THE AUTHOR IN COURT: *POPE v. CURLL* (1741)*

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I.

On 4 June 1741 Alexander Pope, represented by his friend William Murray (later Lord Mansfield), filed a complaint in Chancery against his ancient enemy, the bookseller Edmund Curll. At issue was a volume of letters Curll had published five days earlier entitled *Dean Swift's Literary Correspondence,* which contained letters to and from Pope and Jonathan Swift, as well as letters from Dr. John Arbuthnot, Lord Bolingbroke, John Gay, and others. Pope filed his complaint under the terms of the Statute of Anne,[1] the world's first copyright statute, and claimed the rights, curiously enough by modern thinking, both in his own letters and in those sent to him by Swift. Pope sought, and was granted, an injunction to prevent Curll from selling any further copies of the book. After a response from Curll moving to dissolve, the injunction was continued by Lord Chancellor Hardwicke, but only for those letters written by Pope, not for those sent to him by Swift.[2]

Pope v. Curll, which established the rule that copyright in a letter belongs to the writer, remains a foundational case in English and American copyright law. It is also one of the first cases in which a major English author went to court in his own name to defend his literary interests. What *Pope* records, I shall suggest, is

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[1] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[2] *Pope v. Curll* is reported by J.T. Atkyns. *See* Pope v. Curll, 2 Atk. 342, 26 Eng. Rep. 608 (Ch. 1741). Pope's complaint and Curll's answer are in the Public Record Office in London. The case has been discussed in Harry Ransom, *The Personal Letter as Literary Property*, 30 STUD. IN ENGLISH 116-31 (1951). Ransom also discusses the later case of Thompson v. Stanhope, Amb. 737, 27 Eng. Rep. 476 (1774), which involved the posthumous publication of Lord Chesterfield's letters. In a series of hypothetical cases, Ransom further explores the complications that arise from the establishment of letters as copyrightable. *See also* David Foxon, *Pope and Copyright, in* POPE AND THE EARLY EIGHTEENTH-CENTURY BOOK TRADE app. (1991) (drawing together useful information on Pope's contracts, lawsuits, and plans for litigation); Pat Rogers, *The Case of* Pope v. Curl, 27 THE LIBRARY 326 (1972) (reporting on the materials in the Public Record Office).

an important transitional moment in the concept of authorship and of authors' rights, and a transitional moment, too, in the conception of literary property.

It is a striking fact that in England the legal empowerment of the author as a proprietor preceded the social formation of professional authorship, a development that, as Alvin Kernan has argued, is to be associated with Samuel Johnson.[3] In the first part of the eighteenth century, the values of the patronage culture of early modern England were still prevalent among respectable authors. Pope may have had commercial reasons for pursuing his action against Edmund Curll under the provisions of the new copyright statute, but he presented the issue less as a matter of commerce than of privacy. The unauthorized publication of a gentleman's private letters was, he felt, a violation of basic social principles. *Pope* suggests how from the very beginning of the story of authors' rights in England, issues of "propriety" in the moral sense became inextricably entwined with issues of "property" in the sense of economic interest. *Pope* also records an important moment in the development of the concept of intellectual property. Who owns a letter, the writer or the receiver? In the court's response to this question, the notion of the essentially immaterial nature of the object of copyright was born. This was, at the time, a novel doctrine. But the potential for its production was latent from the beginning in the provision of the Statute of Anne which transformed authors, as well as booksellers, into potential owners of literary property. Booksellers are concerned with material objects—books—whereas authors are concerned with compositions, and with texts. If the author were to be a proprietor and an agent in the literary marketplace, or were to appear in court in his own person to protect his own interests, then inevitably the conception of the property owned would be affected.

To understand the significance of *Pope v. Curll*, I will first discuss the Statute of Anne and the rights of authors in the period prior to its passage. Following this, I will consider the complex nature of Pope's motives in initiating this lawsuit. Finally, I shall consider the case itself and discuss its significance both in the context of Pope's life and career, and in the context of the development of legal doctrine.

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[3] ALVIN KERNAN, PRINTING TECHNOLOGIES, LETTERS & SAMUEL JOHNSON (1987).

II.

Entitled "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times Therein Mentioned," the Statute of Anne, which came into effect on 10 April 1710, was not quite the landmark recognition of authors' rights that it has often been claimed to be. As Lyman Ray Patterson has emphasized, the statute was essentially a booksellers' bill, a legislative continuation of the ancient trade regulation practices of the Stationers' Company, the London guild of printers and booksellers which had long controlled the book trade in Britain.[4] But unlike the traditional guild practice in which ownership of a "copy" continued in principle forever, the statute limited the term of copyright to fourteen years. An extension for a second fourteen-year term was possible if the author was still living at the expiration of the first term. And in a second departure from traditional guild practices, the statute established authors as the original holders of the rights in their works, thereby explicitly recognizing for the first time the author as a fully empowered agent in the literary marketplace.

Prior to the passage of the statute, authors could not be said to "own" their works. Indeed, the very notion of owning a text as property does not quite fit the conception of literature in the early modern period in which it was common to think of a text as an action rather than as a thing. Texts might serve to ennoble or immortalize worthy patrons, and in the process perhaps to win office or other favors for their authors; they might move audiences to laughter or tears; they might expose corruptions or confirm the just rule of the monarch or assist in the embracing of true religion, in which case their authors were worthy of reward. Alternatively, they might move men to sedition or heresy, in which case their authors were worthy of punishment. Thinking of texts in this way, valuing them for what they could do, was commensurate with the traditional society of the sixteenth and seventeenth centuries dominated by patronage structures, just as, later, treating texts as aesthetic objects was commensurate with the advanced marketplace society, founded on the notion of private property, as it developed in the eighteenth century.[5]

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[4] LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 143-50 (1968).

[5] On occasion a state might grant an early modern author an exclusive right to print for a limited term. But these privileges should be thought of as forms of patronage, rather than private property rights, granted as rewards for notable services rendered.

A sixteenth or seventeenth-century author did, of course, own his manuscript, and this might be sold to a bookseller or to a theatrical company. Yet once the material object left his possession, the author's rights in it were at best tenuous. Still, to say that authors owned nothing more than the ink and paper of their manuscripts is not to say that they had no literary rights at all. In the early modern period, there seems to have developed in connection with the individualization of authorship the transformation of the medieval "*auctor*" into the renaissance "author," a general sense that it was improper to publish an author's text without permission. In sixteenth-century Venice, for example, the Council of Ten decreed that printers must not publish works without the author's written consent.[6] In sixteenth-century France, several cases were brought which sucessfully asserted the author's right to control the publication of his work.[7] In England, according to an edict proclaimed by the Long Parliament in the context of the flood of anonymous controversial publications that followed the abolition of the Star Chamber, the Stationers' Company was required to see that all books identified the author on the title page and that no book was published without the author's consent. If any printer failed to secure the author's consent, he would be treated as if he were the author himself.[8]

Issued in a moment of anxiety at the prospect of an uncontrolled press, the Long Parliament's decree was essentially an instrument for establishing criminal responsibility for books deemed libelous, seditious, or blasphemous. Aware that an unscrupulous printer might publish a book against the author's wishes, the House of Commons included a clause requiring authorial consent.[9] Parliament's concern was not with authors' economic rights, but with their potential vulnerability to prosecution merely for having held offending ideas, which was not in itself a crime.

The nature of the English decree suggests that in discussing the development of authors' rights it is important to distinguish between issues of "property" and issues of "propriety." The acknowledgement of the author's personal right to control the publication of his texts was a principle based on concepts of honor

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[6] HORATIO F. BROWN, THE VENETIAN PRINTING PRESS, 1469-1800, at 78-80 (Gerard Th. van Heusden ed., 1969) (1891).

[7] MARIE-CLAUDE DOCK, ETUDE SUR LE DROIT D'AUTEUR 78-79 (1963); Cynthia J. Brown, *Du manuscrit a l'imprime en France: le cas des Grands Rhetoriqueurs*, *in* 1 ACTES DU VE COLLOQUE INTERNATIONAL SUR LE MOYEN FRANCAIS 103, 117 n.37 (1985).

[8] 2 JOURNALS OF THE HOUSE OF COMMONS 402 (1803).

[9] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19 (Eng.).

and reputation consistent with the traditional patronage society. It was not necessarily the same as the acknowledgement of a property right in the sense of an economic interest in an alienable commodity. In practice, of course, the right to control first publication had economic implications, and therefore, it could easily be treated as a property right. Indeed, in practice, English booksellers of the sixteenth and seventeenth centuries seem to have recognized an obligation to pay authors for their "copies."[10]

The parliamentary decree of 1641/2 is, so far as I know, the only state affirmation of any kind of authorial right in England earlier than the Statute of Anne and is essentially a criminal edict. It is probably not an inaccurate generalization, to say that before the statute, an English author effectively had no place in court except as a criminal defendant charged with libel, blasphemy, or sedition. Despite eighteenth-century assertions about authors' ancient common law property rights, no such authorial right was ever established or even, so far as I know, asserted by an author.[11] Indeed, what legal standing—other than under the edict of 1641/2 which was only briefly in force—an English author might have had to take action against a bookseller is unclear. In 1704 Daniel Defoe called for a change, complaining in his *An Essay on the Regulation of the Press*[12] that there was "no Law so much wanting in the Nation, relating to Trade and Civil Property," as one that would provide for authors. If an author could be punished for a libelous or seditious book, Defoe said, then it was only just that he also be permitted to reap the benefit of an excellent book: "For if an Author has not the right of a Book, after he has made it, and the benefit be not his own, and the Law will not protect him in that Benefit, 'twould be very hard the Law should pretend to punish him for it."[13] During the seventeenth century, England had become essentially a marketplace society and the values of possessive individualism were defined and promulgated. Defoe's call for the establishment of authorial property bears witness to the potential for the extension of the ideology of possessive individualism to authorship. We should note, how-

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[10] PATTERSON, *supra* note 4, at 64-77.

[11] *See* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983); Mark Rose, *The Author as Proprietor*: Donaldson v. Becket *and the Geneology of Modern Authorship*, 23 REPRESENTATIONS 51 (1988).

[12] DANIEL DEFOE, *An Essay on the Regulation of the Press in* ON THE FREEDOM OF PRINTING AND SPEECH (1978).

[13] *Id.* at 21.

ever, that his claim is not based on the modern principle that the author is entitled to exploit the product of his labor so much as on the notion of the complementarity of punishment and reward. Defoe was still thinking within the framework of traditional society, in which authority, transmitted through punishment and reward, was conceived as descending from above.

III.

The provision in the Statute of Anne that established the author as the first proprietor of his work did open the way for the author to appear in court in the novel role of plaintiff in a civil action. But in fact, nearly all the early litigation that arose under the statute involved booksellers seeking determinations against other booksellers rather than authors defending their rights against booksellers. The explanation for this is simple. During this period, authors were still, in large part, sustained by the ideology of the traditional patronage society in which gentlemanly honor was the crucial value, and reward, rather than profit, for worthy works was what one expected. The early eighteenth-century conception of respectable authorship as a learned and polite activity existed, at least in principle, apart from the marketplace and did not encourage authors to rush into litigation in defense of their literary properties.[14]

Alexander Pope was an exceptional figure, for more than any other writer of his day he behaved like a literary entrepreneur and made a fortune from his verse. Pope's prominence gave him enormous bargaining power, which he used to secure unusually favorable terms from his booksellers. Despite his involvement in the literary marketplace, Pope characteristically presented himself as a gentleman and a scholar rather than as a professional and was almost obsessively concerned with what we would today call image management. As part of his concern with image management, Pope resolved to make his correspondence public in the latter part of his career, in order, as Maynard Mack puts it, among other things, to "erect a monument to himself and the gifted writers he had known."[15] But for a gentleman to publish his own letters would have seemed inexcusably vain, and Pope

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[14] The only case preceding *Pope* that I am aware of in which a specifically literary figure sued in his own name is *Gay v. Read* (1729) in which John Gay obtained an injunction to protect his rights in *Polly*, the sequel to *The Beggar's Opera*. For information about the case, see James R. Sutherland, *'Polly' Among the Pirates*, 37 MOD. LANG. REV. 291 (1942).

[15] MAYNARD MACK, ALEXANDER POPE: A LIFE 660 (1985).

had to arrange matters so that publication would seem to occur against his wishes. Therefore, in 1735, Pope tricked Curll into publishing his correspondence, thereby creating a situation which would allow him to protest against the indignity of being exposed in print and at the same time, open the way for an authorized version.

So much is familiar knowledge. As reconstructed by James McLaverty, however, the evidence suggests that Pope had a further purpose in the 1735 affair with Curll, one that illuminates his goal six years later in filing suit against Curll over the correspondence with Swift.[16] In the spring of 1735, the London booksellers were campaigning for a bill that would extend the statutory term of copyright. Pope did not appear to be particularly concerned with the term of copyright, but was determined that no bill for the benefit of booksellers be passed without also including a clause to protect authors. He therefore contrived to have the surreptitious edition of his letters appear while the bill was pending. Thus, Curll would serve as an example of an irresponsible bookseller in order to dramatize the bill's limitations and defeat it. The 1735 bill was indeed defeated, although not necessarily because of the affair of the letters as Pope claimed. Shortly after, Pope expressed the hope that if the booksellers' bill was again brought in, Parliament would not increase the term of copyright without also doing something for authors "Since in a Case so *notorious* as the printing a Gentleman's PRIVATE LETTERS, most Eminent, both *Printers* and *Booksellers*, conspired to assist the Pyracy both in printing and in vending the same."[17]

The incident of 1735 bears witness to Pope's genuine concern that there be a legal remedy for the unauthorized publication of letters. We should observe, however, that the issue as he presents it is a matter of personal right rather than of economic interest. Pope's point is that the unauthorized printing of a gentleman's "PRIVATE LETTERS"—the outraged capitals are expressive—is an offence against decency. In 1737 he repeats this same point in the preface to the authorized edition of his correspondence. The unauthorized printing of private letters, he says, is a form of "*betraying Conversation*" and is damaging to the social fabric:

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[16] James McLaverty, *The First Printing and Publication of Pope's Letters*, 2 THE LIBRARY 264 (1980).

[17] 2 ALEXANDER POPE, *A Narrative of the Method by which Mr. Pope's Private Letters were procured and published by Edmund Curl, Bookseller* (1735), *in* THE PROSE WORKS OF ALEXANDER POPE 317, 345 (1986).

> To open Letters is esteem'd the greatest breach of honour; even to look into them already open'd or accidentally dropt, is held ungenerous, if not an immoral act. What then can be thought of the procuring them merely by Fraud, and printing them merely for Lucre? We cannot but conclude every honest man will wish, that if the Laws have as yet provided no adequate remedy, one at least may be found, to prevent so great and growing an evil.[18]

What I would suggest is that in the suit against Curll in 1741, Pope was seeking to achieve in the courts what he had failed to achieve in Parliament—that is, to secure protection for himself and for others against the unauthorized procuring and printing of private letters.

The correspondence with Swift was a set of letters that Pope particularly wished to see published, and for many years he had sought to get Swift to return his letters to him. When at last he succeeded, Pope arranged through an elaborate ruse to have the letters printed in Dublin. This made it possible for him to publish an authorized edition as part of his collected works.[19] Six weeks after Pope's edition appeared, Curll released his volume, which he claimed was a reprint of the Dublin edition. Pope, who had anticipated Curll's action,[20] immediately brought suit. No doubt commercial considerations figured in Pope's suit, for Curll's cheap piracy represented a threat to the expensive authorized edition.[21] No doubt, too, Pope may have derived vindictive pleasure from making Edmund Curll once again his target. Whatever his other motives, the history of his passionate concern over the previous six years with the impropriety of unauthorized printing of letters, suggests that by suing Curll in 1741, Pope was trying to answer his own call to find an "adequate remedy" for "so great and growing an evil" by establishing that letters fell under the statute. In *Pope v. Curll*, then, a commercial regulatory statute was being employed to pursue matters that had as much to do with "propriety"—with authors' personal rights—as with authors' economic interests. In the context of the developing marketplace culture, questions of authorial honor and reputation were becoming entwined with questions of commercial law.

Let us return for a moment to Pope's preface to the 1737 edition of his letters. This preface is dominated by the genteel

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18 1 ALEXANDER POPE, THE CORRESPONDENCE OF ALEXANDER POPE xl (1956).
19 MACK, *supra* note 15, at 665-71.
20 4 POPE, *supra* note 18, at 343 (Letter to R. Allen).
21 *Id.* at 350.

discourse in which Pope represents his outrage as a man of honor against unauthorized publication. But what we can call the "discourse of property" makes itself felt as well. For example, Pope complains that the booksellers' practice of soliciting copies of authors' letters leads to petty thievery: "Any domestick or servant, who can snatch a letter from your pocket or cabinet, is encouraged to that vile practise."[22] Moreover, if the quantity of material procured falls short, the bookseller will fill out the volume with anything he pleases, so that the poor author has "not only Theft to fear, but Forgery."[23] And the greater the writer's reputation, the greater the demand for his books and so the greater the injury to the author: "[Y]our Fame and your Property suffer alike; you are at once expos'd and plunder'd."[24] The blending of the discourse of propriety (marked by such terms as "honor," "generosity," and "fame") with that of property (marked by such terms as "theft," "snatch," and "plunder") produces a certain instability in the preface that is evidence of the way it inscribes a transitional moment in cultural history. My point is that Pope's suit against Curll was equally a mingled affair that took place between two worlds: the traditional world of the author as a gentleman and scholar and the emergent world of the author as a professional.

On 16 February 1742/3, a year and a half after the decision in *Pope v. Curll*, Pope was again in court filing complaints against booksellers. This time, he employed the statute in two actions that clearly pertained to his right to exploit his works for profit. Neither of these cases is reported, and neither seems to be as fascinating as *Pope v. Curll*. They do remind us, however, that although Pope always presented himself as a gentleman, he was also in practice an aggressive professional and the first major author to use the Statute of Anne repeatedly to pursue his professional interests in court.[25]

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22 1 *id.* at xxxix.

23 *Id.* at x1.

24 *Id.*

25 Both suits were related to the publication of the four-book version of the *Dunciad* in 1742. In one, Pope sued Henry Lintot in order to establish that after the initial fourteen-year period, the rights in the original version of the *Dunciad* reverted to himself as author. In the other, Pope sued Jacob Ilive, claiming that he had pirated the enlarged *Dunciad*. For the accounts of these cases, see John Feather, *The Publishers and the Pirates: British Copyright Law in Theory and Practice, 1770-1775*, 22 PUBLISHING HISTORY 1, 1-32 (1987); Howard P. Vincent, *Some Dunciad Litigation*, 18 PHILOLOGICAL Q. 285, 285-89 (1939).

IV.

Let us turn now to the issues litigated in *Pope v. Curll* and to their resolution. Pope's bill of complaint begins by invoking the Statute of Anne and its provision for authors. He states that between 1714 and 1738 he wrote various letters to Swift and specifies by date twenty-nine, asserting himself to be the sole author and maintaining that, having never disposed of his copyright in the letters, he possesses the sole right to print or sell them. He states that during the same period he also received various letters from Swift, and again specifies twenty-nine by date, saying that he had hoped that neither those letters in which property had vested in him by virtue of being their author, nor those letters which were addressed and sent to him, would ever have been published without his consent. He charges Curll with knowingly conspiring with certain unnamed confederates to defraud him of his rights by publishing these letters and complains that he is without remedy at common law. He waives the penalties allowed by the statute but asks for a disclosure of all agreements made with respect to the book and an accounting of the profits, which are to be paid to himself. Any unsold copies are to be delivered to the court and disposed of as the court shall direct. Meanwhile, Curll and his associates are to be restrained by an injunction from any further sales.

Pope's bill of complaint was entered on 4 June 1741 and shortly thereafter the requested injunction was issued. Curll swore to his answer on 13 June and moved to dissolve the injunction. In his answer, Curll acknowledges the statute and admits printing five hundred copies of the book and selling sixteen, but makes three principal points in his defense. First, he argues, that since

> all the letters mentioned in the Complainants said Bill of Complaint were as this Defendant verily believes Actually sent & delivered by and to the several Persons by whom & to whom they severally Purport to have been written & Addressed . . . the Complainant is not to be Considered as the Author & proprietor of all or any of the said letters.[26]

Second, he raises the question of whether, in any case, familiar letters fall under the terms of the statute, saying that he is advised "that the said letters are not a work of that Nature & sole

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[26] The phrase "Author & proprietor" is, I take it, to be understood in the conjunctive: Curll is certainly not denying that Pope actually wrote the letters that he sent to Swift but only that Pope can claim a property in them.

Right of printing whereof was Intended to be preserved by the said Statute to the Author." Third, he says that he has reprinted the letters in question from the Dublin edition printed by George Faulkner under the direction, as he believes, of Dr. Swift, and it is his understanding that any book first published in Ireland may be lawfully reprinted in England.[27] In addition, Curll responds to particular assertions in Pope's complaint, denying that he has any direct knowledge of whether Pope is the sole author and proprietor of the letters or whether Pope ever disposed of whatever rights in the letters he might have had. Curll denies that he has made any agreements with anyone regarding the book except with his printer, and points out that the part of the published book to which Pope is laying claim amounts to only one-fifth of the whole. Curll therefore asserts that he has done nothing illegal in publishing the book and maintains that Pope is not entitled to an account of his profits.

Lord Chancellor Hardwicke's decision, handed down on 17 June 1741, addresses the principal points made by Curll in his defense. The first question, he says, is whether letters, not being intended for publication, fall within the framework of the statute, the purpose of which was defined, we recall, as the encouragement of learning. Hardwicke cites as a parallel the instance of sermons, "which the author may never intend should be published, but are collected from loose papers, and brought out after his death,"[28] and rules in the affirmative, stating that "it would be extremely mischievous[] to make a distinction between a book of letters, which comes out into the world, either by the permission of the writer, or the receiver of them, and any other learned work."[29] In response to Curll's argument that an author is no longer to be considered the owner of a letter if it has actually been sent—or, as Hardwicke summarizes the point, "that where a man writes a letter, it is in the nature of a gift to the receiver"[30]—Hardwicke again overrules the objection, by making a distinction between the physical letter and the copyright:

> I am of opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a licence to any person whatsoever to publish

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27 In fact Curll used Pope's own edition as copytext. Rogers observes that Pope probably did not realize this because it might have been an effective point to make in court. Rogers, *supra* note 2, at 329.

28 Pope v. Curll, 2 Atk. 342, 26 Eng. Rep. 608 (Ch. 1741).

29 *Id.*

30 *Id.*

> them to the world, for at most the receiver has only a joint property with the writer.[31]

As to whether a book originally printed in Ireland, where the statute did not reach, was a "lawful prize," Hardwicke points out that any affirmative would have pernicious consequences, for it would establish an easy way for booksellers to evade the statute by sending books over to Ireland to be printed first. Finally, returning to the initial matter of whether the contested material falls under the statute, Hardwicke notes that the defendant's counsel insisted that the exchange of letters between Swift and Pope "does not come within the meaning of the act of Parliament, because it contains only letters on familiar subjects, and inquiries after the health of friends, and cannot properly be called a learned work."[32] Again, Harwicke decides in the affirmative:

> It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable; for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading.[33]

On the basis of his judgment that familiar letters do indeed fall under the statute, together with his distinction between the receiver's tangible property in the physical letter and the writer's intangible property in his copyright, Hardwicke rules that the injunction be continued, but "only as to those letters, which are under Mr. *Pope*'s name in the book, and which are written *by him*, and not as to those which are written *to him*."[34]

Hardwicke's decision on the question of Irish publication is comparatively straightforward and requires little comment. More interesting is his decision on the question of whether the Swift-Pope letters fell under the terms of the statute. What we should observe here is that the issue in the case led to a circumstance in which a legal question—were letters on familiar subjects protected?—required a judge to make a literary critical proclamation from the bench. If there was to be a statute protecting cer-

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31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*

tain kinds of writings—those that contributed to the advancement of learning—then judges would perforce find themselves, like Hardwicke, making pronouncements on generic matters and on literary value. Hardwicke's judgment is rendered in the somewhat pompous language of refined taste, but the issue is nevertheless also one of commercial value. Under the aegis of the statute, literary and legal questions converged in such a way that significant sums of money might depend upon whether a particular kind of text was deemed "worth protecting" and admitted to the privileged category. Two senses of value—the literary and the commercial—were becoming entangled.

Perhaps the most interesting aspect of Hardwicke's ruling was his distinction between the receiver's special property in the physical letter and the writer's property in the copyright. The Statute of Anne, let us note, prescribed specific and concrete penalties for the invasion of literary property. It provided that all offending books were to be forfeited to the rightful proprietors of the copy to be destroyed, and furthermore that every offender was to forfeit one penny for every offending sheet found in his custody. Precisely what kind of property, tangible or intangible, Parliament supposed it was protecting in the statute is unclear, for in all likelihood such metaphysical questions about the nature of literary property never occurred to the legislators. As Benjamin Kaplan has remarked, the draftsman of the statute was "thinking as a printer would—of a book as a physical entity; of rights in it and offenses against it as related to 'printing and reprinting' the thing itself."[35] So, too, the defendant's counsel was thinking of a letter as a physical entity, an object which once "[a]ctually sent & delivered"[36] passed wholly to the recipient. Hardwicke's judgment, however, involved an important and novel abstraction of the notion of literary property from its material basis in ink and paper.

It is perhaps significant that in the years immediately preceding Hardwicke's decision, the new term "copyright" first came into general use. Indeed, appropriately enough, one of the earliest recorded uses of "copyright" occurs in a letter written by Pope to John Gay in 1732, in which Pope speaks of the bookseller Benjamin Motte together with some other "idle fellow" having

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[35] BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 9 (1967).

[36] Answer to Plaintiff's Complaint, Pope v. Curll, 2 Atk. 342, 26 Eng. Rep. 608 (Ch. 1741) (No. C11/1569/29) (on file with London Public Records Office).

written to Swift "to get him to give them some Copyright."[37] The old stationers' term, "copy," was related to the use of copy as the term for an original manuscript from which copies were made. Thus, it retained some feeling for "copy" as a material object, the manuscript on which the printed edition was based. The new term "copyright" suggests an attenuation of this sense of the material basis of the property. Its appearance at this moment is worth noting in the context of Hardwicke's decision, where the author's words have now, in effect, flown free from the page on which they are written. Not ink and paper, but pure signs, separated from any material support, have become the protected property.

V. The Development of Intellectual Property

When they entered titles in the Stationers' Register, the English booksellers of the sixteenth and seventeenth centuries spoke of "their copies" and "their books," but they could not really be called owners of the texts in the absolute sense of property articulated for the marketplace society by John Locke. Rather the stationers of the old order were participating, as guildsmen of various kinds had done for hundreds of years, in a community defined in terms of reciprocal rights and responsibilities. When disputes between stationers arose, they were settled by the guild court, which generally tried to arrange compromises rather than lay down principles. Now that a statute was on the books, however, the need for the interpretation and articulation of principles would inevitably arise. Furthermore, with the shift in jurisdiction from the guild to the public courts, literary property would be treated like any other form of private property, which was, after all, what the courts were most familiar with. But in order to do this, a new and abstract concept of precisely what an author owned would have to be constructed. We can see this process at work in Hardwicke's decision. We should observe, however, that Hardwicke's judgment on this matter is couched in cautious language: "possibly the property of the paper" may belong to the receiver, who "at most" has "only a joint property with the writer."[38] The tentativeness with which Hardwicke proposes the distinction between the receiver's tangible property and the author's intangible property is to be attributed, no doubt, to the

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[37] Letters From John Gay to Jonathan Swift, 28 August 1732, *in* 4 The Correspondence of Jonathan Swift 64, 64-65 (1963-5) (quoting Letter from Pope to Gay).

[38] Pope v. Curll, 2 Atk. 342, 26 Eng. Rep. 608 (Ch. 1741).

fact that the notion of copyright as a wholly intangible property was still at this point novel and the theory of a property that inheres in words alone had not yet been worked out.

Could a text—as distinguished from a book—be a property? Did authors really have a "property" in their works, entitling them to general relief at common law, or did the statute merely grant them an exclusive privilege, a limited monopoly with penalties to give it force? In 1743, two years after the decision in *Pope v. Curll* and a year before Pope's death, a group of seventeen London booksellers, invoking the Statute of Anne, initiated a suit in the Scottish Court of Session against a group of twenty-four booksellers from Edinburgh and Glasgow that addressed these questions.[39] It was in the context of this long drawn out case that in 1747 William Warburton, Pope's friend and literary executor, published his *Letter from an Author Concerning Literary Property*, which provided the earliest theorization of copyright as a wholly intangible property.[40]

At the heart of Warburton's *Letter* is an analysis of the nature of property, designed to demonstrate that text can indeed be property. Property, he says, can be divided into two classes—movables and immovables. Movable properties can in turn be divided into those that are natural and those that are artificially made. Artificially produced movables can be further divided into products of the hand and products of the mind, for example, "an *Utensil* made; a *Book* composed."

> For that the Product of the *Mind* is as well capable of becoming Property, as that of the *Hand*, is evident from hence, that it hath in it those two essential Conditions, which, by the allowance of all Writers of Laws, make Things susceptible of Property; namely common *Utility*, and a Capacity of having its Possession *ascertained*.[41]

We should note that Warburton never actually demonstrates that literary property has "a Capacity of having its Possession *ascertained*." This point, however, might be lost in the smooth development of his analysis, which, proceeding by progressive division into familiar binary oppositions (movable/immovable,

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39 For the fullest report of this complex case, known variously as *Booksellers of London v. Booksellers of Edinburgh and Glasgow* or *Midwinter v. Hamilton* or *Midwinter v. Kinkaid* or *Millar v. Kinkaid*, see LORD HENRY HOME KAMES, REMARKABLE DECISIONS OF THE COURT OF SESSION 154-61 (1766).

40 WILLIAM WARBURTON, A LETTER FROM AN AUTHOR CONCERNING LITERARY PROPERTY (1747).

41 *Id.* at 7.

artificial/natural, body/mind), makes the notion of intellectual property seem natural and inevitable.

What was the nature of the author's property? According to Warburton, property that was the product of the hand was "confined to the individual Thing made."[42] Like the instrument of its creation, the property was wholly material. "But, in the other Case of Property in the Product of the Mind, as in a *Book* composed, it is not confined to the Original MS. but extends to the *Doctrine* contained in it: Which is, indeed, the true and peculiar Property in a Book."[43]

Thus, the essence of the author's property was wholly immaterial, consisting solely of the "doctrine" or ideas that were the product of his mental labor. Six years earlier, Lord Chancellor Hardwicke had tentatively distinguished between the receiver's property right in the material basis of a letter and the author's property right in the words. Now, in Warburton's *Letter*, the notion of a property in pure signs, abstracted from any material support, was being systematically developed and promulgated.

The clincher in Warburton's argument was his distinction between literary property and patents. Warburton was arguing that since copyrights were property rights and not merely privileges, literary properties, unlike patents, were perpetual. But why should an author's rights be treated any differently from the rights that an inventor might have in a new and useful machine? Warburton's approach was to demonstrate that inventions were of a mixed nature, partaking of the characteristics of both manual and mental products. Thus, insofar as a machine was a kind of utensil, it was appropriate that the maker's property be located in the individual material object and be perpetual. Nevertheless, because the operation of the mind was so intimately concerned in inventions, it was appropriate to extend to inventors a patent that reached beyond the individual material object, but only for a limited term of years. Thus, patent protection was a special category of limited rights designed to accommodate the mixed nature of mechanical inventions, as distinguished from the purely intellectual nature of literary compositions. Rhetorically, then, the introduction of this third, mixed, category of property situated between products of the hand and products of the mind helped to confirm the idea of literary property as wholly immaterial.

The year after Warburton's *Letter* appeared, the Court of

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[42] *Id.*

[43] *Id.* at 7-8.

Sessions issued a decision that in effect denied that a text could be a property. But the legal debate over the nature of literary property was just beginning. Warburton's theorization of copyright was to influence William Blackstone, who, when arguing for the plaintiff in *Tonson v. Collins*,[44] a suit between two booksellers over the right to print the *Spectator*, developed the notion of copyright still further. As Blackstone stated:

> "[A] literary composition, as it lies in the author's mind, before it is substantiated by reducing it into writing," has the essential requisites to make it the subject of property. While it thus lies dormant in the mind, it is absolutely in the power of the proprietor. He alone is entitled to the profits of communicating, or making it public. The first step to which is clothing our conceptions in words, the only means to communicate abstracted ideas.[45]

Words might be either spoken or written, Blackstone continued, but in any case the words were merely the vehicles of the author's sentiments. "The sentiment therefore is the thing of value, from which the profit must arise."[46]

Arguing for the defendant in *Tonson*, Joseph Yates accepted the principle "that the author has a property in his sentiments till he publishes them."[47] But Yates insisted that from the moment of publication the author's ideas ceased to be private property, and cited the limited protection afforded inventors under patent law as a parallel. In reply, Blackstone invoked Warburton's *Letter* on the difference between mechanical inventions and literary compositions, and reaffirmed the immaterial nature of literary property: "Style and sentiment are the essentials of a literary composition. These [elements] alone constitute its identity. The paper and print are merely accidents, which serve as vehicles to convey that style and sentiment to a distance."[48] Six years later in the second volume of his *Commentaries*, Blackstone refined the formulation he had made in *Tonson*. He discussed copyright as a species of property and insisted that, whatever might be the material method of conveying a text from one person to another, the identity of the composition itself "consists entirely in the *sentiment* and the *language*; the same conceptions, cloathed in the

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[44] 1 Black. W. 301, 96 Eng. Rep. 169 (K.B. 1760), *reargued and dismissed*, 1 Black. W. 322, 96 Eng. Rep. 180 (K.B. 1761).

[45] *Id.* at 322-23, 96 Eng. Rep. at 180-81.

[46] *Id.* at 323-24, 96 Eng. Rep. at 181.

[47] *Id.* at 333, 96 Eng. Rep. at 185.

[48] *Id.* at 343, 96 Eng. Rep. at 189.

same words, must necessarily be the same composition."[49]

We should note that in the process of developing Warburton's theory of copyright—and under pressure from Yates's rejection of the notion that ideas might remain property once published—Blackstone significantly shifted the conception of literary property from Warburton's "doctrine" or his own equivalent "sentiments" to the conception of the essence of the property as a fusion of idea and language: "[T]he same conceptions, cloathed in the same words." Not ideas alone, but the expression of ideas: this, to put Blackstone's point in the familiar modern form which it anticipates, was what copyright protected. What was the nature of literary property as Blackstone formulated it? Paper and print—the material basis of publication—were to be regarded merely as "accidents." The bearer of meaning through which the writer's ideas were realized was language. Clothed in words, which Blackstone treated as if they were a kind of substance, the writer's sentiments became property. In the early modern period, it was, as I have noted, usual to think of a text as an action, as something done. Now, in the context of the developing marketplace society, the text was being represented as a kind of thing.

Warburton and Blackstone were arguing the case for copyright to be regarded as a common law property right and thus for copyright to be perpetual. The debate over this issue continued until 1774 when perpetual copyright was rejected by the House of Lords. But even though the claim for perpetual copyright was finally rejected, their representation of literary property—a representation that may be understood as an exposition of Lord Chancellor Hardwicke's opinion on the question of the ownership of letters—as essentially immaterial, endured and of course endures to this day.

Pope v. Curll, then, represents a significant transitional episode both in the history of authorship and in the conception of literary property. Pope himself is of course fascinating as a transitional figure: on the one hand, the last of the great poets in the Renaissance tradition and, as such, the courtly transmitter of received wisdom and the jealous guardian of his own and others' honor; on the other hand, the first of the moderns and, as such, a professional who was immersed in the production and exploitation of literary commodities and the jealous guardian of his finan-

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[49] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 406 (9th ed. 1978).

cial interests. And the case, with its complex blending and enfolding of motives and its fascinating dissolving of matters of propriety into matters of property, refracts both the peculiar nature of its eminent plaintiff and the earliness of its moment in the history of the author as a legally enfranchised figure.

Hardwicke's decision in *Pope v. Curll* has gone down in legal history as establishing that letters are subject to copyright and that an author has the right to withhold his texts from publication if he chooses. But perhaps even more fundamental than the ruling about letters coming under the statute was the distinction that Hardwicke drew between the receiver's property in the paper and the writer's property in the words, for in this moment the concept of literary property as a wholly immaterial property in a text might be said to have been born.