is located with the people of England, or the body politic, and that the only form of legitimate government was that which was established by popular elections. Thus, they subverted the Absolutist head-body metaphor by asserting that it was the role of the body to both elect and if necessary reject its head through the process of democratic elections.[171]

Henry Parker, with his theory of representation, espoused a more moderate view that championed the sovereign primacy of Parliament over both the king and the common people.[172] The moderate Parliamentarians also located the source of ultimate sovereignty with the people but rejected the argument that elections ensured equitable representation. Instead, these thinkers held that the best way to promote the interest of the body politic was by figurative representation in Parliament. Figurative representation meant that the unelected members of Parliament must in their actions as members seek to represent the will of the people and strive to promote the common welfare of the body politic. This growing populist sentiment was ultimately coupled with the Lords' outrage over the King's taxations and led to the break of the Civil War in 1642.[173]

The aftermath of the Civil War produced a dramatic rift in English legal and constitutional landscape. For practical reasons, this work will not discuss the tumultuous period of the war itself nor the immediate period that led to the Glorious Revolution in great

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169 *See* Dzelzainis, *supra* note 166, at 269–70.

170 *Id* at 278.

171 *Id* at 283–85.

172 *Id.*

173 *See* David Wootton, *The Crisis of the Winter of 1642/43 and the Birth of Civil War Radicalism*, 105 ENGLISH HIST. R. Q. 654, 656–69 (1990).

detail. Rather, this Section will briefly focus on the impact of those events on England in the decades that followed.

The years that led up to the Civil War were marked by a simultaneous assault upon the royal prerogative. Both the common law courts and Parliament laid claim to sovereign supremacy by developing competing political theories. These constitutional conflicts ultimately resulted in the institution of Parliamentary superiority following the *Glorious Revolution* in 1688 and the ratification of the '*Bill of Rights*' in 1689. The passage of the bill significantly limited the scope of the royal prerogative and instituted Parliament as the seat of ultimate sovereignty. Although the Judiciary Bench failed to secure its primacy in the constitutional scheme, the common law courts also achieved significant independence from the royal prerogative, even if in truth, the courts effectively exchanged one master with another by becoming more dependent upon Parliament.[174]

All of these remarkable changes also produced a new property regime that would have been unrecognizable to a sixteenth century Englishmen who lived in the early 1600s. It was no longer the king who controlled the dispensation of land and taxation through his royal prerogative, but the Parliament that had an ultimate say in matters of property. By 1689, it became clear that the source of sovereignty and hence distributive justice in England was the Parliament.

III. THE EMERGENCE OF A NEW PROPERTY REGIME

A. The Property Regime Under Parliamentarian Rule

As Hannah Arendt has pointed out, prior to the late 17th century the word "revolution" was strictly tied to its original astronomical meaning, which signified the eternal, irresistible, ever-recurring motion of the heavenly bodies.[175] As a star that completes its revolution around the sun in the same precise place of initial departure, when the word was first invoked in the English political context during the 1660s— its use was metaphorical and served to

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174 Sections III.A and III.B of this work surveys these historical events in detail.

175 *See* Hannah Arendt, *The Freedom to Be Free,* 38 NEW ENG. REV. 56, 58 (2017).

describe a movement or a swing back to a pre-ordained order.[176] The *Glorious Revolution* of 1688 was therefore envisioned by its architects as a reactionary act by which the lawful King of England would once again be recognized as the pinnacle of sovereign dominion.[177] But perhaps ironically, the *Glorious Revolution* which formally intended to restore monarchial power to its former righteousness and glory, actually brought about significant constitutional changes which would have been practically unimaginable to Elizabethan Absolutist observers.[178] In fact, the *Glorious Revolution* proved to be much more 'revolutionary' from the way it was portrayed to the observing public.[179]

These changes were most radical and apparent in the field of property law. The 'Bill of Rights' of 1689 was enacted in order to limit the scope of the royal prerogative in property matters.[180] The Bill restricted the crown's ability to levy taxes without Parliaments' consent or to impose fines and fortitudes in the absence of due process. These limitations were coupled with another significant financial constraint upon the Crown. Up until the 1690s, the Exchequer issued royal tallies or debts of the crown against future tax revenue. These tallies served as sovereign bonds and provided the king with liquidity. The issuance of tallies was within the exclusive purview of the crown and provided it with a reliable means of remaining solvent at times of crisis. The formation of the Bank of England in 1694 marked the end of this independent practice and the issuance of tallies had to be approved by Parliament.[181] These two acts serve as the most potent examples of how the crown was stripped of any meaningful tool of controlling and regulating property in the immediate aftermath of the Glorious Revolution.

Concurrently, Parliament gained unprecedented control over property matters and secured its position as the ultimate authority in these affairs.[182] But Parliament, which was effectively controlled by

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176 *Id*.
177 *Id*.
178 *Id*.
179 *Id*.
180 *See* Keane, *supra* note 153.
181 See NAT'L MONETARY COMMISSION, HISTORY OF THE BANK OF ENGLAND AND ITS FINANCIAL SERVICES TO THE STATE, 66 (U.S. Gov't. Printing Off. 1911).
182 *Id*.

the landed gentry and England's magnets, also sought to limit the power of the state to regulate their own property. As a result, both the 'Bill of Rights' and further legislation in the field of property law imposed restrictions on the ability of the sovereign to forfeit property absent proper legal process.[183]

As in the days of Coke, many of the members of Parliament promoted their own financial interest by attempting to galvanize the 'sanctity' of private property.[184] In this respect, this political faction perceived Locke's labor theory as a powerful conceptual vehicle through which they could support their own self-interest.[185]

B. Locke's Labor Theory

As mentioned in the introduction, Locke's theory proved extremely helpful in cementing the theoretical justifications for the significant changes that took place in the 1690s. In a similar manner to the general perception of the *Revolution*, it was vital for Locke that his theory would be accepted as 'reinstituting' the English system of property to its 'original' historical roots.[186] In this sense, his theory provided a innovative yet ultimately fictitious account of property, disguised as a much-needed return to the traditional English precepts of property. In his writings, Locke sought to reconstruct a myth concerning the formation of English property rights and the establishment of the English constitution, much as Coke had done 50 years prior.[187]

Locke first theorized as to what was the 'natural' manner by which property is brought about. According to his account, property was created through individual labor, whether it be cultivation of land, the creation of objects or even hunting.[188] To protect their property, individuals gradually formed communities or governments that utilize the power of the many in providing such protections. In Locke's view, it therefore logically followed that the chief duty of any government to provide such protection is to its

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183 *See* Keane, *supra* note 153.
184 *Id.*
185 *Id.*
186 *See* Arendt, *supra* note 175.
187 *See* Keane, *supra* note 153.
188 LOCKE, *supra* note 6, at 23–24.

citizens and that any government which blatantly breached this duty was deemed despotic and illegitimate.[189]

In his *Second Treatise*, Locke attempted to demonstrate that this natural phenomenon was in fact the actual historical way by which the English nation and its common laws were first formed. He argued that the Saxon people established the English Crown in order to protect their private properties from Nordic invasions and that it was the role of the Saxon Kings to protect their subjects from wrongful appropriation.[190] In his works, Locke further insisted that even the Norman conquest of England did not in any way abolish the allegedly self-evident and natural property rights of Englishmen in their lands and property:

We are told by some, that the English monarchy is founded in the Norman conquest, and that our princes have thereby a title to absolute dominion: which if it were true, (as, by history, it appears otherwise) and that William had a right to make war on this island; yet his dominion by conquest could reach no farther than to the Saxons and Britons, that were then inhabitants of England. The Normans that came with him, and helped to conquer, and all descended from them, are freemen, and no subjects by conquest; let that give what dominion it will. And if I, or anybody else, shall claim freedom, as derived from them, it will be very hard to prove the contrary: and it is plain, the law, that has made no distinction between one and the other, intends that there should not be any difference in their freedom or privileges.[191]

Locke therefore vehemently denied that it was the sovereign who was the ultimate owner of all the property in England. Instead Locke claimed that, historically he was a mere custodial agent that was tasked with guarding and guaranteeing the private rights in property of the English people.[192]

In addition, due to this fact, Locke concluded that all property owners possessed ultimate jurisdiction over their private property with only some very narrow exceptions.[193] The most notable being

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189 *Id,* at 42.
190 *Id,* at 111.
191 *Id.*
192 *Id.*
193 *Id.*

that they should not infringe upon the rights of another Englishman.[194] In his account, however, the limits that are imposed upon this private right do not emanate from a centralized sovereign decision to promote the rather abstract common good through distributive justice. Rather, he argued that any limitation on private property emanates from a concrete or potential injury to another individual or his property.[195] In accordance with this understanding, the role of the government in regulating property is therefore limited to resolving disputes among private owners of property and protecting the rights of citizens from injurious uses of property by other individuals.[196] More abstractly, the role of the sovereign is limited to overseeing the equitable administration of commutative justice among the private individuals that are under its dominion.[197] In Locke's account, the role of distributive justice is entirely obscured. It only comes into play in the original allocation of goods prior to the formation of the government, that is, in the state of nature. Crucially, this understanding leaves very little room for the government to regulate private property in light of what it determines to be the common good. This is due to the fact that such action is distributive and any governmental regulation should only be made in light of protecting individual interest and not for the "benefit of the community."[198]

In the pragmatic political context, Locke's theory was utilized to introduce new legislation that broadened the private rights of citizens in their property and promoted the introduction of new privately owned institutions such as the Bank of England.[199] For example, during the debates surrounding the 'Four Percent Bill' of 1692, Locke was encouraged by Sir John Somers to argue for the merits of opposing the Bill which sought to enforce government regulation on privately serviced interest rates.[200]

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194 *Id,* at 117–20.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id*. at 100.

199 Letter from John Locke to John Freke and Edward Clarke (Feb. 14, 1696), *in* 12 THE OLD LADY OF THREADNEEDLE STREET, 39–40 (1936).

200 *See* Raymond Astbury, *The Renewal of the Licensing Act in 1693 and Its Lapse in 1695,* 33 THE LIBR. 296, 306–08 (1978).

Locke and his fellow Whig reformers in the early years of the Hanoverian rule of England were also greatly influenced by the Dutch society and wanted to emulate to a great extent this vibrant financial center of Europe.[201] This political faction that established itself as the Whig party in Parliament was deeply disturbed by the centralist-authoritarian rule of Louis XIV of France and identified his regime as antithetical to their vision of a liberal civic society.[202] Locke and his allies in Parliament envisaged a liberal society without legal barriers to the advance of the individual (so long as they were Protestant). Their political action was aimed at improving domestic and foreign trade and establishing London as a financial capital that was free from what they considered as cumbersome and corrupt sovereign oversight.[203] In addition, they promoted legislation that would weaken the grip of the central government over trade and commerce by constructing through laws, a political-economic framework that better resembled the Dutch model of a weak central government and robust privately owned corporations.[204]

The implied ideology that animated all of this vigorous political activity was that private wealth was good and could be earned by talent and hard work, and that given the right encouragement, individuals seeking their own good would create wealth and prosperity in this new competitive world. More fundamentally, this ideology was bolstered by a theoretical framework that championed the primacy of commutative justice and the perceived inherent commercial oppression of the absolutist form of distributive justice, which was identified as an antiquated scholastic remnant of the Dark Ages and their corollary tyrannical feudal regimes.[205] Locke not only argued for the replacement of the sovereign entity that administered distributive justice but also for the supremacy of the laws of private commutative justice over the positive laws of the willing sovereign whether it be a monarch or a democratically

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201 *Id.*

202 See CYNDIA SUSAN CLEGG, PRESS CENSORSHIP IN JACOBEAN ENGLAND, 8–10 (U.S. Cambridge Univ. Press 2001).

203 *See* Astbury, *supra* note 200, at 316–19.

204 *Id.*

205 *Id.*

elected parliament.[206] Hence, in his eyes Parliament should replace the role of the Crown as ultimate sovereign, but nonetheless, Parliament's laws should always be subordinate to the superior "*self-evident*" natural edicts of the common law.[207]

C. Copyright Law in the Aftermath of the Civil War and the Licensing Acts of the 1690s

All of these significant shifts in political philosophy and policy had a substantial impact upon the London book trade and most especially, upon the Stationers' Company. The first wave of parliamentary legislation in the field of copyright was enacted during the Restoration Period of the 1670s.[208] In the strictest technical sense, this legislation simply reinstated the principles and rules of the licensing system that existed prior to the eruption of the Civil War. However, some significant changes were implemented. The new legislation became tied to a stricter censorship regime that was enforced in order to silence any perceived opposition to the newly instated Catholic Stuart monarchs.[209] The Kings of this era, Charles II and James II, were deeply influenced by their French cousin and ally, King Louis XIV, and their efforts to heavily regulate the press were derived to a great extent from their personal ambition plan to quell any hint of internal opposition to their Absolute rule.[210] As a result, these new laws imposed a great burden upon the book trade. During the 1670s and 1680s, printers and other Stationers' workshops were frequently raided by agents of the Secretary of State and many manuscripts were confiscated and seized by order of the courts for containing potentially treasonous materials.[211] Extreme yet relatively frequent cases involving writings which were considered by the authorities treasonable, resulted in more severe punishment. Some printers were imprisoned and a number of them were eventually executed.[212]

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206 *Id.*

207 *See* LOCKE, *supra* note 6, at 302–21.

208 *See* Astbury, *supra* note 200, at 297–99.

209 *Id.*

210 *See* CLEGG, *supra* note 202, at 9–12.

211 *See* Astbury, *supra* note 200, at 299–302.

212 The most notable execution was that of Algernon Sidney in 1683, when his yet-to-be-published papers were confiscated to serve as evidence in his trial for treason. *Id.*

The majority of these persecutions were considered as an integral part of the overall concerted effort of the Tories in Parliament and the King's Courts to restrict the power of the Whigs over the English press. Executions were therefore reserved for those pro-Whig printers who sought to publish works that denied the legitimacy of King Chalres II's Catholic rule over England.[213] As opposed to the flourishing book trade of the tolerant Dutch, the English printers found themselves in the midst of a tense and at times violent, political conflict that turned their profession into a notoriously dangerous one.[214] Printers had to be very careful in constructing their political alliances and many of them decided for political and economic reasons to become loyal to the Tories and their Francophile Catholic King.

The *Revolution* of 1688 brought about yet another dramatic shift in the political balance of England in which the Whigs gained complete control of the Crown and the government. Suddenly, the Stationers who remained loyal to James II and in particular those who were Catholics, were prosecuted by Parliament and the courts.[215] Some of these printers were imprisoned because they were deemed to be radical Jacobites who sought to bring about the return of the exiled Stuarts, but none of them were executed.[216] Instead, Locke and his Whig allies in Parliament attempted to curtail the authority of the Stationers' Company, which they identified as a bastion of support to the old Catholic regime.[217]

In 1692, the Tory Party in Parliament was nonetheless able to pass a Licensing Act with the support of some centrist Whigs.[218] The Tories were traditional backers of the Stationers' Company and recognized that the *Licensing Act* was the key legal instrument to protect the Company's commercial interest.[219] Surprisingly, the centrist Whigs supported this legislation because it also included censoring provisions that enabled the Stationers and the courts to

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213 *See* HAROLD M. WEBER, PAPER BULLETS: PRINT AND KINGSHIP UNDER CHARLES II, 196–201 (Univ. Press of Kentucky 1996).

214 *Id*.

215 *Id.*

216 *See* Astbury, *supra* note 200, at 297.

217 *Id.* at 304.

218 *Id.* at 304–05.

219 *Id.* at 300.

regulate the press by weeding out Jacobite members of the trade.[220] But this coalition was fragile and relied upon the partisan cooperation of two political factions that were essentially at odds with each other.[221]

The opposition to the Licensing Act of 1692 was composed from the remaining majority of the Whig party in Parliament.[222] The Whigs opposed the Act for two main reasons. The predominant reason was a political one: to limit the commercial and political influence of the Stationers Company that they identified as a Tory-Catholic leaning institution. The second motivation was commercial: to break the perpetual monopolistic grip of the individual members of the company over the copyrights they held in lucrative canonical literary works. Ultimately, all the strong opposition to the Bill due to its restricted support, the 1692 Act was limited in duration and was set to lapse in 1695.[223]

Locke and his followers recognized this political opportunity and immediately began to engage in lobbying efforts to ensure that the Act would not be renewed without undergoing significant alternation. To achieve this goal, Locke and his political allies decided to dismantle the coalition that enabled the legislation to pass in 1692. They did so by arguing that the matters of censorship and copyright are distinct issues and that the Licensing Act should be accordingly bifurcated into two separate bills that address both matters separately.[224]

Without the support of the 1692 coalition, Parliament was unable to renew the Act in 1695.[225] The Tories failed to gather sufficient Whig support to pass a bill that would only address the concerns of the members of the Stationers Company.[226] Meanwhile, the moderate Whigs failed to recruit enough Tory backing to pass

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220 *Id.* at 305.
221 *Id.* at 301.
222 *Id.* at 307–08.
223 *Id.* at 314.
224 *See* Astbury, *supra* note 200, at 307.
225 *Id.* at 315.
226 *Id.* at 310.

legislation that would provide the Hanoverian Whig King with a powerful tool to prosecute their historical Catholic allies.[227]

Locke himself promoted an alternative copyright bill that would greatly diminish the power of the Stationers' Company, but this bill proposal also failed to gain sufficient political traction.[228] Nonetheless, it can be argued that Locke must have been greatly satisfied with the outcome of his lobbying efforts. The lapse of the Act in 1695 significantly damaged the Stationers' Company.[229] The company's register was no longer a legally binding official data-base and the Stationers' century-old control over the regulation of copyright in England was greatly diminished. In addition, the lapse of the Act had de-facto introduced the notion of 'free press' in England. Absent a legally sanctioned censoring mechanism, the Crown was unable to prosecute or censor printers who were deemed politically problematic.[230]

In short, the aftermath of the Glorious Revolution also marked the end of the historical role of the Stationers' Company in copyright regulation. This end was the result of a significant change in sovereign authority which greatly curtailed the scope of the Royal prerogative.[231] Absent Royal protection, the Company proved to be an easy target to its commercial and political rivals. In this context, it is also crucial to note that the sovereign changes of the 1680s and 90s did not produce a better or more efficient copyright regime. Instead, the governmental vacuum that was created by the lapse of the Licensing Act in 1695 resulted in a fifteen-year period of legal and commercial chaos in the field of copyright.[232] Without any enforceable legal mechanism, pirating was rampant, and the English book market collapsed into a disarrayed free-for-all.[233] If anything, this anarchic period attests to the commercial devastation that ensues in the absence of sovereign distributive legal mechanisms.[234]

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227 *Id.* at 306–14.
228 *Id.* at 308–09.
229 *See* Gadd, *Stationers' Before 1710, supra* note 39, at 92–95.
230 *Id.* at 94–95.
231 *Id.* at 95.
232 *Id.*
233 *Id.*
234 *Id.*

Even if Locke honestly intended to protect the printers from censorship and award authors with adequate compensation, the sovereign vacuum of the late seventeenth and early eighteenth centuries produced the opposite result.[235] The breakdown of the English book trade left the individual printers and authors legally exposed and unprotected.[236]

D. The Statute of Anne and Its Immediate Implications

The lapse of the Licensing Act in 1695 had resulted in a great depreciation in the political and commercial influence of the Stationers' Company. Without an effective enforcement mechanism, the Company's register was no longer routinely used by printers who sought to protect their works.[237] Many of the Company's individual members lost a great source of their revenue due to pirating and had to limit the amount of copies they printed. In addition, the English book market was flooded with cheap book copies from the continent which had further damaged domestic commerce. The Company made a number of attempts to persuade Parliament to act but due to their diminished importance these requests were largely disregarded.[238]

Nonetheless, during the early years of the 18th century, a growing number of renowned authors such as Daniel Defoe and Jonathan Swift began lobbying Parliament to enact new laws that would protect their writings. Due to their disadvantaged circumstance, the Stationers made a strategic decision to join this effort and also argued that author's works should receive governmental protection.[239] Thus, this newly formed coalition was in essence, a union of two historic commercial adversaries under one cause. But more importantly, it signaled a fundamental change in the Stationers position concerning copyright law.[240] First, due to their diminished political influence the Stationers conceded that any

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235 *Id.* at 94–96.

236 *Id.*

237 *See* PATTERSON, *supra* note 132, at 106.

238 *Id.* at 106–10.

239 *See* RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN, 1695–1775, at 32–33 (Hart Publ. 2004).

240 *Id.* at 35–47.

form of legislation should primarily protect the rights of authors and not of printers, as legislation in the field historically did.[241] Second, they cleverly framed this sovereign protection as stemming from the Lockean principles of the labor theory of property and not as emanating from the rights that were historically bestowed upon them by the king over the ownership of copies.[242] In other words, to promote their short-termed commercial interest, the members of the Stationers Company came to reject the primacy of the rights of printers according to the old distributive regime and based their claims upon the commutative principles of commensurate exchange. This position ultimately alsovundermined their rightful claim to the copies of the canonical works they traditionally held, but nontheless it seems that this was a concession they were willing to make in order to revive their threatened enterprise.[243] Finally, the Stationers supported the authors argument that legislation in the field is necessary to promote the general welfare of the reading public and abandoned the traditional position that it was necessary in order to regulate the commercial field of book printing.[244] All of these concessions were made by necessity and reflect a rather desperate attempt to restore some sort of order to their threatened trade.

After years of mounting pressure, the Copyright Act of 1710 was enacted in April of that year. The Act contained a number of important provisions. First, it sought to curtail the dissemination of unlicensed and foreign books. Second, it was framed as "An Act for the Encouragement of Learning." Third, the Act transferred the right in copies from the Stationers to the authors of the works. Fourth, it limited the role of the Stationers' Company: matters of pirating or infringement were no longer under the jurisdiction of the company but rather under the sole supervision of the courts.[245] Finally, the Act set a time limit on the protection that was afforded to new copies and foreclosed the right to own copy rights in perpetuity. To reward the Stationers for all the concessions they were willing to make, a provision was made to protect the copies that were historically held

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241 *Id.*

242 *Id.*

243 *See* Gadd, *Stationers' Before 1710, supra* note 39, at 94–99.

244 *Id.*

245 The company retained its historical role as the agency that registered copies. *See* DEAZLEY, *supra* note 239, at 39–42.

by the company for an additional period of 21 years after which these once perpetual rights would fall into the public domain.[246]

The Copyright Act of 1710 can be seen as a piece of legislation that reconciled the interests of the Authors and the Stationers' Company. The majority of the provisions in the Act manifested Locke's principles of the labor theory of property. The property itself, referring to the written works, is created by the individual author independently of any government intervention. Therefore, the role of the legislation can be seen as regulating the actual protection of this private property from wrongful usurpation for a limited time.[247] It is important to note that the Act did not clearly distinguish between the protection of the tangible manuscript itself and the intangible right over the circulation of copies of the manuscript.[248]

However, the Act itself also contains two other provisions that can be identified as stemming from a more traditional and distributive understanding of property. In this sense, the Act can be viewed as an 'amphibious' creature of the law. The first element that manifests the hybridity of the Act is the section that states that the law is enacted as "An Act for the Encouragement of Learning." The second element is of course the imposition of a limitation on the time for which the copyright protection would be granted.[249] Both provisions contain traces of the traditional property maxim that asserts that property is a positive right which is conferred by the sovereign and establishes a legal relationship between an individual and a legally recognized object.

Most importantly, the Act de facto rejected the Lockean proviso concerning the imposition of limitations upon the possession of private property. The 'limited duration' provision of the Act does not stem from a concern for rights of other private individuals but in order to promote the common good. In other words, the limitation is imposed in accordance with the principles of 'distributive' and not 'commutative' justice. Although the Act adopted some of Locke's

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246 *Id.* at 59.

247 *See* PATTERSON, *supra* note 132, at 151–53.

248 *Id.*

249 *Id.* at 144–45.

language and also his views about the rights of authors in their works, it outright rejected his theory of property.

The aftermath of the legislation marked a turning point for the English book trade. New and more independent printers were able to enter the market and the general situation of authors greatly improved.[250] The Stationers' Company however, never returned to its former glory and the registration of copies in the Company's Register did not increase in a significant way after the legislation was enacted. Instead, the members of the Company found some comfort in their renewed ability to control the printing of registered classic works due to their historic exclusive rights in them. Ultimately, the Statute expired in 1732 and led to the outbreak of the "Battle of the Booksellers," a second period of legal uncertainty that was to last until the end of the 1770s and is discussed in greater detail in Section III.E.[251]

E. Blackstone's Conception of Intellectual Property

To fully understand Blackstone's conception of intellectual property it is essential to briefly trace the theoretical influences that shaped his legal opinion. First, as many other eminent jurors of the age, Blackstone was deeply influenced by Coke's theory of the common law and considered himself a staunch proponent of his thinking.[252] Blackstone supported the notion that common law was based on custom, adopted voluntarily by the people of Britain and predated the English monarchy.[253] In addition, Blackstone echoed Coke's assertion that the common law is the most accurate reflection of the natural law.[254] This led him to declare that these common law rights are "natural" in the legal sense and therefore cannot be abrogated by the sovereign.[255]

Second, Blackstone supported Henry Parker's position in relation to Parliament's supremacy. As part of this position,

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250 *See id.* at 143–48.

251 *See also* DEAZLEY, *supra* note 239, at 163–67.

252 *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF THE RIGHTS OF THINGS 51–53 (Wilfrid Prest ed., 2016) (1765).

253 *Id.* at 3–9.

254 *Id.* at 2–7.

255 *Id.*

Blackstone maintained the view that Parliament was the seat of ultimate sovereignty in England and that any law or judgment must be executed only upon Parliament's approval.[256] This view of Parliament was most popular amongst the English elite of that age. In this context, it is crucial to note that as a supporter of Parker's views of representation, Blackstone was by no means a populist and he had out rightly rejected the populist notion of popular representation.[257]

Third, in the field of property, Blackstone generally adopted Locke's views by embracing his labor theory. As noted in Section II.F, Locke's theory fit rather neatly with Coke's views on sovereignty. In relation to the field of copyrights in particular, Blackstone agreed with Locke that authors create their literary works through labor and that it is the role of governments to protect this form of intellectual property.[258]

At first glance, it seems that these three main propositions are internally consistent and co-exist rather harmoniously but in fact, they will prove to be contradictory and ultimately irreconcilable. James Wilson, one of the founding fathers of the United States and a renowned legal theorist, summed up Blackstone's theoretical inconsistencies in a precise manner:

> "It is one of the characteristick marks of English liberty," says he [Blackstone], "that our common law depends upon custom, which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people." I search not for contradictions: I wish to reconcile what is seemingly contradictory. But, if the common law could be introduced, as it is admitted it probably was, by the voluntary consent of the people; I confess I cannot reconcile with this—certainly a solid—principle, the principle that "A law always supposes some superior, who is to make it," nor

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256 *Id* at 47–49.

257 *See* BEN HOLLAND, THE MORAL PERSON OF THE STATE: PUFFENDORF, SOVEREIGNTY AND COMPOSITE POLITIES 65–66 (Cambridge Univ. Press 2017).

258 *See* BLACKSTONE, *supra* note 252, at 274.

> another principle, that "sovereignty and legislature are indeed convertible terms."[259]

In this passage, Wilson respectfully points out to the fundamental flaw in Blackstone's view of the law and sovereignty. He observes initially that Blackstone is a proponent of Coke and asserted the 'naturalness' and superiority of the common law. But he also demonstrates that at the same time, Blackstone argued for the supremacy of Parliament as the source and fountainhead of all laws. In other words, in his theoretical writings Blackstone introduces a conflict of laws and it is impossible to determine which of the two sources of law, Parliament or the common law should prevail in the case of any direct contradiction.[260]

Therefore, and perhaps unsurprisingly, it was this abstract and theoretical conflict regarding notions of legal supremacy that produced Blackstone's confusing position on intellectual property law which guided his actions during the great legal conflict that later came to be known as the 'Battle of the Booksellers.' This notorious and long-lasting legal conflict involved two factions of the book market that represented two competing commercial interests. One faction included established members of the Stationers' Company and authors who licensed their works to those printers.[261] The opposing side consisted of a rapidly growing number of independent printers which had printed works that had 'fallen' into the public domain in accordance with the 1710 Act.[262] The Stationers' faction argued that the original authors of the works had a 'natural' and perpetual common law right in their labor and that the provision in the 1710 Act, which secured their rights for a limited period of 14 years, was violating this right. The independent printers argued that the Act did not violate any such right and that they were fully empowered to print these works in light of the statute.[263]

During the 1760s, Blackstone became actively involved in the dispute as a barrister for the Stationers' faction. In 1769, he submitted the written argument on behalf of his client Millar, a

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259 *See* 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 570 (2007).
260 *Id.* at 569–71
261 *See* PATTERSON, *supra* note 132, at 151–54.
262 *See id.*
263 *Id.* at 184–85.

wildly affluent Scottish publisher, in the case of *Millar v. Taylor*.[264] Millar was extremely litigious and was a plaintiff in a number of litigations concerning the matter of copyright protection during the 1750s and 60s. The gist of Blackstone's argument in the case was summed up by the court:

> The Plaintiff insisted that there is a real property remaining in authors, after publication of their works and that they only, or those who claim under them [licensed publishers], have a right to multiply the copies of their literary property, and their pleasure, for sale. And they likewise insisted, that this right is a common law right, which always has existed, and does still exist, independent of and not taken away by the statute of 8 Anne c.19.[265]

In terms of sovereignty theory, this argument asserted the primacy of the common law over the positive law of Parliament and the superiority of 'natural' common law rights over positive rights that are conferred by legislation.[266] In contrary to the conflicting position that was apparent in his writings upon the nature of English sovereignty, as a barrister, Blackstone clearly advocated for the supremacy of the common law over the positive laws of government.

Perhaps unexpectedly, the court in the case ruled in favor of the Plaintiff Millar. In his majority opinion, Sir Richard Aston directly quoted a passage from Locke and concluded that:

> [A] Man may have Property in his Body, Life, Fame, Labours, and the like; and, in short, in anything that can be called His: That it is incompatible with the Peace and Happiness of Mankind, to violate or disturb, by Force or Fraud, his Possession, Use or

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264 *Id.* 159–77

265 Millar v. Taylor (1796) 98 Eng. Rep. 201, 202 (K.B.).

266 In addition, by asking the court to rule in the plaintiff's favor, Blackstone recognized the courts as the ultimate arbiters of the law. This recognition in fact advocated for the supremacy of the judicial branch within the English constitutional scheme. *Id.* at 206.

> Disposal of those Rights; as well as against the Principles of Reason, Justice, and Truth.[267]

Lord Mansfield, who previously served as counsel for another copyright-holding publisher, filed a separate concurring opinion that also asserted the supremacy of the common law and stated that "what is agreeable to the natural principles is common-law; what is repugnant to natural principles is contrary to common law" and concluded that " . . . it is agreeable to natural principles that an author should have a copy of his own works . . ."[268]

Interestingly, Sir Joseph Yates, the sole dissenter in the case, did not reject the constitutional or sovereign principle that underlined the legal theory that was presented by Blackstone. Instead, he merely disagreed with the plaintiff's assertion that the Act actually violated the 'natural' and common law right of authors in their works.[269] In his dissenting opinion, Yates argued that while an author does have natural rights in his works, he voluntarily forfeits those rights to the world if he publishes the work and benefits from the protection of the law. His opinion was also based on Locke's theory of property, but it took into consideration Locke's proviso that whilst individuals have a right to private property from nature by working on it, they can do so only "at least where there is enough, and as good, left in common for others"[270]:

> Shall an Author's Claim continue, without Bounds of Limitation; and for ever restrain all the Rest of Mankind from their natural rights, by an endless Monopoly? Yet such is the claim that is now made; a Claim to an exclusive Right of Publication, for ever: For, nothing less is demanded as a Reward and Fruit of the Author's Labour, than an absolute Perpetuity.[271]

Through his vigorous advocacy, Blackstone secured a significant victory for the established publishers of London and for

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267 *Id.* at 220.
268 *Id.* at 252.
269 *Id.*
270 *See* LOCKE, *supra* note 6, at 17–18.
271 Millar v. Taylor (1796) 98 Eng. Rep. 201, 232 (K.B.).

English authors in general.[272] But in the wider context, *Millar v. Taylor* can also be seen as a remarkable victory for the proponents of the supremacy of the common law and attest to the potency of the 'Myth of the Common Law' which was first conceived by Coke more than 150 years prior to this decision. It is impossible to discern whether Blackstone's advocacy was entirely motivated by his sense of justice or from political expediency but it is clear that despite his inability to reconcile the theoretical gap in his writings concerning this conflict of laws, he was unhesitant to promote a persuasive legal theory that clearly favored the common law.

F. The Demise of Common Law Copyright in England

Despite its decisiveness, the precedent set by *Millar v. Taylor* lasted for less than five years. In February 1774, the case which was heard at the Court of Chancery was appealed to the House of Lords that also served as the court of final appeal.[273] The twelve judges that heard the case were asked to determine five questions: (1) "Whether, at common law, an author of any book or literary composition, had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same, without his consent?" (2) "If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author?" (3) "If such action would have lain at common law, is it taken away by the statute of 8th Anne: and is an author, by the said statute, precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby?" (4) "Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same, in perpetuity, by the common law?" and (5) "Whether this right is any way impeached, restrained, or taken away, by the statute 8th Anne?"[274]

In the most abstract sense, questions (1), (2), and (4) concerned the nature of books and literary works as property, while questions

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272 *See* PATTERSON, *supra* note 132, at 151–54.

273 Donaldson v (1774) 4 Burr. 2408, 7 P.C. 88 (H.L.), 17 Cobbett's Parl. Hist. 953.

274 *Id.* at 976.

(3) and (5) were constitutional questions that concerned the supremacy of positive statutory law.

Despite his apparent conflict of interest, Blackstone decided not to recuse himself and served as one of the judges that opined in the case and found in favor of the plaintiff, in accordance with his previous advocated position in the lower court.[275] In essence, Blackstone reaffirmed the constitutional principle that the common law is supreme and therefore should preempt any positive law that directly contradicted it.[276] With regard to the nature of copyright property, Blackstone reiterated his position that any book or literary composition constitutes common law property. In light of these two assertions, Blackstone concluded that the Statute of Anne unlawfully usurped the right of authors in the works in question.[277]

However, Blackstone's view was the minority opinion in the case. Both the majority of the twelve judges, as well as the House of Lords, ruled in favor of the defendant in the case.[278] The majority of the judges in the case did not submit a uniform opinion and some of the majority judges disagreed about the correct answers in response to the five questions presented. Nonetheless, two of the opinions, those of Lord Chief Justice De Grey and Lord Camden, are of particular interest.

Lord Chief Justice De Grey found that although a common law property right existed over the tangible manuscript produced by the author, this common law right did not extend as far as to protect any additional intangible right in subsequent printed works produced in accordance with the original manuscript.[279] In addition, De Grey found that at any rate, the positive law of Parliament was supreme and that it legitimately abrogated any preexisting 'natural' or common law right. Interestingly, similar to Blackstone's, De Grey's analysis concerning the nature of books and literary works was Lockean in its nature.[280] He concluded that manuscripts are tangible

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275 *See* DEAZLEY, *supra* note 239, at 142–47.
276 *Id.*
277 *Id.*
278 *Id.*
279 Donaldson v. Beckett (1774) 4 Burr. 2408, 7 P.C. 88 (H.L.) 17 Cobbett's Parl. Hist. 953, 988.
280 *Id.*

objects that should be awarded the protection of the common law. But since Locke never settled the question of whether the legal status of intangible and tangible objects was the same, De Grey and Blackstone interpretations of Locke's labor theory differed in respect to this question. In addition, De Grey conducted an extensive historical research to determine whether a common law right in books or literary works ever existed in England.[281] In his opinion, De Grey concluded that:

> What is common law now, must have been so 300 years ago, when printing was invented. No traces of such a claim are to be met with prior to the Restoration. Very few cases of this kind happened in Charles 2d's time, or before the licensing act, and those few were determined upon the prerogative right of the crown. The executive power of the crown drew after it this prerogative right, which extended to all acts of parliament, matters of religion, and acts of state.[282]

De Grey's legal research was commendable and can be said to withstand the test of time. However, his interpretation of this legal history sheds light on the way Locke's conception of property became so pervasive by the end of the 18th century that it obscured any other understanding of the fundamental concept of property. De Grey's analysis failed to recognize that a royal prerogative right was, in fact, the sovereign juridical mechanism by which property was legally constructed and ultimately realized in pre-Civil War England. In other words, no common law right existed in books since property itself was not conceived as a creature of the common law, but rather a right that was conferred by the sovereign.

This exact distinction concerning the legal construction of property that De Gray faild to observe in his opinion was brilliantly summarized by Thomas Hobbes during the Civil War:

> And you cannot deny but there must be law-makers, before there were any laws, and consequently before there was any justice, (I speak of human justice); and

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281 *Id.*

282 *Id,* at 988–89.

> that law-makers were before that which you call own, or property of goods or lands, distinguished by meum, tuum, alienum . . . You see then that no private man can claim a propriety in any lands, or other goods, from any title from any man but the King, or them that have the sovereign power; because it is in virtue of the sovereignty, that every man may not enter into and possess what he pleaseth; and consequently to deny the sovereign anything necessary to the sustaining of his sovereign power, is to destroy the propriety he pretends to.[283]

As this Note already demonstrated, prior to the Civil War no juridical distinction had to be made between royal grants and private property. In fact, from a strict legal perspective, these two terms were indistinguishable. It is unsurprising that in his extensive research De Grey found that these historical decisions "[do] not say a word of property."[284]

Most importantly, it is once again crucial to note that these two different definitions of property bare significant implications on the understanding of sovereignty. In his research, De Grey directly encountered the legal argument that "property [is] founded on [the royal] prerogative," but concluded that such an argument "however allowable for counsel, [is] not very admissible by, or intelligible to, a judge."[285] It is possible to argue that De Grey's remarks in this context were not honest, and that the Lord Chief Justice was well aware of the historical legal validity of this argument. In other words, he well understood that accepting this prerogative based argument as valid would undermine the prevailing constitutional understanding of property. This, in turn, would imply that the seat of ultimate sovereignty is after all the Crown and not Parliament or the courts. However, this possible explanation is merely speculative and it is more likely that De Grey was not entirely familiar with the nature of the pre-Civil War legal scheme.

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[283] *See* THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 72–74 (Univ. of Chi. Press 1997).

[284] Donaldson v. Beckett (1774) 4 Burr. 2408, 7 P.C. 88 (H.L. 1774), 17 Cobbett's Parl. Hist. 953, 989.

[285] *Id.*

Much has been written in recent years about this case and about the role of the common law in the regulation of intellectual property in 18th century England.[286] A number of the scholars that have researched the case and its history are divided upon the question of whether the House of Lords decided that a common law right in intangible works of intellectual property existed historically. It might be the case that a definitive answer to this question would never be found but it is unquestionable that the House of Lords decided that regardless of whether such a common law right existed, the positive law of Parliament abrogated it.

In addition, this Note seeks to establish that the question of whether the House of Lords found that such a right 'existed' and the question of whether such a right actually historically existed are two important but ultimately separate questions.[287] In this context, this Note suggests that such a common law right surely did not exist prior to the Civil War and probably did not exist prior to the publication of Locke's *Second Treaties* in 1689. Given the circumstances, it is also reasonable to speculate that both Blackstone and the plaintiff in the case did not have direct historical evidence such as court records or decisions that indicated the actual existence of such a right prior to the Glorious Revolution. They instead relied upon a more equitable argument that was based upon the persuasive ideology of Coke, Locke, and their theoretical successors. But, in fact, Lord Camden's opinion in the case makes clear that at least some of the Lord's were familiar with the pre-revolution legal scheme:

> The arguments attempted to be maintained on the side of the respondents, were founded on patents,

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[286] *E.g.,* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008); Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 413–15, 424 (2004); H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197, 1221 (2008); Edmund W. Kitch, *Intellectual Property and the Common Law*, 78 VA. L. REV. 293, 295 n.12 (1992); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 335 (2004); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 31 (1987); Catherine Seville, *The Statute of Anne: Rhetoric and Reception in the Nineteenth Century*, 47 HOUS. L. REV. 819, 824–27 (2010).

[287] Donaldson v. Beckett (1774) 4 Burr. 2408, 7 P.C. 88 (H.L. 1774).

> privileges, Star Chamber decrees, and the bye [sic] laws of the Stationers' Company; all of them the effects of the grossest tyranny and usurpation; the very last places in which I should have dreamt of finding the least trace of the common law of this kingdom; and yet, by a variety of subtle reasoning and metaphysical refinements, have they endeavoured to squeeze out the spirit of the common law from premises in which it could not possibly have existence.[288]

If anything, it seems that Camden and his fellows were willing to accept or were capable of understanding the historical origin of intellectual property in England. It demonstrates that the political circumstance of this given era had narrowed their ability appreciate or sanction the underlying legal principles of a previous constitutional scheme. Simply put, the jurists of the late 18th century conceived of their intellectual heritage as antithetical to their own ideological beliefs. As a result, they simply rejected those legal principles that shaped the sovereign theory and the legal scheme that existed in England in the decades that led to the Civil War.

Nonetheless, the case clearly established that even if a common law right in books or literary works existed historically, the Statute of Anne has rendered this right irrelevant.[289] The case therefore can be seen as a clear triumph of Parliament's supremacy over the common law, but also as a moment of extreme dissonance between legal practice and theory.

Provided with this historical survey, it is now possible to answer the questions that were presented to the House of Lord's in the case: (1) Prior to the Civil War, authors did not possess a copyright in their literary works; instead, printers were conferred with this right by a sovereign act of distributive justice and were entitled to protect these rights in the courts of common law. (2) Prior to the Civil War, authors could sell their manuscripts to members of the Stationers' Company in accordance with the laws of commutative commercial exchanges but they had no legal authority to reprint, sell or to

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288 *Id.*

289 *Id.*

prohibit these actions after they have sold their work. (3) Parliament as the supreme and ultimate seat of sovereignty, had the authority to abolish the distributive regime that was instituted by Queen Mary and replace it with another (i.e. the Statute of Anne). (4) Historically, authors had no printing rights but members of the Stationers' Company were vested by the prerogative with the sole right of printing, publishing or distributing copies in perpetuity and they were entitled to enforce this right in the courts of the common law. (5) Finally, the historical rights that were conferred upon the members of the company was indeed "impeached, restrained, or taken away" by the subsequent Statute of Anne.[290]

CONCLUSION

Initially, this Note applied Locke's labor theory to the AIA's first-inventor-to-file legal scheme. This attempted application has revealed the inability of the theory to adequately explain the animating principles of our prevailing patent jurisprudence. A short historical survey demonstrated that in its origins, intellectual property law had functioned in harmony alongside the contemporaneous legal theory. For political reasons during the 17th century, the system was first disturbed by practical political reforms and later was itself theoretically reformed by John Locke. These reformers denied the ability of the king to decide who can create and own intellectual property. They also questioned the ability of any sovereign government to select who should be granted property rights. Locke's new theory perceived property as a creation of individual labor and deemed the process of private property accumulation as reflective of personal merit. However romantic this tale might sound, it simply did not represent the actual pre-existing legal scheme that was historically constructed according to an antithetical legal architecture. Perhaps surprisingly, the original architecture of that legal system still governs our laws and to generate any type of meaningful legal reforms in the field, we must first come to terms with the inability of our prevailing ideology to describe actual legal practice.

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290 *Id.*