5 When the Law Advances Access to Learning: Locke and the Origins of Modern Copyright

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Let me begin with the singular historical fact that constitutes this chapter's endpoint.[1] On April 5, 1710, after nearly two decades of political wrangling over the reinstatement of some form of book licensing in Great Britain, to replace the granting of publisher monopolies in exchange for state censorship, the British Parliament passed the Statute of Anne 1710. Its extended title begins, "An Act for the Encouragement of Learning …" And therein lies my tale. One of the things that makes this act remarkable is how much of that "encouragement" the bill contained. Another is that the act successfully launched the modern era of copyright law. For the first time, a legislative body recognized that the author of a work possessed rights over its reproduction, if for a limited term of up to 28 years. Yet the story I set out below is about how, in the decades preceding the act's passage, learning came to play the role that it did in initiating the age of copyright. The encouragement of learning was not the whole of the impetus for this new law, but the part that it played is surely worth pausing over today in light of the great turmoil and promise currently surrounding new models of scholarly publishing.

How is it, one might well ask, that learning held such a place in the introduction of modern copyright law, when the law today offers it so little encouragement to pursue what researchers, funders, librarians, and publishers now agree is learning's optimal state for the digital era—namely, "open access"? What the law supports is the selling of exclusive access to journals by subscription. This is the economic model that continues to dominate the circulation of this work and is proving a great roadblock to the transition to open access. One reason for that is how a growing proportion of these subscription journals are held by Elsevier and four other big corporate publishers who have been able to wring from them, with the support of copyright monopolies, a profit margin that exceeds those of most other businesses.[2]

Even as these publishers are encouraged by the law to wrest a greater share of research expenditures away from the academic community, the move to open access by authors, research funders, and scholarly publishers (including Elsevier for a small proportion of its titles) has resulted in roughly half of the current research articles being made freely available.[3] To be half open, however, is still to be in a state of flux. In 2018 and 2019, journal subscription negotiations with Elsevier and other publishers broke down in a number of countries; readers and researchers continue to turn to the pirated troves of research in Sci-Hub, just as fair use disputes over scholarly works continue to end up in the courts.[4] What success open access has achieved in all of this is largely the result of what amounts to copyright workarounds. For example, authors and journals use Creative Commons licenses to grant rights to users that the law does not. Funding agencies enter into a contract with grantees, as part of open-access mandates, that prevents them from, in effect, fully exercising their copyright. Given that the law is doing little enough to encourage learning in the digital era, grounds exist for revisiting learning's role in the origins of modern copyright. Think of it as a first step in considering how the law might once again encourage this form of learning.

In response to this question of how learning first became central to the origins of modern copyright, the philosopher John Locke will be our guide. In the 1690s, Locke's earnest lobbying on learning's behalf contributed to the lead up to the Statute of Anne 1710, which, as he died in 1704, he did not live, alas, to see pass. Amid late seventeenth-century debates over regulation of printing, Locke served as something of a public defender of scholarly interests. Yet before setting out the case that he made, I need to acknowledge that some historians take the act's seeming emphasis on learning to be nothing more than "window dressing," as John Feather puts it, with the good that it did learning, if any, "difficult to quantify."[5] The statute "ensured," in his estimation, "the continued dominance of English publishing by a few London firms."[6] While I do not doubt that the leading firms retained their market share, the proof of the substantial protection that the Statute of Anne 1710 afforded learning against commercial interests is found, as I will go on to show, in the ongoing political actions—and not without some success—by which printers and booksellers sought to curtail these protective measures.

In this, I follow the lead of Ronan Deazley, who, in contrast to Feather, holds that with this act, "Parliament focused upon the author's utility in society in the encouragement and advancement of learning," thereby

upholding "pre-eminence of the common good" as copyright's organizing principle.[7] Still, Deazley also allows that "Parliament bowed to the lobbying of the book trade in passing the Statute of Anne."[8] I seek to establish how there was another source of forceful lobbying at work on Parliament, and that Locke offers a model, in this one instance, of an activist scholar who might well inspire efforts today in the face of relentless industry lobbying and market dominance.

Locke's contribution to the formation of early copyright law is also worth considering for what it can teach about his influential natural law theory of property. Locke made property a matter of human rights under natural law. Those rights extended, he held, to the individual's right of consent in democratic governance. This was in stark contrast, Locke insisted, to the authority that kings presumed to have over property and individuals through a divine right.

To consider his argument for property rights, in *Two Treatises of Government* (published anonymously in 1689), he posits a world that in its original state is given in common to humankind. Allowing that individuals have a right in themselves, they are able to acquire from the commons that which they labor over. Their acquisitions are subject to natural constraints, *to ensure that there is "enough, and as good, left in common for others" and that holding such property did not lead to its spoilage or waste*.[9] Locke's theory of property continues to be a major influence in the field of intellectual property jurisprudence.[10] Yet few of those considering his theory look to how he applied it to the Parliamentary proposals he made on the regulation of printing. I contend that his theory of property informs his legislative suggestions, particularly around balancing authors' ownership rights with the distinctive access and use rights that facilitate scholarship that were to find a place in the Statute of Anne 1710.

Locke's Lobbying

On January 2, 1693, Locke appears to have initiated his attempt to influence Parliament with a letter to his longstanding friend Edward Clarke, who was then serving as the Whig Member of Parliament from Taunton. The letter expresses Locke's concerns about the current state of the book trade. At the time, Parliament was considering renewing once more the 30-year-old Licensing of the Press Act of 1662, which was itself a continuation of state press regulation dating back to policies first instituted by Henry VIII in

1538.[11] The 1662 Act enabled the Stationers' Company, which was the guild representing London's leading printers and booksellers, to grant its members perpetual monopolies for titles and whole genres in exchange for the press's cooperation in executing state censorship of the press. The Act's full title, after all, was "An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Books and Pamphlets and for Regulating of Printing and Printing Presses." It restricted printing to London, York, and, in recognition of the universities' historic rights, Oxford and Cambridge.[12] The Whig opposition to Charles II, however, regarded this licensing of censorship as another instance of Restoration overreach on the part of the reinstated monarchy (although book licensing had persisted through Cromwell's interregnum). Parliament allowed the Press Act to lapse in 1679, only to later renew it in 1685 for seven years, after Charles's controversial (which is to say Catholic) brother, James II, took the throne. The Act also survived the Glorious Revolution of 1688, which deposed James and placed William III and Mary on the throne. Following the passing of the Bill of Rights in 1689, the Whigs increasingly sought to put an end to press regulation as a regrettable carryover from the *ancien régime*.

In his 1693 letter to Clarke, Locke asked his friend to consider the damage done to learning by the Stationers' Company book monopolies granted by the Press Act of 1662. In particular, Locke addresses in his letter the effects of the broad monopolies granted in perpetuity to printers and booksellers by the Stationers' Company, under the terms of the Press Act. Such monopolies made it nearly impossible to undertake improved editions or import such editions of classical authors:

> I wish you would have some care of Book buyers as well as all of Book sellers, and the Company of Stationers who haveing got a Patent for all or most of the Ancient Latin Authors (by what right or pretence I know not) claime the text to be their and soe will not suffer fairer and more correct Editions than any thing they print here or with new Comments to be imported … whereby these most usefull books are excessively dear to schollers.[13]

Locke's letter to Clarke was too little too late. The Press Act was renewed in March 1693.[14] It was only extended this time, however, for two years, indicating Parliament's lack of enthusiasm for book licensing, despite the case made for it by the Stationers' Company. The limited-terms renewal appears to have given Locke hope, as he continued his campaign against any further renewal of the act. To prevent that from happening, he worked

not only with Clarke, but involved, in what he referred to as "the Colledg" (college), both John Freke, a lawyer and Whig lobbyist, and John Somers, who held the parliamentary post of lord keeper of the great seal and who was a member of the Privy Council.[15]

In 1694, Clarke was appointed to the House of Commons committee to review those laws that were about to expire, the 1662 Press Act among them. To assist Clarke in preventing the renewal, Locke prepared a memorandum for his friend which begins by sounding the familiar trumpet of a free press: "I know not why a man should not have liberty to print what ever he would speake."[16] To require that a license to print a work be obtained in advance was like "gagging a man for fear he should talk heresy or sedition."[17] All that was required, he proposed, was that the printer or author be clearly identified in the book to ensure that someone will "be answerable for" any legal transgressions.[18] As things stood, "by this act England loses in general," and as he puts it, "Scholars in particular are ground [down] and nobody gets [anything] but a lazy ignorant Company of Stationers. To say no worse of them. But anything rather than let mother church be disturbed in her opinion or impositions, by any bold voice from the press."[19] For Locke, the issues of freedom of speech and of scholarly inquiry were closely aligned in ways that, if both are supported, would benefit Britain as a whole.

Locke then moved into what mattered to him at least as much as press freedom, which was the current "restraint of printing the classic authors."[20] He asked with a touch of sarcasm about the value of such restraint: "Does [it in] any way prevent the printing of seditious and treasonable pamphlets, which is the title and pretense of this act?"[21] More than a decade before, Locke had been party to such sedition in print, escaping with his life to Holland in 1683.[22] More to our point, Locke was also indignant over how poorly the Stationers' Company served learning: "Scholars cannot but at excessive rates have the fair and correct editions of these books and the comments [commentaries] on them printed beyond [the] seas"; they are left with "scandalously illprinted" local editions, given the lack of competition amid the perpetual monopolies.[23] To illustrate, Locke referred to an imported edition of "Tully's Works" (Marcus Tullius Cicero), which he found to be "a very fine edition, with new corrections made by Gronovius, who takes the pains to compare that which was thought the best edition"; the work was "seized and kept a good while in [the Company's] custody," before it was sold with the booksellers "demanding 6s. 8d. per book."[24] The

problem is that, broadly stated, the crown enabled the Stationers' Company to grant patents on whole bodies of work, such as classical authors, which a printer could exercise without end or limit.

Locke's overarching concern for scholars' rights to access such works led him to a backhanded commendation of the current act's requirement that a free copy of each new book be sent to "the public libraries of both universities."[25] This university-access policy originated in Britain with the 1610 agreement that Oxford patron Thomas Bodley secured from the Stationers' Company to supply the university library, which Bodley was in the process of restoring, with a copy of each book printed. The deed that Bodley drew up reads that the Stationers' Company of London "out of zeale to the advancement of good learning … granted to the University of Oxford, for ever, one copy of every new book in quires that they might borrow or copy any book deposited, for reprinting."[26] This deposit requirement had been included in the 1662 Press Act, although Locke complains that it "will be found to be mightily if not wholly neglected" by the Stationers' Company, "however keenly it might otherwise support the act."[27] From my perspective, the book deposit stipulation, as it applied to the "public" or university libraries at Oxford and Cambridge, demonstrates how commerce sponsors, even as it stands apart from, the commons of learning. It is another instance of Locke's theory of property in which authors, printers, and booksellers have a right to the fruits of their labor, "at least where there is *enough, and as good, left in common for others*."[28] The public library of the university was that commons, when it came to the properties of learning.

As part of Locke's concern for his balance of rights, he objected to the perpetual monopolies granted to the Stationers' Company. In its place, he recommended limits to *the ability to purchase or sell rights in a work*: "it may be reasonable to limit" the property of "those [printers and booksellers] who purchase copies from authors that live now and write," he states in his Licensing Act memo, "to a certain number of years after the death of the author or the first printing of the book as suppose 50 or 70 years."[29] This would encourage the publication of new editions of older works, in contrast to the current situation in which "the Company of Stationers have a monopoly of all the classic authors."[30] Locke also objected to restrictions on the importing of books into Britain. This was a point that his friend Clarke made to the House of Lords in Lockean terms by pointing out that, for book importers, restrictions and delays meant that "part of his Stock lie dead; or the Books, if wet,

may rot and perish."[31] Under Locke's natural law, whoever allowed property to spoil was claiming "more than his share, and [it] belongs to others," as he put in the famous chapter on property in *Two Treatises*.[32]

What Locke ultimately bemoans in his memo on the Press Act of 1662 is that it is "so manifest an invasion on the trade, liberty, and property of the subject" that it places under siege what he sees to be the intellectual property rights of the learned.[33] As Locke saw it, access to this literature must be facilitated for scholars rather than impeded by unfair trade practices such as perpetual monopolies and book blockades: "That any person or company should have patents for the sole printing of ancient authors" he concludes in the memo, "is very unreasonable and injurious to learning."[34]

In 1695, not long after Locke's memo, Clarke began to work with fellow legislator Robert Harley, Earl of Oxford, on a "Bill for the Better Regulating of Printing and Printing Presses." Their proposed bill had the virtue of exempting from state licensing books that dealt with science, arts, and heraldry. It made no reference to a number of previously granted privileges, including the Stationers' Company monopolies and the universities' printing rights.[35] Locke was not involved in Clarke and Harley's initial drafting of the new bill, but they sent him a copy of it and he soon proposed amendments. Although a number of Locke's suggestions for the bill have been lost, what remains in his papers makes clear that he had come by this point to recognize the importance of instantiating the authors' intellectual property rights. He proposes to Clarke that the new bill "secure the author's property in his copy" for a limited time.[36] This property in a work could be safeguarded, he suggests, by a registration process: upon printing, a book was first to be deposited "*for the use of the publique librarys of the said Universities*," after which the bill "shall vest a privileg in the Author … for __ years from the first edition."[37] This time, the exact number of years of a limited monopoly was left up to Parliament.

While Locke argues for the authors' intellectual property rights, the registration process he recommends could also be said to protect the rights of learning. He makes the authors' limited privileges dependent on depositing the work in the public libraries of the universities for the use of scholars. Authors are to be encouraged with an eye to the use of their work by the learned. In a similar spirit, Locke also proposed that authors should retain a right over subsequent editions of their work. At the time of the bill's drafting, he was likely revising the third editions of both *An Essay*

Concerning Human Understanding (1689) and *Two Treatises*, which may well have instilled in him a sense that the author has the ultimate sense of responsibility for, and interest in, correcting and improving a work with each new edition, even as the ultimate beneficiaries are the works' readers.

Still, Clarke and Harley's "Better Regulating of Printing" bill ran into the vehement objections of the Stationers' Company, which sought a straightforward renewal of the Licensing Act of 1662. The Company's representatives protested that the reforms proposed by Clarke and Harley were "wanting as to the Security of [our] Property."[38] This was a fair enough estimation of Clarke, Harley, and Locke's intent to eliminate monopoly privileges. Drawing on Locke's points over the potential loss to learning, Clarke responded to the Company's stand by circulating objections to its unfair and illogical trade practices.

Although the "Better Regulating of Printing" bill was not to attract the votes it needed and died on the floor of the Commons in 1695, Clarke and others had effectively sown the seeds of doubt about the Press Act of 1662, and that same year both the House of Commons and the House of Lords voted not to renew the act. It expired on May 3, 1695, putting an end to well over a century of press censorship, permanent monopolies, and a generally corrupted state of press regulation. The great nineteenth-century historian and politician Thomas Babington Macaulay declared that the act's expiry meant nothing less than that "English literature was emancipated, and emancipated for ever, from the control of the government."[39] Locke's part in the defeat of the Licensing Act led his biographer, Maurice Cranston, to praise his subject's political realism: "Unlike Milton, who called for liberty in the name of liberty, Locke was content to ask for liberty in the name of trade, and unlike Milton, he achieved his end."[40] For my part, I think Cranston sells Locke short on the degree to which he pursued the liberty of the press in order to advance learning, even if he also found cause in how monopolies damage the book trade.

Piracy's Interlude

Immediately following the expiry of print licensing in 1695, upstart printers and booksellers flooded the streets of London with an inventive array of broadsides and gazettes, cheap pirated editions of books and magazines, and scandalous and obscene pamphlets.[41] The statesman Sir William Trumbull

wrote in a letter at the time that "since the Act for Printing Expired London swarmes with seditious Pamphletts."[42] By 1709, there were as many as eighteen London newspapers, including the first daily. Well before that, existing libel and blasphemy laws were applied to transgressive publications through arrests and warrants, much as Locke had held was preferable to press censorship. New laws were also added, such as the 1698 "Act for the More Effectual Suppressing of Blasphemy and Prophaneness."[43] The Stationers' Company denounced, with increasing rancor and outrage, a market flooded with cheap reprints of its titles. Since the 1680s, printers of such works were accused of *piracy*.[44] It was, in fact, a free market in print materials. And the Stationers' Company did not fail to return to Parliament in search of remedy, only to find reintroducing press regulation an uphill battle.

Following the Licensing Act's expiry in 1695, the Company promoted one unsuccessful parliamentary bill after another, while petitions were also submitted to no avail by the Church of England, Oxford University, and groups of journeymen printers.[45] In 1704 (the year of Locke's death), after the Company sponsored the introduction into Parliament of a "Bill to Restrain the Licentiousness of the Press" to no avail, it decided on another tactic. It embraced the language of learning, having earlier opposed its advocates in the form of Locke and before that Milton, with his 1644 *Areopagitica*.[46] The theme had just been revitalized by the novelist, pamphleteer, and journalist Daniel Defoe in his 1704 *Essay on the Regulation of the Press*. The book was full of praise for the French King Louis XIV for the "Encouragement" he had "given to Learning" through the liberty of the press in France, contending that the English "License of the Press" was not consistent with "the Encouragement due to Learning."[47]

Beginning in 1706, three anonymous petitions were presented before Parliament, likely with the Stationers' Company support, starting with the one-page *Reasons Humbly Offer'd for a Bill for the Encouragement of Learning, and the Improvement of Printing* (1706).[48] This petition opens with a concern for the "Many Learned Men [who] have been at great Pains and Expence in Composing and Writing of Books" and takes a Lockean stance on the author's "undoubted Right to the Copy of his own Book, as being a Product of his own Labor." The petition reflects the concern that "Learned Men will be wholly Discouraged from Propagating the most useful Parts of Knowledge," given how easily their work could be pirated without state oversight. The petition closes with what was to become the requisite image of the

bereft author's widow who, in the case "of the late Arch-Bishop Tillotson," might have been generously provided for by "Booksellers" were it not for the print piracy of an unregulated era.

This petition may have been among the dozen such petitions, proposals, and bills that had failed since 1695, but this one managed to gain some purchase. A further iteration, combining authors' natural rights to their work and the public good of learning, was drafted and introduced into Parliament on January 11, 1710. It was entitled the "Bill for the Encouragement of Learning, and for the Securing of Property of Copies of Books to the Rightful Owners thereof." It refers to "Books and Writings" as "the undoubted Property" of authors, with such property regarded as "the Product of their Learning and Labor," with labor being the key to Locke's theory of property.[49] This was soon struck from the bill, so that an author's earned right of ownership is left implicit. It is not what is being legislated. As such, ownership is left to natural and common law, while the act determines that from such ownership, authors have a right to a limited-term monopoly to encourage their contribution to learning.

Statute of Anne 1710

The statute that was passed on April 5, 1710, begins "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." Note how the act's title no longer sets out the encouragement of learning *and* the securing of property rights as two distinct purposes. Rather, it makes the encouragement of learning the very principle behind granting such property rights. And the switch from "securing" to "vesting" suggests that the act is not about pinning down a right but about placing a right-to-copy in the hands of authors for a limited term.[50]

The act opens with the Stationers' Company's complaint that "printers, booksellers, and other persons have of late frequently taken the liberty of printing … books and other writings, without the consent of the authors or proprietors of such books and writings," which leads "too often to the ruin of them and their families."[51] Authors are characterized as "learned men" who strive to "compose and write useful books."[52] Thus, the author (or assignee) "shall have the sole liberty of printing and reprinting such book and books for the term of 14 years." The statute requires that books "before

such publication, be entered in the register book of the Company of Stationers, in such manner as hath been usual."[53] What had been usual was the granting of a monopoly right in perpetuity, compared to what was now to be a 14-year term limit for the monopoly rights. Such rights were regarded as a temporary "encouragement" or incentive, intended to ward off "ruin" while inspiring authors to prepare additional useful books.

Of the roughly ten provisions that follow in the statute, four set out the distinctive rights associated with learning, as I see it, or "the public interest," as William Cornish frames them.[54] Two of these measures spoke directly to Locke's earlier concerns. The first addresses the price of learned books: "The Vice-Chancellors of the Two Universities … the Rector of the College of *Edinburgh* … have hereby full Power and Authority … to Limit and Settle the Price of every such Printed Book … as to them shall seem Just and Reasonable.[55] This power to roll back book prices, which the House of Commons introduced into the act, was also granted to the archbishop and other officials, but was of particular value for faculty and students in the context of the university.[56] This price-control clause was repealed only a few decades later by an "Act for prohibiting the Importation of Books" passed in 1739, which was clearly a bill much more to the Stationers' Company liking.[57]

The second new measure in favor of learning, and also a point advocated by Locke, makes it clear that with the reinstatement of print regulation, nothing in the act "shall be construed to extend to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas."[58] This right was somewhat qualified by the 1739 act cited in the previous paragraph, which forbade importing books that had already been published in Great Britain.[59] While this revision was clearly directed against piracy, it kept open a channel for learned books published abroad, even as it potentially restricted the import of new editions of the classics, which was also among Locke's concerns.

The other two measures in support of learning were brought forward, in an enhanced form, from the Licensing Act of 1662. One was a reinstatement of the book deposit policy. It required printers to provide "Copies of each Book … upon the best Paper" to a wider range of university and college libraries: "The Royal Library, the Libraries of the Universities of Oxford and Cambridge, the Libraries of the Four Universities in Scotland, the Library of Sion College in London, and the Library commonly called the Library belonging to the Faculty of Advocates at Edinburgh."[60] Where

the Licensing Act set aside three copies for learning, the Statute of Anne 1710 increased the number to nine on the best paper. Extending this provision to all British universities serves as an excellent reminder of how fully the law expressed a public faith in these institutions' contribution to, at a minimum, the composing and writing of useful books. Although it took more than a century, the book trade also succeeded in reigning in this measure, by having six of the university libraries eliminated in the 1836 Copyright Act.[61] Still, *legal book deposit* was to grow into a common legislative requirement throughout the world.[62]

The final measure in the statute declares that nothing herein should "prejudice or confirm any right that the said universities" had "to the printing or reprinting any book or copy already printed, or hereafter to be printed."[63] The universities' rights had historically included Bibles and almanacs by which they cross-subsidized scholarly publications—often by leasing out these rights—although not without numerous legal disputes with the Stationers' Company.[64] Much as with the libraries and legal deposit, university presses were recognized as standing apart from the common book trade and worth protecting as such.

The Statute of Anne 1710 only refers to learned men and their "useful books" in the opening paragraph. After that, it identifies as its subject the "author of any book" and the "proprietors of such books and writings," which is to say the booksellers and printers to whom authors commonly sold their work, as well as to "other person or persons" to whom such rights were assigned. It is this aspect that the act reflects, as Mark Rose suggests, "the emergent ideology of the market," as putting an end to a "monopolistic system of privilege" among a select set of printers and booksellers.[65] The Stationers' Company, having thrived under the old system of privilege, was fully prepared to compete in a book market based on authors' rights to exercise short-term monopolies of 14 years that could be renewed once (which the booksellers succeeded in having lengthened over time). Still, an act that further opened the book market and introduced an age of copyright also granted distinct privileges of access to learning; that is, the law would now offer people a right to fairly priced books, imported books, books on library shelves, new and better editions from abroad, and books printed at university presses.

Still, it needs to be made clear that the guild members of the Stationers' Company were undoubtedly the principal financial beneficiaries of the act. Yet it did not put an end to print piracy, given that the act did not, for

example, extend to Ireland.[66] At the same time, the Company's members continued to act for decades on a number of their older (perpetual) monopolies, at least until the courts, in *Donaldson v Becket*, put an end to their assumed rights in 1774.[67] The following year, the British Parliament further intervened in the book market, again on the side of learning, by passing a "Bill for enabling the Two Universities to hold in Perpetuity the Copy Right in books, for the advancement of useful Learning, and other purposes of Education, within the said Universities."[68] A decade or so later, the Statute of Anne inspired a similarly spirited intellectual property clause in the U.S. Constitution in 1788 that empowers Congress to pass laws "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[69] This concept of copyright as a legal vesting of limited-term rights in the author was to spread slowly around the world, if not without much controversy, complaint, and piracy, amid the ongoing negotiations of international trade bodies and national adoptions of more recent legal elements, such as "fair use," that bear on research and education.[70]

It is impossible to know how much credit Locke is owed in his lobbying for learning in the formation of modern copyright law. Yet he provides a clear instance, with backing from Milton, Defoe, and others, of how learning was a reference point in articulating the public good that underwrites intellectual property rights. The resulting Statute of Anne 1710 managed to bring into a legislative order the interests and rights of authors, scholars (also as authors), printers, and booksellers. If printers and booksellers were the ones who profited, authors and scholars had their rights advanced. Three centuries later, amid the emergence of the digital era, a new order of scholarly publishing is struggling to form, caught once more between powerful commercial forces and the distinctive interests of opening up a global commons for learning.

Much as Locke did earlier, scholars and research librarians are speaking out and lobbying today in favor of increased access to needed works and resources. And much as happened with the Statute of Anne 1710, I am cognizant of Kathy Bowrey and Natalie Fowell's caution that "faith in any enduring legal truth residing in copyright law to resist commodification is ill-founded and politically naïve."[71] What Locke worked toward was placing some legislative limits on the (inevitable) commodification of scholarly works. This is a special application, if self-interested on his and my part, of

his theory of property, in which the appropriation of property "does not lessen but increase the common stock of [hu]mankind."[72]

The Statute of Anne created what was, in effect, a special intellectual property class for works of learning. This eighteenth-century legal reform of book regulation is worth reconsidering today. Much of its original protection has been lost and few legal limits exist today on publisher pricing and profits in the field of scholarly publishing. At the same time, the law has yet to offer ways of encouraging the degree of access and openness that many are finding to be the great promise of the digital era for learning. At the very least, the history of the Statute of Anne 1710 should incite academics and librarians to speak up in defense of legal rights that encourage learning. They should support the effective lobbying work for open learning and science carried on by organizations such as the Scholarly Publishing and Academic Resource Coalition (SPARC).[73] We must, once again, find the advantages for learning among the play of commercial interests, knowing that this was nothing less than the original intent of copyright law and is no less worthy a goal today.

Notes

1. An earlier version of this chapter appeared in the journal *KULA: Knowledge Creation, Dissemination, and Preservation Studies* 1, no. 1 (2017) under the author's copyright, and grows out of material initially explored in *The Intellectual Properties of Learning: A Prehistory from Saint Jerome to John Locke* (Chicago: University of Chicago Press, 2017).

2. Vincent Larivière, Stefanie Haustein, and Philippe Mongeon, "The Oligopoly of Academic Publishers in the Digital Era," *PLOS ONE* 10, no. 6 (2015): e0127502, https://doi.org/10.1371/journal.pone.0127502.

3. Hamid R. Jamali and Majid Nabavi, "Open Access and Sources of Full-Text Articles in Google Scholar in Different Subject Fields," *Scientometrics* 105, no. 3 (2015): 1635–1651, https://doi.org/10.1007/s11192-015-1642-2; Éric Archambault et al., "Proportion of Open Access Papers Published in Peer-Reviewed Journals at the European and World Levels—1996–2013" (Science-Metrix), accessed April 28, 2019, http://science-metrix.com/sites/default/files/science-metrix/publications/d_1.8_sm_ec_dg-rtd_proportion_oa_1996-2013_v11p.pdf.

4. Holly Else, "Dutch Publishing Giant Cuts off Researchers in Germany and Sweden," *Nature* 559 (2018): 454, https://doi.org/10.1038/d41586-018-05754-1; Michael Hiltzik, "In Act of Brinkmanship, a Big Publisher Cuts Off UC's Access to

Its Academic Journals," Los Angeles Times, July 11, 2019, https://www.latimes.com/business/hiltzik/la-fi-uc-elsevier-20190711-story.html; John Bohannon, "Who's Downloading Pirated Papers? Everyone," *Science*, April 25, 2016, https://www.sciencemag.org/news/2016/04/whos-downloading-pirated-papers-everyone; Nicholas Kaster, "Copyright Case: Cambridge University Press v. Albert, USA," *Kluwer Copyright Blog*, October 30, 2018, http://copyrightblog.kluweriplaw.com/2018/10/30/usa-cambridge-university-press-v-albert-united-states-court-appeals-eleventh-circuit-no-16-15726-19-october-2018/.

5. John Feather, "The Book Trade in Politics: The Making of the Copyright Act of 1710," *Publishing History* 8 (1980): 20, 35.

6. Feather, "The Book Trade in Politics," 37.

7. Ronan Deazley, "The Myth of Copyright at Common Law," *The Cambridge Law Journal* 62, no. 1 (2003): 108, 133.

8. Ronan Deazley, "What's New About the Statute of Anne? Or Six Observations in Search of an Act," in *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, ed. Lionel Bently, Uma Suthersanen, and Paul Torresmans (Cheltenham, UK: Edward Elgar Publishing, 2010), 45, https://doi.org/10.4337/9781849806428.00010.

9. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 2.27.

10. Joris Deene's work exemplifies the common scholarly assumption regarding Locke's contribution to copyright law: "The criterion of intellectual effort as a basis for human appropriation of one's own creation has its origins in John Locke's Labor Theory as Described in the Second Treatise of Government (1690): 'Every Man has a Property in his own Person … The Labor of his Body, and the Work of his Hands, we may say, are properly his.'" Joris Deene, "The Influence of the Statute of Anne on Belgian Copyright Law," in *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, ed. Lionel Bently, Uma Suthersanen, and Paul Torresmans (Cheltenham, UK: Edward Elgar Publishing, 2010), 141, https://doi.org/10.4337/9781849806428.00017; on Locke's continuing influence on intellectual property jurisprudence, see, for example, Robert P. Merges, *Justifying Intellectual Property* (Cambridge, MA: Harvard University Press, 2011), 31–67.

11. Henry VIII issued a proclamation on November 16, 1538, requiring that books receive "his maiesties special licence," in light of "wronge teachynge and naughtye printed bokes." Quoted in Alfred W. Pollard, "The Regulation of the Book Trade in the Sixteenth Century," *The Library* 7, no. 25 (1916): 22–23, https://doi.org/10.1093/library/s3-VII.25.18.

12. Raymond Astbury reports that during the 1690s, the universities entered into an agreement with the Stationers' Company not to compete on the sales of English

Stock-books, which included cheap editions of schoolbooks, psalm-books, and almanacs, further reflecting the universities' struggle to find the right trade-off of privileges to make a go of scholarly publishing. Raymond Astbury, "The Renewal of the Licensing Act in 1693 and Its Lapse in 1695," *The Library* 33, no. 4 (1978): 296–322, https://doi.org/10.1093/library/s5-XXXIII.4.296.

13. John Locke, *The Correspondence of John Locke*, ed. Esmond Samuel de Beer, vol. 4 (Oxford: Oxford University Press, 1976), 614–615.

14. In the House of Lords, 11 dissenting Peers issued a statement of protest against the act, as it "subjects all Learning and true Information to the arbitrary Will and Pleasure of a mercenary, and, perhaps ignorant, Licenser, destroys the Properties of Authors in their Copies; and sets up many Monopolies." "Because the Following Provisos Were Not Admitted," *Journal of the House of Lords* 12 (March 8, 1693): 163.

15. Locke, *The Correspondence of John Locke*, 4:288–289.

16. John Locke, "Liberty of the Press (1694–5)," in *Locke: Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press, 1997), 331, https://doi.org/10.1017/CBO9780511810251.

17. Locke, "Liberty of the Press," 331.

18. Locke, "Liberty of the Press," 331.

19. Locke, "Liberty of the Press," 335.

20. Locke, "Liberty of the Press," 334.

21. Locke, "Liberty of the Press," 334.

22. Locke was at the time something of a hired pen for the late Lord Shaftesbury, who was behind the profligate pamphlet attacks on Charles II that marked the Exclusion Crisis (mounted against Charles's Catholic brother's claim to the throne). King Charles II saw to the expulsion of Locke from his faculty position at Oxford's Christ Church. After returning from political exile to Britain in 1689, Locke lived as an independent scholar on an annuity he'd arranged with Lord Shaftesbury—derived from slave-trade gains, despite his championing of (English) human rights—while residing with another patron, Damaris Cudworth; R. S. Woolhouse, *Locke: A Biography* (Cambridge: Cambridge University Press, 2007), 197–216.

23. Locke, "Liberty of the Press," 332.

24. Locke, "Liberty of the Press," 332–333.

25. Locke, "Liberty of the Press," 336.

26. Quoted in I. G. Philip, *The Bodleian Library in the Seventeenth and Eighteenth Centuries*, 1980–1981 (Oxford: Oxford University Press, 1983), 27. Ian Philip calculates that this deposit system originally brought in about 20 percent of what was being

published in 1615–1616, 28; the idea, which came from Bodley's librarian Thomas James, may have been inspired by François I's Montpellier Ordinance of 1537 requiring (if seldom honored) the placing of books in the French king's library before they were sold. Robert C. Barrington Partridge, "The History of the Legal Deposit of Books throughout the British Empire" (Honours Diploma, Library Association, 1938), 18.

27. Locke, "Liberty of the Press," 336.

28. Locke, *Two Treatises of Government*, 2.27.

29. Locke, "Liberty of the Press," 337; Joseph Loewenstein judges that Locke's "opposition to perpetual copyright is one of the most consequential aspects of Locke's critique of the licensing bill," while pointing out that it was inspired by the "limited-term privilege" of "the old institution of the patent." Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: University of Chicago Press, 2002), 230.

30. Locke, "Liberty of the Press," 332.

31. "Commons Reasons for Disagreeing to the Clause for Reviving the Printing Act," *Journal of the House of Lords* 15 (1695): 546.

32. Locke, *Two Treatises of Government*, 2.31.

33. Locke, "Liberty of the Press," 336.

34. Locke continues: "Tis very absurd and ridiculous that anyone now living should pretend to have a property in or a power to dispose of the property of any copies or writings of authors who lived before printing was known and used in Europe." Locke, "Liberty of the Press," 337.

35. Among those calling for a renewal of the Licensing Act was John Wallis, book licenser and professor of geometry at Oxford, who warned that the university's loss of privileges in printing profitable books would leave it unable to subsidize costly scholarly works (a refrain heard from university presses today). Astbury, "The Renewal of the Licensing Act in 1693 and Its Lapse in 1695," 322.

36. Locke, *The Correspondence of John Locke*, 4:795.

37. Locke, *The Correspondence of John Locke*, 4:796.

38. Quoted in Astbury, "The Renewal of the Licensing Act in 1693 and Its Lapse in 1695," 312.

39. Thomas Babington Macaulay, *The History of England, from the Accession of James II*, vol. 4 (Philadelphia, PA: Butler, 1856), 337.

40. Maurice William Cranston, *John Locke, a Biography* (Oxford: Oxford University Press, 1957), 387; Astbury: "Clearly, the Commons' objections owed much to Locke's Memorandum of 1694, even though his expressions of animosity towards Court and

Church as the leading champions of preprinting censorship were expunged." Astbury, "The Renewal of the Licensing Act in 1693 and Its Lapse in 1695," 315; Deazley notes that "the parallels between Locke's commentary and those reasons presented by the Commons to the Lords for refusing to renew the 1662 Act are striking." Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775)* (Oxford: Hart Publishing, 2004), 4.

41. Deazley, *On the Origin of the Right to Copy*, 11.

42. Quoted in Astbury, "The Renewal of the Licensing Act in 1693 and Its Lapse in 1695," 317.

43. Geoff Kemp, "The 'End of Censorship' and the Politics of Toleration, from Locke to Sacheverell," *Parliamentary History* 31, no. 1 (2012): 26–27, https://doi.org/10.1111/j.1750-0206.2011.00282.x.

44. Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago: University of Chicago Press, 2011), 41; On the origins of the term piracy, John Fell refers, in a 1674 letter, to the Stationers' Company as "land-pirats" for treading on the university's "propertie in Printing," quoted in Adrian Johns, *The Nature of the Book* (Urbana, IL: University of Chicago Press, 1998), 344. The Oxford English Dictionary credits J. Mennes' *Recreattion for Geniuses Head-peeces* (1654) with the first use of piracy in this sense.

45. Feather, "The Book Trade in Politics," 21–24.

46. John Milton, "Areopagitica," in *Milton's Prose Writings*, ed. K. M. Burton (London: Dent, 1958), 149.

47. Daniel Defoe, *An Essay on the Regulation of the Press* (London, 1704), 9, 11; Rose reviews Defoe's extensive writings as a journalist on this theme during this period, commenting at one point on Defoe's Lockean conception of authorship. Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993), 38.

48. Lionel Bently and Martin Kretschmer, eds., "Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, London (1706)," in *Primary Sources on Copyright (1450–1900)*, 2008, http://www.copyrighthistory.org/cam/index.php.

49. Cited by Ronan Deazley, "Commentary on the Statute of Anne 1710," in *Primary Sources on Copyright (1450–1900)*, ed. Lionel Bently and Martin Kretschmer, 2008, http://www.copyrighthistory.org/cam/index.php.

50. "The Statute of Anne; April 10, 1710," The Avalon Project, 2008, http://avalon.law.yale.edu/18th_century/anne_1710.asp.

51. Feather establishes the degree to which the Stationers' Company influenced the final wording of the statute: the Company did bear the expenses associated with

seeing the statute through Parliament, although it was not allowed to change the term limit on copyright. Feather, "The Book Trade in Politics," 36.

52. This language dates back to the Company's 1706 petition, which begins, "Whereas many Learned Men have been at great Pains and Expense …" While any author was to a degree learned in early eighteenth-century Britain, the Company had in this earlier petition referred to "a Gentleman [who] has spent the greatest Part of his Time and Fortune in a Liberal Education." Bently and Kretschmer, "Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, London (1706)," 706.

53. "The Statute of Anne; April 10, 1710."

54. William Cornish, "The Statute of Anne 1709–10: Its Historical Setting," in *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, ed. Lionel Bently, Uma Suthersanen, and Paul Torresmans (Cheltenham, UK: Edward Elgar Publishing, 2010), 23–24, https://doi.org/10.4337/9781849806428.00009.

55. "The Statute of Anne; April 10, 1710."

56. Harry Ransom, *The First Copyright Statute, an Essay on "An Act for the Encouragement of Learning," 1710* (Austin: University of Texas Press, 1956), 101–102.

57. George Ticknor Curtis, ed., "An Act for Prohibiting the Importation of Books Reprinted Abroad … (1739)," in *A Treatise on the Law of Copyright* (London: Maxwell & Sons, 1847), 11–14; Harry Ransom notes that "the regulation had not been effective" without elaborating further. Ransom, *The First Copyright Statute*, 107, n. 13. Still, in its original conception, it attests to a parliamentary interest in protecting access to learned works, as well as to how the Stationers' Company had to give leeway to learning, if only temporarily in this case.

58. "The Statute of Anne; April 10, 1710."

59. Eaton Sylvester Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States: Embracing Copyright in Works of Literature and Art, and Playright in Dramatic and Musical Compositions* (Boston: Little, Brown, 1879), 468.

60. "The Statute of Anne; April 10, 1710."

61. Catherine Seville, "The Statute of Anne: Rhetoric and Reception in the Nineteenth Century," *Houston Law Review* 47 (2011): 840.

62. Richard Bell, "Legal Deposit in Britain (Part 1)," *Law Librarian* 8, no. 1 (1977): 5–8. For the most recent in this lineage, see Paul Gooding, Melissa Terras, and Linda Berube, "Towards User-Centric Evaluation of UK Non-Print Legal Deposit: A Digital Library Futures White Paper," Research Reports or Papers, May 21, 2019, http://elegaldeposit.org.

63. "The Statute of Anne; April 10, 1710."

64. Ian Gadd, ed., *The History of Oxford University Press: Volume I: Beginnings to 1780*, (Oxford: Oxford University Press, 2013).

65. Rose, *Authors and Owners*, 33–34.

66. Ransom, *The First Copyright Statute*, 195.

67. See Rose on the works of Milton and Shakespeare continuing to be subject to perpetual monopolies. Rose, *Authors and Owners*, 77; and Deazley, "The Myth of Copyright at Common Law" on the myth of a perpetual common law copyright to which *Donaldson v Becket* put an end.

68. "Bill for Enabling the Two Universities to Hold in Perpetuity the Copy Right in Books, for the Advancement of Useful Learning, and Other Purposes of Education, within the Said Universities," in *House of Lords Parchment Collection* (Manuscript List, 1714–1814, 1775).

69. United States of America, "U.S. Constitution: Article 1 Section 8," The U.S. Constitution Online, 2010, http://www.usconstitution.net/xconst_A1Sec8.html?ModPage speed=noscript; As Oren Bracha put it: "When, in the late eighteenth century, Americans created their first copyright regime—first through state enactments and then by the federal 1790 Copyright Act—they used the British Statute of Anne as their doctrinal blueprint. Despite a few changes and omissions, the degree of similarity on the level of basic concepts, structure, and text between the 1790 Copyright Act and the 1710 British statute is remarkable." Oren Bracha, "The Statute of Anne: An American Mythology," *Houston Law Review* 47, no. 4 (2010): 877–878.

70. Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPs Agreement* (London: Routledge, 2003).

71. Kathy Bowrey and Natalie Fowell, "Digging up Fragments and Building IP Franchises," *The Sydney Law Review* 31, no. 2 (2009): 209.

72. Locke, *Two Treatises of Government*, 2.37.

73. Elliott Shore and Heather Joseph, "Positive Changes for SPARC's Operating Structure," SPARC, June 17, 2014, https://sparcopen.org/news/2014/positive-changes-for-sparcs-operating-structure/.

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Histories, Infrastructures, and Global Politics of Open Access

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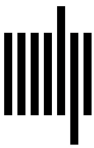

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