FROM RIGHTS IN COPIES TO COPYRIGHT: THE RECOGNITION OF AUTHORS' RIGHTS IN ENGLISH LAW AND PRACTICE IN THE SIXTEENTH AND SEVENTEENTH CENTURIES

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An author's right to be treated as the creator and owner of literary property is not defined in any English statute before the Copyright Act of 1814.[1] That Act, however, was to some extent a formal codification of long-standing practices that had arisen partly because books are commercially viable properties only after they pass through the hands of publishers, printers, and booksellers. Indeed, the real history of copyright in Britain, as opposed to its formal legal history, can never be dissociated from the organization and structure of the book trade. That was as true in the sixteenth century as it was in the nineteenth, for it was in the sixteenth century that the concept of a book (or text or work) as property began to evolve. This paper traces one aspect of that evolution, and tries to discern what, if any, rights the author was deemed to have, or could abrogate to himself.

The traditional view among literary scholars, supported by many legal historians, is that authors' rights were non-existent in the sixteenth century. It is argued that, with the exception of a few cases of crown grants of patents to individual authors to protect their books, there is no evidence for authors' rights in any form. The earliest glimmering of recognition cannot be found until the 1640s, when some stationers began to pay authors for their books.[2] This argument is, in itself, clearly inadequate, if only because of its fallacious logic. If authors' rights were not recognized, why were the patents granted to authors? Moreover, if we are prepared to accept that payment to authors constitutes a *de facto* recognition of rights, we have to concede that there is evidence for payments before the 1640s. These caveats, however, are comparatively trivial. We cannot test the traditional

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[1] John Feather, *Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775-1842 Part II: The Rights of Authors*, 25 PUBLISHING HIST. 45-72 (1989).

[2] Leo Kirschinbaum, *Author's Copyright in England Before 1640*, 40 PAPERS OF THE BIBLIOGRAPHICAL SOCIETY OF AMERICA 79 (1989). *See also* Feather, *supra* note 1, at 43-80.

view of copyright evolution without looking in a little more detail at what rights were considered to exist and how they were established and protected.

In England, the legal basis for the granting of rights in copies was the Royal Prerogative. The extreme assumption in law was that all written works could be disposed of by the Crown, although in practice this came to be understood in a slightly different way. By the early seventeenth century, some authorities held that there were "prerogative copies," defined as those for which there is "no particular author." In such instances, " 'then, by the rule of our law, the King has the prerogative in the copy.' "[3] This particular case concerned almanacs,[4] but the same principle was applied to all the major patents, such as those in the English Bible, the Book of Common Prayer and indeed the Statutes of the Realm.[5] This interpretation, however, while it accurately reflects the practice of the early seventeenth century, was not universally accepted even then and certainly could not have been fully sustained a hundred years earlier.

There were, however, three distinct classes of privileged books protected by patents, although the distinction may be clearer in retrospect than it was at the time. First, there were patents that granted an individual, or group of individuals, the sole right to print a particular book of unknown or collective authorship, e.g., the Bible. The earliest patents, granted in the reign of Henry VIII, all seem to fall into this category. Secondly, some patents granted similar rights in whole groups of books on a particular subject or in a particular category, including those not yet written. The first significant grant of this kind was that made to Richard Tottel in 1553 for common law books.[6] Finally, there were patents granted to protect named books by named authors. These patents are more difficult to identify, but an indisputable example arose in 1563 when Thomas Cooper, at that

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[3] Company of Stationers v. Seymour, 1 Mod. 257 (1677), *quoted in* 6 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 373 n.6 (1924) (citation omitted) [hereinafter HOLDSWORTH].

[4] *Id.*

[5] There is no easily accessible complete list of the patents. All are, of course, on the copyright patent rolls ("CPR"), and can be most easily traced through the published Calendars. A few examples are: statutes and proclamations (to John Cawood, 1553), 1 CPR PHILLIP AND MARY 53 (1553-54); psalters and primers (to William Seres, 1559), 1 CPR ELIZABETH I 54-55; and the English Bible and other items (to Christopher Barker, 1557), 7 CPR ELIZABETH I 333-34. *See also* JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING 17, 36-37 (1988) and references cited therein.

[6] *Id.* at 17.

time Master of Magdalen College School, Oxford,[7] was granted a patent to protect his revised edition of Eliot's Latin dictionary and his own *Thesaurus Linguae Romanae* for a period of twelve years.[8] Other examples follow, with increasing frequency, throughout the reigns of Elizabeth I, James I and Charles I. These are, of course, the books cited to support the view that this was the only form of author's copyright which was recognized before 1640.

In fact, when we look more closely at this third group of privileged books, a somewhat different picture emerges. Almost without exception they were learned works that had involved their authors in long periods of compilation, and sometimes great expense, or books for which the market was very limited and that needed protection in order to guarantee the publisher a reasonable chance of financial return. Several such patents were enrolled in the 1570s. In 1573, for example, Ludovick Lloyd was given an eight-year privilege for his translation of Plutarch's *Lives*, with the rider that no other English translation of the work was to be printed during that period.[9]

Gradually, the terms of such grants became less restrictive. In 1592, Richard Field was granted the sole right to print Sir John Harington's translation of Ariosto's *Orlando Furioso*, with no limitation of time.[10] Some of the grants became very broadly based indeed. When Cooper's privilege expired in 1580, it was partly renewed in the name of his publisher Henry Bynneman; this time it was for twenty-one years and included not only the latest recension of Eliot's dictionary, but also Cooper's continuation of Languet's *Chronicle* and all chronicles and dictionaries.[11] Thus, an individual patent had been changed into a class patent, analagous to Tottel's rights in common law books.

By the middle of Elizabeth I's reign, however, it was already recognized that the privileges granted by patent covered only a minority of books. An investigation into the patents in 1583 concluded that "[s]tationers hath diuers copies seuerall to them selues, w^{ch} they enioye as fully as if they had the Quenes preuilege for euerie of them. . . ."[12] No objection seems to have been raised to this at the time, but when Sir Thomas Coventry,

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[7] He subsequently became Bishop of Winchester. *See* DICTIONARY OF NATIONAL BIOGRAPHY.

[8] 2 CPR ELIZABETH I, at 518.

[9] 6 CPR ELIZABETH I, at 93.

[10] CSPD ELIZABETH I 179 (1591-94).

[11] 8 CPR ELIZABETH I, at 210-12.

[12] *See* SIR WALTER GREG, A COMPANION TO ARBER 127 (1967).

the Solicitor-General, investigated the matter again in 1618, he reported to James I that:

> Wee do not conceive that either the ordinans or the decree can restrein yo^{r} power and p^{r}rogative to grant privilege, where it shalbe needfull or convenient . . . but the Stacion^{r}s chiefly relye on this that the thinges are meane, and not worth of yo^{r} Ma^{ties} priuelege especially, the printing of them being settled already.[13]

Coventry's implied claim of an absolute prerogative was typical of the times, but it did have some support in this instance. The Monopolies Act of 1614, intended to remedy the widespread abuse of the patent system for private profit, specifically exempted "grants of privilege heretofore made or hereafter to be made of for, or concerning printing" from its provisions,[14] and indeed James I had made a number of grants of privilege for individual books.[15]

In practice, as Coventry recognized, the use of the prerogative to grant rights in books was severely limited by established custom. The phrase "the printing of them being settled already" is the key to understanding this, for Coventry was here referring to the long-standing book trade practice of assigning *de facto* rights to the first publisher of a new book. This had been described more neutrally, and largely accurately, by the 1583 Commissioners:

> euerie of them [the stationers] hath of order seuerall to him self any boke that he can procure any learned man to make or translate for him, or that can come to his hand to be the first printer of it.[16]

This is by far the most succinct contemporary statement of the true situation in the late sixteenth and early seventeenth centuries, and a good deal more succinct and accurate than much subsequent academic writing on the subject.

How did the stationers come to occupy this special position? Who were the stationers? In answering these questions the historian of the book trade can perhaps help the literary scholar and indeed the legal historian to understand the origins and development of the copyright.

The "stationers" referred to both by the Commissioners in

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[13] *Id.* at 165.
[14] 21 JAMES I, at ch. 3, § 10.
[15] GREG, *supra* note 12, at 50-52, 56-57, 72, 153-55, 157, 162-63, 236.
[16] *Id.* at 127.

1583 and by Coventry in 1618 were the freemen of the Company of Stationers of London, the trade guild, or livery company, to which members of the book trade belonged. The Stationers' Company had a very special and protected relationship both with the trade that it encompassed and with the Crown, and had powers and privileges far beyond those of other livery companies. Although it can trace its history back to the beginning of the fifteenth century,[17] the Company's most glorious era begins with its reorganization in 1557, the last year of Mary I's reign.[18] In that year, a Royal Charter granted it a virtual monopoly over printing and bookselling in London and throughout the kingdom. This was confirmed and amplified by Elizabeth I in 1558. The reason for granting such sweeping powers to the Stationers' Company was no mere benevolence. In 1559 Elizabeth I made the purpose quite explicit in a set of Injunctions on the book trade.[19] The Company's role was to control the output of the press, and to ensure that no book was printed unless it was properly licensed by the censors appointed by the Crown.[20] This gave the Company great responsiblity as a counterbalance to its great power, and during the first decade of its chartered existence it gradually evolved both regulations and practices to enable it to fulfill these obligations.

The details of the Company's internal organization need not detain us, but in one respect its arrangements are critical to our present subject, for it took its duties as surrogate controller of the press very seriously and tried to ensure that the Injunctions were fully enforced. To do so, it established a system of recording licenses in a volume known to scholars as the "Stationers' Register," although known at various times in history as the "Hall Book," the "Register Book," the "Entry Book," and probably other names as well. In 1557-1558, the first year of operation under Mary I's Charter, a list of titles was recorded in the Register with the annotation "lycensed to be printed by the master and

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17 For the history of the Stationers' Company prior to 1557, see Graham Pollard, *The Company of Stationers Before 1557*, 18 THE LIBRARY, 1-38 (4th ser. 1937-38).

18 *See* CYPRIAN BLAGDEN, THE STATIONERS' COMPANY—A HISTORY 1403-1659 (1960). The Charter is printed in 1 EDWARD ARBER, TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554-1640, at xxvii-xxxii (Birmingham, 1875-94) [hereinafter ARBER]. *See also* Graham Pollard, *The Early Constitution of the Stationers' Company*, 18 THE LIBRARY, at 235-60 (4th ser. 1937-38).

19 *See* W.W. GREG, SOME ASPECTS AND PROBLEMS OF LONDON PUBLISHING BETWEEN 1550 AND 1650, at 5-6 (1956).

20 The relevant Injunction is printed in ALFRED W. POLLARD, SHAKESPEARE'S FIGHT WITH THE PIRATES AND THE PROBLEMS OF THE TRANSMISSION OF HIS TEXT 13-14 (1920).

wardens."[21] There is a similar series of entries for 1558-1559,[22] and although the record may be incomplete, it is clear that the practice of entering licenses to print in the Register first became usual and then, very soon, compulsory. As early as 1557, a stationer was fined twenty shillings by the Company for printing a book before it had been entered,[23] and in December of the same year another stationer was fined four shillings for printing a book "contrary to our ordenaunces that ys not havynge lycense from the master and wardyns."[24]

Again, some interpretation is needed. What are these ordinances? And what exactly are the licenses apparently being issued by the Master and Wardens? The first question can be easily, although not very satisfactorily, answered. As early as 1558-59, the Master and Wardens, the elected senior officers of the Company, and their immediate advisers later formalized into the Court of Assistants (who in due course became self-electing and the electoral college for the wardenships and mastership), were drafting regulations under which the Company might operate. Only a draft survives of this version, but the Ordinances were finally agreed upon in 1562, and revised from time to time thereafter.[25]

The Ordinances help us to understand the licenses, although they do not fully explain their force. In the 1558-59 draft, one clause reads: "Euery boke or thinge to be allowed by the stationers before yt be prynted."[26]This clearly reflected earlier practices, as the fine in December 1557 shows. But what was the license? The form of words used varies, but it is clear that the Master and Wardens are granting it. It is equally clear that under the 1559 Injunctions the powers of censorship rested with the Privy Council and other designated officials of church and state. In practice, however, this crucial authority had been delegated to the Stationers' Company. The license granted by the Master and Wardens in effect signified their assent to the view that it was permissible to print the book. This was indeed an awesome responsbility, for in many cases, and soon perhaps in most, there was no formal permission from the censors.

The original purpose of the entries in Stationers' Register is

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21 1 ARBER, *supra* note 18, at 74-75.
22 *Id.* at 94-97.
23 *Id.* at 45.
24 *Id.* at 70.
25 BLAGDEN, *supra* note 18, at 42-45.
26 GREG, *supra* note 19, at 4.

clear: it was a record of the fact that, in the opinion of the Master and Wardens, the book had been properly licensed or could be printed without offense. It very soon, however, came to take on an entirely different meaning. At some time in the year 1563-64,[27] John Sampson was fined twenty pence by the Company for printing what are called "other mens copyes,"[28] a phrase that becomes familiar in the Company's records during the next eighty years, and that was used in each of the following two years to justify fines on other stationers.[29] Indeed, even before the 1562 Ordinances were adopted, something similar can be found. In 1558-59, William Copland was fined twenty pence for printing a book "of master Bradfordes."[30] These entries and others can only mean that as early as the late 1550s and certainly before 1565, it was accepted within the Company that the license was not merely a testimony to the right to print a particular book, but to the unique right to do so. Here we have, in all but name, the concept of copyright.

Within a very short time, we have every indication that "copies" were being treated as property. The justification for the fines was, of course, that the printing by one stationer of a copy that had been entered to another was an infringement of the latter's property rights. It followed therefore that copies could be traded, and in the late summer of 1564 we have the first record of such a transaction, when two copies were registered in the name of Thomas Marsh, "which he boughte of" Luke Harrison.[31] In 1566-67, we have the first example of a joint registration by two stationers of the same copy, in which they apparently owned equal shares.[32] Gaps in the records from the later 1560s through 1576 leave some questions outstanding, but by 1576 when the Register resumes and becomes more detailed, there can be no doubt that there is a well-established and generally accepted pattern of copy ownership, including transfers by purchase, inheritance and gift, subdivision into shares, and similar commercial activities. The evidence that copies were treated as property is scattered throughout the early records of the Stationers' Com-

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27 Entries were not precisely dated until 1576, and can only be assigned to a particular year.

28 1 ARBER, *supra* note 18, at 239.

29 *See, e.g.*, 1 ARBER, *supra* note 18, at 274, 315.

30 *Id.* at 93.

31 *Id.* at 259.

32 *Id.* at 329.

pany. As early as 1579, a copy was used as security for a debt;[33] similar practices at a later date include using copies to secure mortgages.[34]

The basic rules were very simple. Every copy had to be entered on the Register. This is apparent from fines for not registering,[35] although it was not made explicit until as late as 1637, when a decree of the Court of Star Chamber required that in addition to being licensed, every book "shall be also first entred in the Registers Booke of the Company of Stationers."[36] Once it had been registered, the copy was the sole property of the person who had registered it, provided that he had the right to make the entry in the first place. Indeed, a number of entries is conditional and the reservations expressed coincidentally reveal sharp practice and uncertainties.

These conditional entries are not uniform. In 1580, the Wardens, dissatisfied with the contents of a book, ordered it to be entered with the proviso that those in whose favor the entry was made "promese to bringe the whole impression thereof into the Hall in case it be disliked when it is printed."[37] This clearly arose from the Warden's fear of allowing a book to be printed that was religiously or politically unacceptable. Fear of annoying an influential author was equally potent. In 1581, a book on the education of children was entered with the reservation that if it had any contents "preiudiciall or hurtefull" to Roger Askham's *Schoolmaster* "then thys Lycence shalbe voyd".[38] Askham had been Elizabeth I's tutor and was highly regarded at court. Most interesting for our purposes, however, are those conditional entries where the concern was with the legalities of the ownership of the copy rather than its contents. A number of entries in the 1580s are made with such comments as "vpon condicon that no other man be interested in yt,"[39] and "soe much . . . as Doth not belonge to anie other of this Companie."[40] These cases, which are a few among many, clearly illustrate that the Stationers' pri-

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[33] RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1576 TO 1602, FROM REGISTER B, at 9 (W.W. Greg & E. Boswell eds., 1930) [hereinafter Greg & Boswell].

[34] RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1602 TO 1640, at 217, 292 (William A. Jackson ed., 1957) [hereinafter Jackson]. *See also* 4 ARBER, *supra* note 18, at 377.

[35] *See, e.g.*, 2 ARBER, *supra* note 18, at 336 (entry of Sept. 2, 1578).

[36] 5 *id.* at 529-30.

[37] 2 *id.* at 366.

[38] *Id.* at 390.

[39] *Id.* at 416.

[40] *Id.* at 421.

mary concern was to regulate the trade to benefit its own members.

The origin of their power to do so lay in the state's perception of the need for censorship, but that power also conferred obvious economic benefits on the trade, or at least on certain members of it. For the book trade historian, the real significance of the early history of copy ownership is that it was the motive force for a critical change in the balance of power within the trade itself. For more than a century after the invention of printing, it was the printers, with their command of the limited technical facilities for book production, who controlled the trade. For example, it was the printers who dominated the Stationers' Company in the first ten or fifteen years after its Charter was granted. Gradually, however, the copy-owning booksellers took over from them. Printers came to be, as they have remained, the paid agents of the copy owners.[41] The copy owners reinforced their dominance through the Stationers' Company from the late 1580s onwards, and then began to exert political and legal influence outside the narrow circles of the book trade itself.

The Stationers' Company thus came to occupy the remarkable position of power and influence noted first by the 1583 Commissioners, and later and less objectively by Coventry, because it was a matter of mutual convenience to the trade and the state. The bargain was a simple one; in return for relieving the state of the day-to-day burden of censorship, the leading members of the Stationers' Company were guaranteed a virtual monopoly over the publishing of English books. This bargain was established in little more than a decade, and was to survive for over half a century. In essence, it even survived the destruction of the political system that created it.

The Stationers' position was further enhanced by their gradual absorption of the older system of copy protection by patent. This was a long and complicated business, whose details need not concern us. In summary, it is enough for our purposes to note that from the late 1570s onwards there was concern in the trade about the disproportionate wealth and power of those among its number who held the patents in the privileged books such as the Bible, the Statutes, and the common law books. The "class" patents, as they are sometimes called, were a particular grievance, because they included some of the most profitable copies in existence, whose publication involved far less financial

[41] FEATHER, *supra*, note 5, at 35-40.

risk than the speculative publishing of new and untried titles in a small and limited market. Piracy of patented copies was becoming a real problem by the early 1580s, but was ingeniously solved by Richard Day, who had inherited from his father a large group of patent rights including those in schoolbooks. Day reached an agreement with the principal pirate, John Wolfe, under which Wolfe became one of a group of shareholders in the schoolbook and other patents. This now became a complex piece of jointly-owned property, and to avoid disputes between the shareholders, its management was effectively delegated to the Court of Assistants, the governing body of the Stationers' Company. Other patents followed the same pattern of development, and by the 1590s, the whole operation had its own Treasurer, and a capital value assessed at the massive sum of nine thousand pounds. It was known as the "English Stock". Shares in the Stock were sold to Company members according to their rank and status. Regular annual dividends paid from the profits of publishing the Stock's copies ensured that the trade in general supported the system.[42] This was an even more astonishing coup than the Company's takeover of the crown licensing system, for it now controlled those copies that clearly did have their origin in the royal prerogative and existed only because of grants from the Crown.

It is clear that the idea of rights in copies, that is, the unique right to print a particular text, was well established before the end of the 1580s, and probably earlier. At the same time it was also claimed, and probably established *de facto*, that such rights could only belong to freemen of the Stationers' Company. In 1598, members of the Company were required by the Court of Assistants to desist from the practice of entering copies on behalf of non-members.[43] A later order, in 1607, was even more explicit: copies were to be entered only by freemen of the Company resident in London; no freeman was to help anyone else to enter a copy, and no copy was to be printed without entry.[44] The Company went to great lengths to prevent the ownership of copies outside its own membership. In 1605, ten copies were entered to Edmund Weaver that were alleged to be the property of Thomas Wight, who was not a member of the Company. This entry was,

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[42] *See* Cyprian Blagden, *The English Stock of the Stationers' Company: An Account of its Origins*, 10 THE LIBRARY 163-85 (5th Ser. 1955); Cyprian Blagden, *The English Stock of the Stationers' Company in the Time of Stuarts*, 12 THE LIBRARY 167-86 (5th Ser. 1957).

[43] Greg and Boswell, *supra* note 33, at 59.

[44] Jackson, *supra* note 34, at 31.

however, only to allow Wight to "dispose of them to any freeman of this Companye."[45] These were, of course, only the internal rules of the Stationers' Company. In one commentator's view, the 1614 Monopolies Act made it possible for anyone to own a copyright,[46] but in practice the Act was only applied in the case of rights granted by patent. For the vast majority of copies which were not the subject of patents, entry in the Register by a freeman was the only way of establishing rights, whatever the niceties of legal theory. The intention was to ensure that the Company retained absolute control over the trade. The commercial advantages were obvious, but the case could always be made in terms of the need to protect the security of the state.

The key to enforcement was that entry in the Register was the only acceptable proof of copy ownership, as can be shown from a number of incidents. The case of Thomas Wight, seeking to have his copies entered even though he could never exploit them, exemplifies this, but there are more explicit cases of the Register being used to prove ownership. An interesting, if negative, example is that of the rights in "the book of Dcor ffaustus;" the book is not Marlowe's play, but rather the English translation of the German "Faust Book," which was his source. On December 18, 1592, the Court of Assistants ruled that the copy was owned by Abel Jeffes, if no entry could be found for it in the name of Richard Oliffe.[47] No such entry existed, and the copy was duly considered to belong to Jeffes; in 1596, he was able to transfer his share to Edward White. The full story is actually more complicated than this brief summary implies. No-one involved was an exemplary member of the Company, and there was almost certainly a good deal of sharp practice hidden beneath the curt entries in the Court Book and the Register.[48] Nevertheless, the principle is clear enough: Oliffe's claim had to stand or fall on the existence of a valid entry in the Register. Another case, and perhaps a less difficult one, occurred in 1603, when the late Robert Dexter's copies were declared to be the common property of the Company, "according to a former constitution in suche cases."[49] Five copies were named, but there was the rider that

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45 3 ARBER, *supra* note 18, at 288-89.

46 HOLDSWORTH, *supra* note 3, at 366.

47 Greg and Boswell, *supra* note 33, at 44.

48 MARLOWE'S DOCTOR FAUSTUS 1604-1616, at 9-10 (1950).

49 The "former constitution" embodied the rule that the unclaimed copies of a dead owner reverted to the company. It is not clear where this rule was actually written, but it was certainly the normal practice; it was referred to as the "Custom of the Company" in 1626, and the "antient Custome" in 1638. Jackson, *supra* note 34, at 188, 307.

the order included "all other copies and bookes wherein Robert Dexter Deceased had Right by entranc [*sic*] in the hall book."[50] Nothing could be more explicit.

Although entry was the only proof of ownership, it has to be remembered that the Register was merely a record of established rights; it did not, in itself, confer those rights. The conditional entries exemplify this, but a more surprising group of entries is of copies in which rights are clearly deemed to exist, and to be properly owned, but for which there had been no entry. On July 2, 1602, thirteen copies which had belonged to a deceased member of the Company were entered in the name of William Leake; of these, earlier entries can be found for nine only. Four of them had never been entered, and yet the ownership, and the right to transfer them, was not challenged.[51] In 1607, a similar transfer of a group of copies took place including several which had not previously been entered.[52] An even clearer case is that of Dekker's play *The Shoemaker's Holiday*, written in 1599, staged in 1600 and published in the same year by Valentine Simmes.[53] There was no entry in the Register, but in 1610 it was transferred by Simmes to James Wright, without any difficulty or challenge.[54] It is clear that Simmes's rights were accepted, and we can conclude from this that unchallenged publication in itself constituted the establishment of rights in the copy, at least so far as the trade was concerned. The entry in the Register merely confirmed those rights, after any member of the Company who denied them had the opportunity to prove his case.

A challenge to the right of publication might come from several sources. The Court of Assistants was concerned primarily with objections from within the Company's membership, since its first concern was to maintain good order in the trade by ensuring that its own decrees and ordinances were obeyed. The Court Books and the Hall Books are full of minutes and entries, some

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[50] 3 ARBER, *supra* note 18, at 248.

[51] *Id.* at 210. The transaction was perhaps somewhat more complicated than I have implied. The entry was "by Direction from the wardens under their handes: after yt had ben agreed uppon at il last courtes." Unfortunately, Register B, Greg and Boswell, *supra* note 33, has nothing to say on the transaction. The two previous meetings of the Court of Assistants had been on May 8 and June 28, and, apparently, at neither meeting was this matter discussed. However, there are a number of minor errors and confusions in Register B in 1602, *id.* at 86-90, and some minutes may not have been written up properly at the time.

[52] 3 ARBER, *supra* note 18, at 365. There are no caveats and complications in this case, in which John Smethwicke entered sixteen copies "which dyd belonge to Nicholas Lynge."

[53] 3 E.K. CHAMBERS, THE ELIZABETHAN STAGE 291-92 (1923).

[54] 3 ARBER, *supra* note 18, at 431.

of them deeply obscure in their details, which reflect both the disputes that arose, and the Court's efforts to mollify everyone involved in them, while ensuring that its own authority was not blatantly flouted. The second source of objections, far fewer in number, but taken very seriously when they did arise, was the various official bodies which might object to the contents of a book rather than to the commercial arrangements made for its publication. These represent only a very small proportion of the cases that were heard, and as the number of internal trade cases increased with the great increase in the output of books in the later sixteenth and early seventeenth centuries, the proportion of cases promoted by outsiders became even smaller.

There was, however, also a third source of complaints, from outside both the book trade and the official circles concerned with the censorship of the press. This group of complainants, although the use of the word "group" implies a degree of cohesion which did not exist, consisted of those who argued that they had some prior claim on the ownership of whatever it was that was claimed as a piece of property by a Stationer. In dealing with this, we must first deal with a red herring which bedevils much of the writing on this subject by literary historians.

The serious study of most of the matters discussed in this paper had its origins in the study of the textual and theatrical history of the Elizabethan and Jacobean drama, and especially in the complex relationship which existed, or which was presumed to exist, between playwrights, theatrical companies and printers and publishers. We must necessarily generalize, and, as a generalization, it is not wildly misleading to say that plays were written by authors working on commission for theatrical companies. Some companies were effectively owned by an individual. One such was the Admiral's Men in the later part of Elizabeth I's reign, whose owner, Philip Henslowe, kept a detailed, if somewhat confused account, of his dealings with playwrights and others.[55] It is clear that Henslowe paid his dramatists, and that their plays then went into the repertory for as long as they could hold the stage. Other companies, of which the only significant example was the Chamberlain's Men (who became the King's Men in 1603) were, in effect, joint stock companies. The whole issue is confused by the fact that Shakespeare was a principal sharer in the Chamberlain's/King's company, and that his plays,

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[55] HENSLOWE'S DIARY (R.A. Foakes & R.T. Rickert eds., 1961) [hereinafter Foakes & Rickert].

after 1598, belonged to that Company. There was nothing unusual about this arrangement; it was the standard pattern. The dramatist wrote for the Company that employed him, or of which he was a shareholder, and the play he wrote became part of the stock of plays owned and performed by that Company.[56]

None of this was of any significance to the book trade, except insofar as some plays were published. We must first put that statement in context. In a typical year, between June 1594 and June 1595, Henslowe's company, the Admiral's Men, introduced eighteen new plays into their repertory.[57] If we assume that a major professional company, such as the Admiral's, always worked at that rate, then we would expect it to introduce something of the order of 150 to 200 new plays a decade. Let us compare this with the rate of publication. In the fifteen years from 1590 to 1605, eighteen plays were published that can be definitely associated with the Admiral's Men;[58] in the period 1597 to 1612,[59] 32 plays belonging to the Chamberlain's/King's Men were printed.[60] It is not unreasonable to conclude that publication was of infinitesimal significance to playwrights and theatrical companies. Publication was the exception not the rule.

So far as the Stationers' Company was concerned, plays were copies like any other. Some plays were printed in texts generally recognized by later scholars to be deeply corrupt, and yet their publication was not itself irregular. The cases of *2* and *3 Henry VI* illustrate this point. The first edition of *2 Henry VI* (with the title *The First Part of the Contention of York and Lancaster*) was published in 1594, in a badly mangled text not entirely by Shakespeare.[61] This was entered in the Register on March 12, 1594, in a perfectly normal way, by Thomas Millington.[62] Millington, the publisher of the 1594 and 1600 editions, transferred his rights to Thomas Pavier in 1602.[63] Pavier published an edition in 1619, and the play, in a revised and more accurate text, was duly re-

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56 There is, of course, a vast literature on all of this, much of it of little relevance to our purposes. The organization of the theatrical companies does, however, have some bearing on the issue. CHAMBERS, *supra* note 52, is the standard and massively detailed (and virtually unreadable) source. For a useful summary, however, see ANDREW GURR, THE SHAKESPEARIAN STAGE 1574-1642, at 19-59 (1970).

57 *See* Foakes & Rickert, *supra* note 55, at 21-30.

58 *Id. See also* 3 CHAMBERS, *supra* note 53, *passim*; W.W. GREG, A BIBLIOGRAPHY OF THE ENGLISH PRINTED DRAMA TO THE RESTORATION (1939-59).

59 The period from the formation of the Company to Shakespeare's retirement.

60 *See supra*, note 54.

61 For an exhaustive study, see PETER ALEXANDER, SHAKESPEARE'S HENRY VI AND RICHARD III (1929).

62 2 ARBER, *supra* note 18, at 646.

63 3 *id.* at 204.

printed in the First Folio of Shakespeare's works in 1623, an enterprise to which Pavier was almost certainly a consenting party.[64] *3 Henry VI* has very similar legal and textual histories. The key point here is that a corrupt text was treated as if it were a perfectly normal copy. From the trade's point of view that was precisely the case.

It is crucial to maintain a clear distinction between "piracy" as it was understood in the book trade and "piracy" as it might have been understood by the theatrical companies. So far as the book trade was concerned, piracy could take place only if the established and proven rights of a Stationers' Company member were infringed. The theatrical companies took a different view, and on a few occasions intervened, or attempted to intervene, to prevent the publication of plays from their repertory. The most notorious case was in 1619, when the Court of Assistants ordered as follows: "vppon a ler from the right ho^{ble} the Lo. Chamberleyne It is thought fitt & so ordered That no playes that his Ma^{tyes} do play shalbe printed wthout consent of some of them."[65]The Court could hardly ignore an order from such a source, and it should be seen in the context of interventions by civil and ecclesiastical authorites to prevent undesirable publication in particular cases. Some such cases involved an author who wanted to protect his work for some reason. The King's Men had their own special reasons for seeking to protect their plays from publication at that time, and merely followed the normal contemporary practice of turning to their most powerful patron in the hope of obtaining his help, as indeed they did.[66] Earlier instances of alleged intervention by the theatrical companies to prevent publication (usually, but not always, of apparently corrupt texts) have been discussed at great length,[67] but the case for them remains unproven. In the last analysis, there is no real evidence that, except in the one instance just cited, there was any significantly special relationship between the theatrical companies and the book trade. So far as the trade was concerned, plays were just books like any other, waiting to be converted into cop-

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64 *See* W.W. GREG, THE SHAKESPEARE FIRST FOLIO: ITS BIBLIOGRAPHICAL AND TEXTUAL HISTORY 68 (1955).

65 Jackson, *supra* note 34, at 110.

66 This was part of the preliminary stages of assembling the rights that were needed to produce the First Folio; *See* GREG, *supra* note 64, at 28-75.

67 Pollard began the discussion in SHAKESPEARE'S FIGHT, *supra* note 20, at 42-44; Greg judiciously ended it in ASPECTS AND PROBLEMS, *supra* note 19, at 112-22, where he gives a much more measured account of the so-called "blocking" entries and related issues.

ies and hence into profits. These interventions on behalf of the theatrical companies are not without parallel and precedent elsewhere. Although the majority of patents for books were granted by the Crown to members of the book trade, this was not invariably the case. Some went to Crown servants, as part of the normal process of rewards for services rendered, but even in the sixteenth century there are isolated examples of patent protection for authors and others involved in the writing, as opposed to the publishing, of a book. A very early example is found in Mary I's reign. It was not, however, until the reign of James I that the number of authorial patents became somewhat more significant. It was, on the whole, works of scholarship that were most fully protected, just as they had been in the middle decades of the sixteenth century. The difference was that it was now generally the authors and not the printers or booksellers who were recognized as needing this protection. Two examples are of particular interest: John Minsheu's *Glosson Etymologicon*, for which a patent was granted in 1611, and was ultimately to become the first book published by subscription in England,[68] and John Marriott's *Pharmocopoeia Londiniensis*, protected in 1616, which was the first of a long line of such books.[69] These and other examples all suggest that James I was exercising the prerogative as Coventry had defined it: that is, the law assumed that all copyrights could be granted by the Crown. In practice, however, these patents confirmed, rather than conferred, the rights of the creator of what would later be called a literary work. In the 1640s, this confirmatory grant of copyright was incorporated into the process of licensing by the House of Commons when it usurped the powers of the Crown, and there are enough examples of this practice to suggest that the concept of authorial rights was quite familiar.[70]

We must not push the evidence further than it will allow us to go, but even from the book trade we can find some limited recognition of authors' rights. We know, for example, that authors were paid for their copy. In itself this proves nothing, but it does at least suggest that the booksellers recognized that in acquiring a copy for entry and publication, they were acquiring something which had already taken on the status of property. In

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[68] *See* GREG, *supra* note 19, at 51-52, 157; *see also* Sarah L. C. Clapp, *The Beginnings of Subscription Publication in the Seventeenth Century*, 29 MODERN PHILOLOGY 199-244 (1931-32).

[69] GREG, *supra* note 12, at 156, 162.

[70] *See* N. Frederick Nash, *English Licenses to Print and Grants of Copyright in the 1640's*, 4 THE LIBRARY, at 174-84 (6th Ser. 1982).

this matter, examples from the theatrical world are not without interest, although they must be used with caution. The playwright Robert Greene was once accused of selling the same play twice, once to the Queen's Men and then again to the Admiral's.[71] The facts are of less interest to us than the accusation, for clearly it was thought credible that a man should write a play and then sell it. We have here at least anecdotal evidence that an uncommissioned writing was regarded as its author's property in the late 1580s when this allegation was published.

Moreover, we can see the beginnings of a distinction between manuscript and printed works. In the 1590s, Thomas Nashe indicated that printed publication was one way to prevent further illicit copying of works by scriveners, at a time when the circulation of literary works in manuscript was still common.[72] In effect, an astute author could take advantage of the system established and controlled by the Stationers' Company. Once a book was in print, it was protected by the Company's regulations, and there is evidence for the exploitation of this fact by authors seeking to protect themselves against unauthorized printing or the printing of inaccurate or incomplete texts.[73] Again, the examples are few, and we know more about those of literary interest than about the great mass of ordinary books; but the signposts are there if we will only read them. Before the death of Elizabeth I, it was recognized that authors had some rights in the books that they wrote, and that those rights could be translated into money by the sale of the copy to a Stationer. The Stationer could then use the book trade's own system of copy protection both to protect his own investment and, if it were a matter of concern, the author's reputation.

The recognition of the essential uniqueness of each copy was implicit in the whole idea of copy protection, and as early as the mid-1580s, we find the Court of Assistants trying to regulate against plagiarism. In 1584, for example, *A book of cookery* was entered to Edward White, on the condition that no-one else owned the copy and that it was not "collected out of anie book already extante in printe in English."[74] This is the earliest explicit statement in the Register that an entry is conditional upon

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71 3 CHAMBERS, *supra* note 52, at 325.

72 This continued throughout the seventeenth century. *See, e.g.*, Harold Love, *Scribal Texts and Literary Communities: The Rochester Circle and Osborn b. 105*, 42 STUD. IN BIBLIOGRAPHY 219-35 (1989).

73 *See* PERCY SIMPSON, STUDIES IN ELIZABETHAN DRAMA 186-92 (1955).

74 2 ARBER, *supra* note 18, at 438.

the copy having a degree of originality. It was not, however, the first time that the problem had arisen. Two years earlier Henry Denham was ordered by the Court of Assistants to pay the not inconsiderable sum of £ 4.6s.8d. to Edward White because of a book which he had published called *The Diamond of Devotion*, "pte whereof was taken out of a copie of y^{e} said Ed. whites Called the footepath of faithe."[75] Similar cases are not numerous, but they did occur.[76] All point towards the same conclusion: that there was, probably unintentionally, a growing *de facto* acceptance that the protection of copy-owners' rights, which were the economic cornerstone of an organized and efficiently conducted book trade, would only be possible if the integrity of the copies themselves were subject to some similar, if less stringent, control.

It would be perverse to claim that authors' rights were widely recognized in pre-revolutionary England; it would be more accurate, although still perhaps a slight exaggeration, to suggest that they were dimly perceived. Nevertheless, the early history of rights in copies is critical to an understanding of the later development of the concept of copyright. English copyright has its origins in the Crown's need to control the press. This need led to the development of a system in which control could be exercised by restricting the number of printers and booksellers, and by ensuring that even within that number there were close controls on who might print what books. Such a system rapidly outgrew the capacity of the Crown to adminster it, so that it was, in effect, handed over to the book trade. The leading members of trade seized upon it for their commercial advantage, and in so doing confirmed the idea that a copy was unique and that the right to print it was also unique. This, in turn, led to the gradual realization that unique copies had unique creators, and that those creators also must be deemed to have some share in the rights which they had created.

In the later seventeenth century and beyond into the eighteenth, the rapid expansion of the book trade, and a changing cultural climate in which there was an insistent and almost insatiable demand for new books, created a situation in which authors were better placed to negotiate with their publishers. Even so, rights remained trade rights. The so-called Copyright Act of 1710 mentions neither copyright nor authors; it was little more than a codification, an inadequate and inaccurate codification as it

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75 Greg and Boswell, *supra* note 33, at 12.

76 *See, e.g.*, Jackson, *supra* note 34, at 105, 207.

proved, of existing book trade practices. The power of the authors, however, was soon to be asserted. Men—and a very few women—had been living by their pens in England since the sixteenth century. By the middle of the eighteenth century, they were a large and growing, if not yet entirely respectable, class. That was possible only because the products of their pens commanded a market price, and that in turn was possible only because the commodity was protected against unfair competition. The origins of that protection can be seen dimly through the veils which will probably always divide us from a full understanding of the English book trade at the very beginning of its organized existence. Nevertheless, the ideas were there, and just as the 1710 Act was little more than a statutory recognition of the rights of the trade, the Act of 1814 was an even more belated recognition that authors had always played their part in the commerce of letters, and for nearly two hundred years had been rewarded, however inadequately, for their labors.